Federal Court  Cour fédérale

Date: 20171222

Docket: IMM-2561-17

Citation: 2017 FC 1188

Ottawa, Ontario, December 22, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ARTA BILBILI
ANISA BILBILI
LUCIANO CEKA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Arta Bilbili, her son, Luciano Ceka, and her sister Anisa Bilbili, are Albanian citizens. They sought refugee status in Canada on the basis that Arta's husband, Dritan Ceka, was abusive to her and Luciano. They also alleged that Dritan's brother, Rigels Ceka, kidnapped and sexually assaulted Anisa after she defended her sister.

[2] The Applicants seek judicial review of an April 27, 2017 decision of the Refugee Appeal Division [RAD], which upheld the Refugee Board Division [RPD] decision rejecting the Applicants' refugee claim.

[3] Although several issues were raised on this judicial review, I find that the RAD's decision to not admit the Applicants' new evidence was both unreasonable and determinative of the application before me. Thus, for the reasons that follow, the RAD's decision must be set aside and reconsidered by a different member of the RAD.

II. Background and Decision Under Review

[4] At the hearing before the RPD, the Applicants responded to questions through an interpreter.

[5] After the RPD released its negative September 26, 2013 decision, the Applicants identified two interpretation/translation errors apparent in the transcript of the hearing and in the RPD's decision. On appeal to the RAD, they sought to admit a statutory declaration of Edmond Aliko, an interpreter and translator of Albanian documents and testimony, explaining these errors [Declaration].

[6] The first error Mr. Aliko identified was whether Rigels had sent Arta a "text message" after assaulting her sister. Mr. Aliko deposed that none of the Applicants had actually testified that a text message was sent.

[7] The second alleged error was in a translated police report provided by the Applicants, which read: “we have followed the problem on our part in continuance”. Mr. Aliko’s evidence was that this should have been translated as: “we have followed the problem on our part continuously”.

[8] The RAD refused to admit the Declaration on appeal, for the sole reason that “[n]o explanation was provided as to why this information could not have been produced before the decision was rendered”. The RAD summarized the errors identified in the Declaration as follows:

> - The first error is that Arta did not receive a text message from Rigel, Dritan’s brother, who allegedly raped Anisa. Apparently, the content of the message was actually that she had been raped and then thrown on the asphalt.
>
> - The second is that the sentence in the police report “we have followed the problem on our part in continuance” should actually be translated by “we have followed the problem on our part in continuance.”

III. Analysis

[9] The RAD’s assessment of the admissibility of new evidence is reviewable on a reasonableness standard (*Canada (Citizenship and Immigration) v Singh*), 2016 FCA 96 at para 9). The RAD may admit new evidence under section 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 only where it arose after or was not reasonably available at the time of the RPD’s decision, or in circumstances where the Applicants could not reasonably have been expected to have presented it to the RPD.

[10] As mentioned above, the RAD's sole reason for not admitting the Declaration was that no explanation had been given as to why it had not been produced prior to the RPD's decision.

[11] First, I agree with the Respondent that the Applicants cannot complain, whether now or before the RAD, of any errors of translation in the police report, as it was their document which they themselves provided to the RPD.

[12] However, I do agree with the Applicants that the RAD's reasoning makes little sense with respect to the new evidence of the misinterpretation of the words "text message". This was not a case where that interpretation error ought to have been detected during the hearing itself in the context of the particular questions being asked. The RPD staff and legal counsel did not speak Albanian and the Applicants obviously required an interpreter.

[13] For clarity, the relevant transcript excerpts are reproduced here:

> PRESIDING MEMBER: And how were you able to get away?
>
> THE INTERPRETER: I am sorry. I am just going to ask her to repeat that.
>
> PRESIDING MEMBER: Yes.
>
> MS A. BILBILI: After what happened, he told me that my sister received a text message and then he just threw me on the street.
>
> […]
>
> PRESIDING MEMBER: You didn't tell your uncles or you didn't tell the doctors?
>
> MS A. BILBILI: When I went home, I told my uncle and I told my sister because they knew, they already knew. As I said before, once he raped me and left me in the middle of the street, he told me that, "I sent your sister a text message."

> […]
>
> PRESIDING MEMBER: How come there is no mention of a text message going to your sister in your Basis of Claim forms, even the amendments?
>
> MS A. BILBILI: Well, he told me that my sister received the message. I don't know how she received the message, but I was told that she received the message, "She has been told, she knows."

[14] The interpretation errors were only brought into focus through the RPD's decision:

> [30] The co-female claimant was asked details in regards to what occurred after the assault, how she was able to escape and what occurred. She testified that after the assault, she was thrown to the street. The co-female claimant testified that Rigels texted her sister after the sexual assault to tell her what occurred. When asked how she knew this, the co-female claimant testified he told her. When asked why this information was omitted from her BOC and amended BOC, she testified he told her he texted her sister. She did not know what happened after the assault. It was brought to her attention that the female claimant did not testify or write that she received a text message. The co-female claimant testified it was what he said. The panel does not find it credible that the co-female claimant would omit this information from her BOC or amended BOC.

[15] Thus, the impact of the interpretation errors was not known until the RPD rendered its decision, and the source of the confusion was not understood or appreciated until the Applicants' new interpreter, Mr. Aliko, clarified the matter as follows:

> In particular, in its reason for decision the Board relies on the fact that the Appellant, Arta Bilbilli [sic] received a text message from Rigels, the rapist of her sister. I have personally listened to the digital recording of the hearing with particular attention to all of the sections in which there is a reference to a text message. There is no doubt that the Appellants did not testify that there was a text message. The proper translation from the transcript dated September 11th, 2013, page 91 of the Appellants' Record, line 22 is, "after what happened he told me that my sister got the message and then he just threw me on the street." The proper translation

> from the transcript dated September 11th, 2013, page 94 of the Appellants' Record, line 4-5 is, "I sent your sister a message."

[16] There is limited case law in the area of new evidence before the RAD specifically relating to translation issues at the RPD. An analogy may be drawn to *AN v Canada (Citizenship and Immigration)*, 2016 FC 549 [*AN*], in which Justice Boswell considered the RAD's decision to not admit new evidence relating to the applicant's difficulty with the language of the RPD hearing. Justice Boswell found that the evidence only emerged after the rejection of her claim, so it was not reasonable to exclude it on the basis that it was available prior (at para 23).

[17] Further, and while this Court is not bound to follow the RAD's own decisions, in *X, Re*, 2016 CarswellNat 11036 (WL Can), the RAD admitted evidence of translation errors precisely for the reason advanced in this case, i.e. finding "it was not until after the Appellant received the written decision of the RPD that errors in interpretation were considered to be problematic and may have resulted in errors in the RPD's decision" (at para 13).

[18] The RAD also admitted new evidence in similar circumstances in *X, Re*, 2014 CarswellNat 2151 (WL Can) as follows:

> [8] The interpreter's affidavit submitted by the Appellant was created after the rejection of the Appellant's claim. Although its content relates to facts that existed before the rejection of the claim — that is, the interpretation in the refugee hearing — it was not reasonably available to the Appellant at that time, as no one in the hearing room other than the interpreter spoke both English and Kurdish and therefore could not detect the alleged interpretation errors.

[19] On judicial review, this Court does not determine whether the new evidence should have been accepted by the RAD, but rather whether the RAD's decision not to admit the evidence was reasonable (*Walite v Canada (Citizenship and Immigration)*, 2017 FC 49 at para 30).

[20] For the reasons set out above, I am satisfied that the RAD's decision was unreasonable. The Declaration was neither available to the Applicants prior to the release of the RPD's decision, nor could they reasonably have been expected to have presented it to the RPD.

[21] I also conclude that the RAD's decision on this point lacked transparency, justification, and intelligibility (see *Agyemang v Canada (Citizenship and Immigration)*, 2016 FC 265 at para 23 [*Agyemang*]). The RAD simply excluded the Declaration on the basis that "no explanation" had been provided as to why this information could not have been produced before the RPD's decision was rendered. While the Applicants' submissions to the RAD on their new evidence were not contained in the record for this Application, I accept that at least the basic test under section 110(4) of IRPA would have been before the RAD. Thus the RAD's explanation for its decision not to admit the Declaration was also unreasonable.

[22] Indeed, the RAD seems to have misunderstood the content of the Declaration. Mr. Aliko's evidence was that none of the Applicants ever testified that a text message was sent. The RAD's comment that, "[a]pparently, the content of the message was actually that she had been raped and then thrown on the asphalt" misses the point. And although I would not interfere with the RAD's decision to not admit the evidence on the mistranslated police report, I do note that the RAD also does not accurately transcribe the interpretation error said to have

been made with respect to that report: it simply repeats the error, as shown in paragraph 8 of these Reasons.

[23] In conclusion, the RAD's decision with respect to the inadmissibility of the Declaration was unreasonable. The RAD's entire decision must therefore be set aside and remitted for reconsideration (*Agyemang* at para 24; *Jeyakumar v Canada (Citizenship and Immigration)*, 2017 FC 241 at para 26).

[24] I wish to comment briefly on the Applicants' arguments in relation to procedural fairness. The Applicants submit that the new evidence put to the RAD went not just to the RPD's credibility determinations, but to the issue of inadequate interpretation, and therefore the fairness of the RPD hearing. The Applicants argue that the RAD's decision on new evidence in such circumstances should be reviewed on a correctness standard, because if the evidence going to procedural fairness is not accepted, the RAD may circumvent the procedural fairness issue altogether.

[25] Although there has been scant case law on the question of new evidence relating to procedural fairness since the release of *Singh*, Justice Boswell did touch on this issue in *AN*. There, Justice Boswell did not apply a correctness standard as argued by the Applicants in this case, but commented that the restrictions of section 110(4) of IRPA may not necessarily be applicable when the new evidence speaks to procedural fairness issues:

> [22] In my view, however, the RAD unreasonably rejected those portions of the Applicant's affidavit dated June 3, 2015, and those of her Aunt's affidavit dated June 16, 2015, which dealt with the language of the hearing before the RPD and the representation of

> the Applicant by her Aunt as a designated representative. The affidavit evidence submitted in this regard went to the fairness of the Applicant's hearing before the RPD, and it was not reasonable for the RAD to restrictively assess and reject this evidence through the lens of subsection 110(4) of the Act. Moreover, it was contradictory and unintelligible and, therefore, not reasonable for the RAD to reject this evidence as not being admissible under subsection 110(4) of the Act, and then, later in its reasons, to review this rejected evidence to determine whether the Applicant's right to a full and fair hearing had been compromised.
>
> [23] The restrictions on presenting evidence under subsection 110(4) of the *Act* and Rule 29(4) of the *RAD Rules* should not necessarily be applicable when the evidence presented on an appeal to the RAD raises issues about the procedural fairness of the proceeding before the RPD and not about the credibility, facts, or substance of a refugee's claim. Even if it could be said that such restrictions may be applicable, the evidence of the Applicant's difficulty with the hearing being held in Uyghur and her Aunt's conflicting interests only emerged after rejection of the Applicant's claim and she could not reasonably have been expected in the circumstances of this case to have presented evidence of her Aunt's conflict of interest until it was revealed and disclosed to her.
>
> [Emphasis Added]

[26] The Applicants therefore propose the following question for certification: "How should the RAD address questions of natural justice that are raised based on new evidence before it?"

[27] Although the law on this issue is not settled, I agree with the Respondent that the question is inappropriate for certification in this particular case because it is not dispositive of the outcome of the application (*Zhang v Canada* (*Citizenship and Immigration*), 2013 FCA 168 at para 9).

JUDGMENT in IMM-2561-17

THIS COURT'S JUDGMENT is that the application is granted. The RAD Decision is set aside and the matter is remitted back for reconsideration by a different decision maker. No question will be certified. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2561-17
STYLE OF CAUSE:	ARTA BILBILI, ANISA BILBILI, LUCIANO CEKA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 18, 2017
JUDGMENT AND REASONS:	DINER J.
DATED:	DECEMBER 22, 2017

APPEARANCES:

Yehuda Levinson	FOR THE APPLICANTS
Julie Waldman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Levinson & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT