Federal Court  Cour fédérale

Date: 20181004

Docket: IMM-1179-18

Citation: 2018 FC 994

Ottawa, Ontario, October 4, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

SHIROMI HETTI ARACHCHILAGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Arachchilage, the applicant, is a citizen of Sri Lanka. She alleges she is in danger in Sri Lanka due to her gender and because Sri Lankan authorities have suspected her of supporting the Liberation Tigers of Tamil Eelam [LTTE]. The Refugee Protection Division [RPD] rejected her claim, finding that she is neither a Convention refugee nor a person in need of protection. A

decision of the Refugee Appeal Division [RAD] that upheld the RPD decision was quashed by this Court on judicial review and was referred back to the RAD for redetermination.

[2] The RAD has again upheld the RPD decision, and Ms. Arachchilage has again sought judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. She submits the RAD has erred in its assessment of a new medical report; by failing to hold an oral hearing; and in its treatment of evidence that was before the RPD.

[3] The application is granted. For the reasons that follow, I have determined that the RAD unreasonably found that the new evidence, in the form of a medical report, was of little relevance to the claim. Having unreasonably determined the new evidence was of little relevance, the RAD then erred in finding it had no discretion pursuant to subsection 110(6) of the IRPA to hold an oral hearing. I further conclude that the RAD has again erred in its treatment of evidence that was before the RPD corroborating Ms. Arachchilage's claim.

II. Background

[4] Ms. Arachchilage's husband was a lance corporal in the Sri Lankan Army. He reportedly developed a suspicion that she was giving information to and supported the LTTE. She alleges that he reported his suspicions to army officials and that she was mistreated by her husband and the military as a result of this suspicion. She reports that on different occasions she was arrested, detained, beaten, abducted by security forces, sexually assaulted, and interrogated about her LTTE connections.

[5] The applicant worked in Israel for two years under a work permit prior to coming to Canada in May 2013. She reports her intent in coming to Canada was to apply for permanent residence as a live-in caregiver; due to rule changes, this option became unavailable to her.

[6] Ms. Arachchilage's claim was supported by various letters and reports, including a medical report from Sri Lanka indicating she had been treated for sexual assault in January 2011. The RPD concluded that this report lacked probative value as it reflected treatment for sexual assault but did not establish that a sexual assault had occurred.

A. *Arachchilage v Canada (Minister of Citizenship and Immigration), 2017 FC 433 [Arachchilage]*

[7] Justice Denis Gascon found the first RAD decision was unreasonable due to its treatment of the Sri Lankan medical report.

[8] Justice Gascon found the RAD had erred in a number of ways. First, it focused on what the report did not say rather than what it did say. Second, he found it was unreasonable to expect that the medical report would identify the perpetrator of the sexual assault. Finally, it was illogical to conclude that there is a difference between being sexually assaulted and being treated for sexual assault, especially given the uncontradicted evidence of the sexual assault and Ms. Arachchilage's hospitalization. He further found there had been a complete disregard for the Chairperson's Guidelines on *Women Refugee Claimants Fearing Gender-Related Persecution* [Gender Guidelines].

III. The Decision under Review

[9] After setting out the background of the claim and its role, the RAD addressed the request to admit new evidence. The new evidence was a Canadian medical report that Ms. Arachchilage argued corroborated the sexual assault she suffered while detained in 2011 by Sri Lankan army authorities. The RAD addressed the factors set out in subsection 110(4) of the IRPA and, relying on the decision of the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, admitted the new evidence, finding it to be relative and probative to the assault, and not available earlier.

[10] Having admitted the new evidence, the RAD then considered whether it should proceed with an oral hearing pursuant to subsection 110(6) of the IRPA. It noted the Canadian medical report described injuries on three parts of the applicant's body, injuries that the medical report described as "consistent with the description of injuries described by the Appellant." The RAD noted, however, that Ms. Arachchilage's testimony before the RPD regarding her injuries was "vague and non-specific" and concluded her evidence was not consistent with the injuries described in the report. On this basis, the RAD found the report's contents had little relevance to the allegations of sexual assault, assigned the report little evidentiary weight, and held it provided insufficient persuasive evidence to support the allegations of harm.

[11] Having found the new evidence "lack[ed] the materiality to justify either allowing or rejecting the refugee protection claim," the RAD found that paragraph 110(6)(c) of the IRPA had not been satisfied and that it had no discretion to hold a hearing.

[12] The RAD then addressed the claim that the RPD had failed to apply the Chairperson's Gender Guidelines. It noted the Guidelines are meant to assist the RPD and RAD in their assessment by identifying difficulties faced by women who suffer gender-based persecution, but they do not shield an applicant from having her evidence tested or accepted without inquiry. It found that despite adaptations made by the RPD to accommodate Ms. Arachchilage's testimony, she "provided little more than very basic details. She was vague and evasive in much of her testimony." She also failed to clarify inconsistencies in her testimony. The RAD found the applicant had "learned a number of key responses or facts associated with her narrative and [attempted] to insert these facts at appropriate locations in her testimony."

[13] The RAD noted the absence of persuasive documentation to support Ms. Arachchilage's various reports of mistreatment and identified a number of inconsistencies in her narrative that were not adequately explained. In addressing the reported 2011 abduction, interrogation, and hospitalization, the RAD held the narrative was not detailed enough to distinguish this incident from the others. The RAD then noted her testimony before the RPD "provided little or no insight into her alleged interrogation by the Army or her treatment at the hospital."

[14] In considering the supporting documentation, the RAD found that a letter from the applicant's brother was vague and non-specific and did not indicate how he became aware of the information or whether he had witnessed the events. The RAD found that he must have been recounting facts related to him by the applicant and that the letter did not provide substantial persuasive evidence of the harm the applicant faced or may face in Sri Lanka. It assigned little evidentiary weight to the letter.

[15] Turning to a supporting letter from a Justice of the Peace, the RPD noted it did not support the applicant's allegations of harm nor offset the negative credibility findings. It assigned little evidentiary weight to the letter.

[16] In examining a Sri Lankan medical report indicating that the applicant had been treated for sexual assault, the RAD concluded that the RPD had erred by focusing on what the report did not say. However, while the report confirmed a sexual assault occurred, it did not support the allegations surrounding the agents of persecution, and the RPD's error was insufficient to undermine the overall assessment.

[17] The RAD further found Ms. Arachchilage's failure to claim protection in Israel and to immediately initiate a claim upon arrival in Canada detracted from her subjective fear and undermined her allegations of harm. The RAD concluded that the applicant's allegations of harm were not credible and that she had not demonstrated she was a Convention refugee or a person in need of protection.

IV. Issues

[18] The application raises the following issues:

A. Did the RAD err in its treatment of the new evidence, the Canadian medical report?

B. Did the RAD err by failing to hold an oral hearing pursuant to subsection 110(6) of the IRPA?

C. Did the RAD err in its treatment of evidence that was before the RPD?

V. Standard of Review

[19] When reviewing a decision of the RAD that engages the legal requirements under the IRPA, a reasonableness standard of review is to be applied as the RAD is interpreting and applying its home statute. The RAD's assessment of evidence in considering whether a claimant is a Convention refugee or a person in need of protection is a question of mixed fact and law that is also to be reviewed against a standard of reasonableness (*Arachchilage* at paras 10 and 11).

VI. Analysis

A. *Did the RAD err in its treatment of the new evidence, the Canadian medical report? Did the RAD err by failing to hold an oral hearing pursuant to subsection 110(6) of the IRPA?*

[20] I will deal with the RAD's treatment of the new evidence and its determination in respect of an oral hearing together.

[21] The respondent submits that the RAD reasonably assessed the new evidence contained in the Canadian medical report. The RAD concluded that the applicant's testimony was inconsistent with the injuries described in the report and on this basis reasonably concluded the medical report had little relevance to the sexual assault allegations. Accordingly, there was no discretion to hold an oral hearing.

[22] I disagree. The RAD's analysis was limited and fails to set out in a justified and transparent manner why it concluded Ms. Arachchilage's testimony was inconsistent with the medical report.

[23] In discussing the report, the RAD noted that it described the nature and location of injuries on Ms. Arachchilage's body. The RAD then noted that the physician preparing the report expressed the view that the injuries observed were consistent with the injuries described to the physician by the applicant. Having noted the physician's conclusion, the RAD observed that it could not conclude that the injuries reflected in the medical report were in fact consistent with the injuries described. This is because the RAD found that Ms. Arachchilage's testimony and her documentary evidence before the RPD did not provide specific descriptions of her injuries. The RAD found her evidence was vague and non-specific in this regard. On this basis, the RAD found Ms. Arachchilage's evidence on the record was "not consistent" with the physician's report.

[24] The RAD's "not consistent" conclusion is important. The RAD relied on this foundational finding to then conclude the medical report was of little relevance to the claim. It then determined that evidence of little relevance could not justify allowing or rejecting the claim. As a result, the requirements of paragraph 110(6)(c) of the IRPA had not been satisfied, and the RAD found it had no discretion to hold an oral hearing.

[25] I am left to wonder how, absent some explanation, evidence that is described as vague and non-specific leads to the conclusion that Ms. Arachchilage's reported injuries are

inconsistent with the injuries described in the report. It would have been equally possible for the RAD to conclude that the vague and non-specific evidence was *consistent* with the injuries described in the medical report or that the evidence did not allow the panel to draw any conclusions in this regard.

[26] Had the RAD adopted one of these other plausible inferences, it could have reasonably assessed the report as having greater relevance to the claim. Evidence that was of some relevance could have in turn justified allowing or rejecting the claim, triggering the RAD's discretion to hold an oral hearing. An oral hearing might well have been granted given the RAD's concerns with the vague and non-specific evidence of injury on the record.

[27] The applicant also notes the RAD's continued reference to "allegations" of sexual assault despite Justice Gascon's finding at paragraph 20 of *Arachchilage* that the failure in the first RAD decision to recognize a sexual assault had occurred is beyond understanding:

> [20] But there is more. No matter how the medical note is read, to conclude, as the RAD did, that the note "does not tell the RAD whether or not the Appellant had actually been assaulted which is a big difference from being 'treated for sexual assault'" is simply beyond understanding. This interpretation is an affront to both the evidence on the record and the basic common sense. Contrary to the RAD's allusion in its decision, the medical note did not simply state that Mrs. Arachchilage complained about or consulted for a sexual assault; it said that she was *treated* for it. If a physician reports that a person has been treated for an injury, it is plainly illogical, in the absence of any evidence pointing in that direction, to draw the inference that the injury did not necessarily occur. Being *treated* for an injury necessarily implies that an injury had occurred. Whether it is a sexual assault, a broken leg or a heart pain, if a medical report refers to someone being treated for an injury, no reasonable reading of such evidence can lead one to conclude that this person did not actually experience or suffer from such injury. Furthermore, in this case, there is no evidence

> disputing Mrs. Arachchilage's testimony on the occurrence of the sexual assault, and Mrs. Arachchilage was hospitalized for four days. [Emphasis added.]

[28] The respondent submits that in referring to "allegations" in the decision under review, the RAD was referring to the alleged perpetrator, not the assault itself. Even accepting the respondent's explanation, the at-best ambiguous reference to "allegations" in this context again reflects a disregard for the Gender Guidelines, the purpose of which is "to ensure knowledgeable and sensitive consideration of the evidence of women claiming refugee status because of violence within a relationship" (*Arachchilage* at para 22, citing *Griffith v Canada (Minister of Citizenship and Immigration)* (1999), 171 FTR 240 at para 3).

[29] I believe this disregard is also evident in the RAD's limited consideration of what it describes as Ms. Arachchilage's "vague and non-specific" testimony relating to her injuries. The RAD's limited consideration of Ms. Arachchilage's evidence in the context of the medical report fails to consider the Gender Guidelines' express note that due to culture or trauma, victims of gender-based violence may be reluctant to disclose their experiences.

[30] The RAD's treatment of the new evidence is lacking in the required elements of justification, transparency, and intelligibility. The determination that the new evidence was not relevant is not reasonable and in turn undermines the reasonableness of the oral hearing decision.

B. *Did the RAD err in its treatment of evidence that was before the RPD?*

[31] In addressing the medical report from Sri Lanka, the RAD accepted that the report evidences a sexual assault but found "it does not provide any persuasive evidence to assist in establishing the identity of the perpetrator of the assault and the type or extent of injuries received" and that it "is not capable of supporting the Appellant's allegations against the agents of persecution."

[32] In reaching this conclusion, the RAD failed to consider the report within the context of the other evidence before it. For example, the record indicates that Ms. Arachchilage was arrested or detained on January 16, 2011, and held for four days. The report states she was admitted for treatment on January 20, 2011, the very day other evidence indicates she was released from a period of detention during which she reported she was physically and sexually assaulted by the agent of persecution. The proximity in time between the period of detention, the reported assaults, and the delivery of medical treatment are factors that on their face corroborate the narrative but were not addressed by the RAD.

[33] In considering the letter from Ms. Arachchilage's brother, the RAD focused on the absence or vague nature of the information in the letter and the failure of the letter to disclose the source of the brother's knowledge.

[34] I first note that the brother's letter is consistent with other evidence on the record. It states that (1) Ms. Arachchilage's husband was a member of the army; (2) he abused her because of

suspicions that she supported the LTTE; (3) she fled the country; (4) authorities have come looking for her since she fled; and (5) she was detained by authorities.

[35] While it is not for this Court to re-weigh the evidence I note that, despite the RAD's concern that the information in the letter is vague, the brother does describe the type of "cruel behavior" experienced, reporting that Ms. Arachchilage suffered "torture and threatening" and a "beating." The RAD also takes issue with the brother's source of information, concluding he was likely recounting what his sister told him. However, other evidence on the record indicates the brother secured Ms. Arachchilage's release from authorities, helped her make a complaint at the police station, and provided shelter to her. In short, there is evidence to indicate he was very involved in the events underpinning the claim, evidence the RAD fails to address.

[36] The RAD's search for missing details and focus on what the documents did not contain prevented it from engaging in an analysis of the facts and evidence that were before it. It was incumbent on the RAD to evaluate the medical report from Sri Lanka and the brother's letter on the basis of what they said (*Nagarasa v Canada (Citizenship and Immigration)*, 2018 FC 313 at para 23). Had the RAD done so, the outcome might well have been different.

VII. Conclusion

[37] The application is granted. The parties have not proposed a question of general importance and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is granted;

2. The matter is returned for redetermination by a different decision-maker; and

3. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Richard Wazana	FOR THE APPLICANT
Attorney General of Canada	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Wazana Law Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT