

Federal Court



Cour fédérale

Date: 20191008

Docket: IMM-4834-18

Citation: 2019 FC 1269

Ottawa, Ontario, October 8, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

MARIA DEL CARMEN AGUIRRE PEREZ

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 (“*IRPA*”) for judicial review of a decision (the “Decision”) made by the Refugee Protection Division (“RPD”). On September 5, 2018, the RPD determined that the Applicant is neither a Convention refugee nor a person in need of protection, respectively pursuant to sections 96 and 97(1) of the *IRPA*.

[2] The Applicant is a 58-year-old woman of Mexico. While in Mexico, she experienced repeated sexual, physical, and psychological abuse at the hands of her older brother. The RPD failed to apply a presumption of truthfulness. The RPD also failed to properly examine the Applicant's credibility in light of the Immigration and Refugee Board's *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* (the "Gender Guidelines"). Finally, the RPD made illogical credibility findings that lacked transparency. For the reasons that follow, I allow this application for judicial review.

II. **Facts**

[3] Maria Del Carmen Aguirre Perez (the "Applicant") is a 58-year-old citizen of Mexico. The Applicant has three brothers and three sisters. One of her older brothers began sexually abusing the Applicant when she was five years old. The Applicant was forced to flee her family home in 1989 along with her two younger sisters when the sexual abuse escalated. The older brother continued his physically abusive behaviour towards his family members. The Applicant's older brother attacked the Applicant with an axe when she refused to give him documents belonging to their grandfather. The Applicant's older brother was detained for one day following this attack. He threatened to kill the Applicant after he was released.

[4] The Applicant fled Mexico and arrived in Canada in 1998 because she feared her older brother. The Applicant did not submit a claim for refugee protection because she was unaware that the circumstances of the abuse she suffered at the hands of her older brother allowed her to seek international protection. The Applicant returned to Mexico briefly in 2002 for her father's funeral, but fled again after receiving a death threat from her older brother. The Applicant arrived in Canada for a second time on June 24, 2002. It was not until 2012 that the Applicant

submitted a claim for refugee protection. The Applicant was unaware of the refugee protection process during this period and did not have anyone who could assist her.

III. Decision Under Review

[5] In assessing the Applicant's credibility, the RPD stated that it had taken into account the stressful nature of the hearing process as well as cultural factors. The RPD noted that the Applicant has been in Canada for over 19 years and that her family members are supportive. Additionally, the RPD stated that it had taken into account the *Gender Guidelines* in assessing the Applicant's credibility. Finally, the RPD noted, "the problem of domestic or family violence is rampant in Mexico."

[6] The RPD began its credibility assessment with the statement that the Applicant "has the burden of proof to establish her credibility". The RPD held that the Applicant did not provide a valid explanation as to why her parents did not notice and address the physical and sexual abuse being perpetrated by the Applicant's brother. In support of this finding, the RPD noted that the abuse had continued for seven years and that the Applicant's parents were educated. The RPD also reasoned that the Applicant's mother would have taken notice of her daughter's distress, bruising, and locking of the bathroom door.

[7] Confronted with these concerns by the RPD, the Applicant explained that her mother had been conflicted due to her love for her son, and that her father was powerless. The RPD characterized this explanation as "too cerebral to have a ring of truth". The RPD questioned the Applicant as to why her parents did not seek psychological help for their son. The Applicant explained that her mother and father were lenient and powerless. The RPD concluded on this issue that the Applicant did not credibly establish her allegations of sexual abuse.

[8] The RPD went on to assess the Applicant's decision to take her sisters to Guadalajara. The RPD noted that the Applicant wished to protect her sisters, but that her sisters had not expressed they had any problems with the older brother. The RPD indicated it would be abnormal for sisters not to share details about physical abuse. Additionally, the RPD noted that the Applicant was apart from her sisters studying in Guadalajara from 1981 to 1985, at a time when her sisters would have presumably needed her the most due to their young age.

[9] The RPD questioned the Applicant about why her brother never went after her in Guadalajara. The RPD impugned the Applicant's explanation that her mother forbade the brother from visiting the Applicant in Guadalajara by refusing to give him the keys to the house in that city. Specifically, the RPD found it inconsistent that the brother would manipulate his mother for money, but that he did not pressure her to give him the keys to the house in Guadalajara. The RPD characterized this apparent change in the brother's behaviour as incoherent.

[10] The RPD noted that the Applicant spent three months in the United States in 1994, but that she returned to Mexico without having applied for refugee protection in the United States.

[11] The RPD challenged the Applicant's claim that her mother asked her to take over her brother's position at the family pharmacy. The RPD reasoned it was neither reasonable nor realistic that the Applicant's mother would ask her to take over her brother's job while having knowledge of the brother's abuse.

[12] The RPD noted the Applicant had initially stated that her family pharmacy's 70th anniversary had occurred in 2000. The affidavits provided by her siblings, however, stated that the anniversary was in 1997. The Applicant corrected this error at the beginning of the hearing.

The RPD held this was not an honest mistake and that the correction had been made to support the Applicant's claim. The RPD reasoned that the Applicant's level of education and the significance of the date militated against a finding that the Applicant had made an honest mistake.

[13] The RPD went on to examine the Applicant's thirteen-year delay in filing her claim for refugee protection. The RPD noted that the Applicant did not file a claim during her first three and a half years in Canada while she worked. In June 2002, the Applicant returned to Mexico for her father's funeral. She promptly returned to Canada after receiving a death threat from her brother. Only after approximately ten years did the Applicant file her claim for refugee protection. The RPD found this was incompatible with what would be expected of a reasonable person who feared persecution in Mexico.

[14] The RPD concluded that the Applicant had fabricated her claim in order to stay in Canada. The RPD rejected the Applicant's application for refugee protection.

IV. **Issue and Standard of Review**

[15] The only issue to be determined in the present matter is whether the RPD Decision is reasonable. A standard of reasonableness applies to the RPD's credibility findings (*Kulasingham v Canada (Citizenship and Immigration)*, 2012 FC 543 at para 22).

V. **Analysis**

A. *Assessing Credibility*

[16] The Applicant challenges the RPD's credibility findings. According to the Applicant, the RPD failed to apply the presumption that an applicant is telling the truth (*Maldonado v Canada*

(*Minister of Employment and Immigration*) (1979), [1980] 2 FC 302, [1979] FCJ No 248 (CA) at para 5). Although this presumption can be rebutted by contradictions or inconsistencies, the RPD reversed the presumption and put the onus on the Applicant to prove her credibility—without providing an explanation for doing so. The RPD stated unequivocally that the Applicant “has the burden of proof to establish her credibility”. The Applicant’s credibility was scrutinized under a microscopic analysis, which contained numerous illogical and unintelligible comments.

[17] Furthermore, the RPD’s assessment of the Applicant’s claim that she had been sexually abused regularly since a young age was egregious. The RPD’s analysis greatly departed from what is required by the *Gender Guidelines*. It was insufficient for the RPD to simply state that it had taken the *Gender Guidelines* into consideration. As Justice Campbell stated in *Talo v Canada (Citizenship and Immigration)*, 2012 FC 478 at para 5: “As a matter of law, it is not sufficient to merely mention the Guidelines without demonstrating their application.”

[18] The RPD began its analysis of the Applicant’s credibility by forming an opinion about what would constitute a reasonable parental response to the sexual abuse of one sibling by another. Specifically, the RPD stated that it is “doubtful that such unchecked behaviour could be carried out for seven years without the parents’ intervention and interdiction.” The RPD did not give due consideration to the other possibilities and explanations as to why the parents may not have intervened, i.e. that the Applicant kept the sexual abuse hidden until she told her mother at the age of twelve. Justice Gleason explained in *Mabuya v Canada (Citizenship and Immigration)*, 2013 FC 372 at para 5:

There are numerous cases in which this Court has set aside RPD decisions that fail to exhibit adequate sensitivity to the issues enshrined in the *Gender Guidelines*. Often, these cases turn on a finding that the Board’s credibility determinations fail to take account of the realities faced by a female claimant, such as the

impact of cultural taboos surrounding sexual violence. As a result of such taboos, survivors of sexual violence may fail to report assaults or even to speak about them contemporaneously, but such failures are not necessarily indicative of a lack of credibility.

[19] Instead of assessing the Applicant's claims, the RPD projected its own preconceived notions about what it believed to be the reality of a victim of sexual violence. In doing so, it failed to take into account the realities faced by the Applicant. This demonstrates a failure to exhibit adequate sensitivity to the Applicant, and more importantly—is a misapprehension of the RPD's role.

[20] The RPD makes a series of incomprehensible conclusions based on the testimony of the Applicant regarding her sisters. The RPD writes in the Decision:

Asked if her sisters received the same treatment, [the Applicant] said that her sisters did not mention anything to her. The panel noticed that the claimant is giving an answer which keeps the focus on herself. It has no ring of truth. For sisters not to share difficulties, particularly as it involves one [*sic*] physical and psychological integrity is not acceptable as a normal reaction, unless there is nothing to share, of course.

[21] The RPD stated that the Applicant's sisters did not tell the Applicant that they had experienced sexual abuse at the hands of their brother, but comes to a bizarre conclusion that the truthfulness of the Applicant's statements is tarnished because the Applicant had provided an answer that put the "focus on herself". If the Applicant's sisters had not mentioned anything to her regarding the sexual abuse perpetrated by their older brother, we are left to wonder how much more appropriately the Applicant could have explained this without stating something along the lines of "I am unsure because my sisters had not mentioned anything to me." It is unclear why such a statement would be interpreted as the Applicant putting the focus on herself, why a focus on the Applicant would be viewed unfavourably during a hearing to determine the

Applicant's refugee claim, and finally—why the statement would diminish the Applicant's truthfulness. This analysis exhibits a lack of intelligible reasons.

[22] Furthermore, the RPD stated that “for sisters not to share difficulties, particularly as it involves one [*sic*] physical and psychological integrity is not acceptable as a normal reaction.” The RPD completely veered off course by insisting on its singular and narrow-minded conception of a “normal reaction” to sexual abuse and trauma faced by the Applicant and her sisters. Such analysis was deeply inappropriate. In this regard, the Decision departs from the *Gender Guidelines*.

[23] Rather than engaging with the complex range of human emotions and wide variety of potential responses to trauma, the RPD demanded a particular reaction. Justice De Montigny in *Sukhu v Canada (Citizenship and Immigration)*, 2008 FC 427 at para 20 explains that shame is a “perfectly plausible explanation” under the *Gender Guidelines* as to why the female refugee claimant would not have obtained a medical report after a sexual assault. It is a reasonable response for a person to keep sexual abuse hidden from others. The RPD failed to understand and consider the possibility that the sisters were unwilling to share their experiences with each other due to shame or fear.

[24] The Applicant explained to the RPD that her parents did not realize the sexual abuse was occurring because her father was powerless and her mother was conflicted. The RPD found this explanation “too cerebral to have a ring of truth”. It is not immediately clear what the RPD meant by this phrase. If the RPD wished to state that the Applicant's explanation was fabricated, it should have directly said so. In this regard, the Decision lacked transparency.

[25] Moreover, the RPD stated that the Applicant's mother "would have noticed that something was going on because her daughter would always lock the bathroom door when she was taking a shower". This finding defies logic, lacks transparency, and appears to rely solely on speculation. It is entirely unclear how the RPD arrived at a finding that the locking of a bathroom door is an indication that sexual abuse has occurred.

[26] Throughout the Decision, the RPD displayed a persistent disregard for its proper role and function. At times, it appears the RPD crowned itself an expert in the study of human behaviour. In doing so, the RPD made assumptions about the "proper" human response to traumatic events such as rape and sexual abuse; then it demanded that the Applicant fit within this fictional mould. The Applicant's failure to fit within this idealized portrait led the RPD to impugn her credibility; as a result, the RPD dehumanized the Applicant by denying her capacity to react to trauma in her own way.

[27] It is insufficient to say that the RPD failed to heed the *Gender Guidelines*. In fact, the RPD's approach was diametrically opposed to what the *Gender Guidelines* require. The Decision severely lacked sensitivity and demonstrated a disregard for the Applicant's narrative. The Decision ignored relevant facts and instead rested on a fictionalized caricature of trauma response.

B. *Delay in Filing Refugee Protection*

[28] There is no question that the Applicant's delay in filing a claim for refugee protection was significant; in total, the Applicant delayed filing a claim for approximately thirteen years. The RPD determined that this delay was unacceptable and supported the negative credibility findings identified in the Decision.

[29] However, the accepted approach to the analysis of delay in the filing of a refugee claim is as follows (*Duarte v Canada (Minister of Citizenship and Immigration)*, 2003 FC 988 at para 14):

[T]he presence of delay does not mandate the dismissal of a claim as a claimant may have a reasonable explanation for the delay. Nonetheless, delay may, in the right circumstances, constitute sufficient grounds upon which to dismiss a claim. It will ultimately depend upon the facts of each claim.

[30] The Applicant explains in her affidavit that post-traumatic stress disorder, fear, and a lack of awareness led her to delay filing her claim. The RPD did not attempt to determine whether the sexual abuse experienced by the Applicant contributed to the delay. In light of the circumstances of the Applicant's claim and the *Gender Guidelines*, such an inquiry was necessary. The RPD had clearly envisioned the proper timeframe for the filing of a refugee claim prior to delving into the facts. That is an erroneous approach.

[31] A parallel can be drawn between the case at bar and *Rudoy v Canada (Citizenship and Immigration)*, 2015 FC 1051 at para 39, where Justice Southcott determined that the RPD's delay finding was insufficient to deny a claim for refugee protection because it was intertwined with unreasonable credibility findings.

[32] Similarly, in the case at bar, the RPD arrived at an array of unreasonable credibility findings. These findings influenced the delay analysis because the RPD failed to question whether the sexual abuse caused or contributed to the delay.

VI. Certified Question

[33] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. Conclusion

[34] For the foregoing reasons, this application for judicial review is granted. This matter will be returned for redetermination by a different panel member. The RPD commenced its analysis with the rejection of the presumption of credibility for the Applicant. The remainder of the Decision is littered with unreasonable credibility findings. Furthermore, the Decision diverges widely from what is required by the *Gender Guidelines*. While the Applicant's delay in filing her claim may be relevant, it is not determinative in the circumstances.

JUDGMENT in IMM-4834-18

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter referred back for redetermination by a different decision-maker.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4834-18

STYLE OF CAUSE: MARIA DEL CARMEN AGUIRRE PEREZ v THE
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