

Federal Court



Cour fédérale

Date: 20200629

Docket: IMM-2216-19

Citation: 2020 FC 727

Ottawa, Ontario, June 29, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

A.B.

Applicant

And

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision made on March 13, 2019 by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB], in which it found that the Applicant was not a Convention refugee or a person in need of protection [Decision].

[2] For the reasons that follow, this application is allowed.

II. Background Facts

[3] The Applicant, A.B., is a citizen of Kenya.

[4] The Applicant sought refugee protection from her husband, who she was forced to marry when she was 13. Her husband frequently physically and sexually abused her, causing two miscarriages and permanent vision loss.

[5] In 2012, the Applicant's husband attacked her with a knife, creating a gash on her arm that required stitches. The Applicant filed a report with the police, but the police did not protect her or follow up on the report. The Applicant's husband beat her for going to the police.

[6] In 2013, the Applicant and her husband travelled to the United Kingdom (UK). Her husband did not leave the Applicant alone in public or let her go outside without him. Unbeknownst to the Applicant, her husband also brought his second wife to the UK at the same time.

[7] In 2015, the Applicant convinced her husband to apply for Canadian Temporary Resident Visas [TRVs]. In 2016, the Applicant's friend lent the Applicant money to purchase a plane ticket. The Applicant left Kenya and arrived in Canada on February 27, 2016. The Applicant made a refugee claim at the airport.

A. *Refugee Protection Division*

[8] On November 7, 2017, the Refugee Protection Division [RPD] found that the Applicant was neither a Convention refugee nor a person in need of protection.

[9] The RPD found that the determinative issue was credibility. It identified several credibility issues with the Applicant's testimony, including implausibilities and contradictions that were not explained in a satisfactory way. The RPD also found that the police report and hospital record provided by the Applicant were fraudulent.

B. *Decision under Review*

[10] The RAD indicated that it was reviewing the RPD decision on a correctness standard as set out in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 unless it stated otherwise. No such statement was made in the Decision.

[11] The Applicant appealed the RPD decision to the RAD and sought to admit five pieces of new evidence. The RAD did not accept 4 of the 5 new pieces of evidence.

[12] The RAD gave little weight to the psychological reports filed by the Applicant. The RAD upheld the RPD's finding that the Applicant was not credible because she gave disordered and vague testimony. The RAD found that the psychological reports did not adequately account for the vagueness of and inconsistencies in the Applicant's testimony.

[13] The RAD made negative credibility findings about the Applicant's ability to plan her escape from Kenya, and drew a negative inference from her failure to seek protection from immigration officials when she was in the UK in 2013.

[14] The RAD dismissed the appeal and confirmed that the Applicant was neither a Convention refugee nor a person in need of protection.

III. Preliminary Issue

[15] Although the Respondent is now commonly known as the Minister of Immigration, Refugees and Citizenship its name under statute remains the Minister of Citizenship and Immigration: *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and IRPA s 4(1).

[16] Accordingly, as part of this judgment, the style of cause is amended to reflect the Respondent as the Minister of Citizenship and Immigration.

IV. Issues and Standard of Review

[17] The Applicant argues that the Decision is unreasonable for three reasons. First, the RAD erred in failing to admit her new evidence. Second, the RAD erred in its assessment of the psychological and medical reports. Third, the RAD made unreasonable credibility findings without properly considering the evidence before it.

[18] I find, as discussed below, that the determinative issue is the RAD's unreasonable assessment of the Applicant's psychological and medical reports. It is therefore not necessary to consider the other two issues, other than briefly reviewing the relationship between those reports and some of the implausibility and credibility findings made in the Decision.

[19] Recently, the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] extensively reviewed the law of judicial review of administrative decisions. The Supreme Court confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness subject to certain exceptions that do not apply on these facts: *Vavilov* at paragraph 23.

[20] Within a reasonableness review, a high degree of deference is owed by this Court when the impugned findings being challenged relate to the credibility and plausibility of a refugee claimant's story, given that the RPD and the RAD have expertise in that regard and considering their role as the trier of fact: *Vall v Canada (Citizenship and Immigration)*, 2019 FC 1057 [*Vall*] at paragraph 15.

[21] Citing *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the Court confirmed in *Vavilov* that a reasonable decision is one that displays justification, transparency and intelligibility with a focus on the decision actually made, including the justification for it: *Vavilov* at paragraph 15.

V. The Psychological Reports

[22] The Applicant submitted to the RPD three different psychological reports from two psychiatrists.

A. *Dr. Parul Agarwal – April 20, 2016 Report*

[23] Dr. Agarwal provided an initial assessment of the Applicant's psychological and emotional functioning in a report dated April 20, 2016. At that time she also discussed the possible impact on the Applicant's emotional and mental health if she could not stay in Canada and was to return to Kenya.

[24] Dr. Agarwal's credentials are set out in her report. They include specialty training in psychiatry at Cambridge University in England, which was completed at the University of Toronto. Her critical area of interest is working with marginalized families and children where there has been exposure to domestic violence and other adversity.

[25] In preparation for conducting the assessment, Dr. Agarwal read the Applicant's basis of claim narrative. Her assessment report recites the Applicant's story of childhood sexual abuse by her father's best friend when she was aged 5, her forced marriage to her husband at age 13 and the ensuing emotional, physical, and sexual violence by him. The assessment then sets out in detail what the Applicant reported to Dr. Agarwal as the mental and emotional impact of those events.

[26] Dr. Agarwal listed twelve different stressors acting on the Applicant, including growing up in a very patriarchal and conservative society and being forced by her parents to return to her abusive marriage.

[27] In her clinical assessment, Dr. Agarwal itemized a large number of symptoms that the Applicant had displayed during the assessment. Dr. Agarwal set out in detail her observations regarding the Applicant's emotional and physical state during the assessment. She concluded that the Applicant met the criteria for chronic and severe Post-Traumatic Stress Disorder (PTSD) as well as severe and chronic Major Depressive Disorder.

[28] In addition, Dr. Agarwal found that Applicant possessed classic symptoms of Battered Women's Syndrome, such as not having a sense of agency over their lives causing them to find it very difficult to leave their abusers and fearing that the abuser will hurt them more if they leave.

[29] Dr. Agarwal found that the Applicant needed psychological treatment in the form of trauma-focused individual therapy with an organization that can provide a counsellor to work with her. She stated that treatment would not be effective until the threat of being forced to go back to Kenya to her husband's abuse was removed.

B. *Dr. Parul Agarwal – June 20, 2016 Report*

[30] After the Applicant was advised that the IRB was seeking to join her claim to that of her husband's second wife, who had separately fled to Canada, her counsel requested a follow-up assessment by Dr. Agarwal to (1) reassess the Applicant's mental status; (2) provide a

professional opinion on whether it was appropriate to expect her to testify in the same hearing as her husband's second wife and (3) whether the Applicant should be designated by the IRB as a vulnerable person.

[31] Dr. Agarwal reported that the Applicant appeared extremely distressed with developments since the last report. She advised Dr. Agarwal that after the previous assessment she had disclosed her childhood sexual abuse to her uncle. She subsequently told her aunt with whom she had been living since arriving in Canada. The result was that they turned their backs on her. The Applicant's uncle never spoke to her again and, within a week, her aunt told her to move out of the house.

[32] Dr. Agarwal confirmed that the Applicant continued to suffer from chronic and severe PTSD as well as severe and chronic Major Depressive Disorder.

[33] With respect to the vulnerable person assessment, Dr. Agarwal's clinical assessment was that forcing the Applicant to testify with her husband's second wife was "clinically very inappropriate as it will certainly trigger past traumatic memories and cause a decompensation in her mental status". Dr. Agarwal's opinion was that the presence of the husband's second wife would impede the Applicant's ability to testify and present her case in a clear, cogent manner.

[34] Dr. Agarwal concluded that the Applicant should be designated as a vulnerable person for her hearing.

C. *Dr. Elena Irina Nica-Graham – January 26, 2017 Report*

[35] Dr. Elena Irina Nica-Graham performed a psychiatric assessment of the Applicant to update her mental health status and to re-evaluate specific questions that the IRB identified as requiring a more objective and detailed psychiatric opinion than was previously submitted. She was also asked to address: (1) whether the Applicant's mental health issues met the criteria for an expedited hearing; (2) the extent to which the Applicant's psychiatric symptoms would prevent her from coping with the hearing process and affect her ability to give coherent testimony with a view to helping the IRB determine whether she should be granted status as a vulnerable person and, (3) the impact on the Applicant's mental health caused by having her claim joined with the claim of her husband's second wife to determine whether her right to a just and fair hearing might be significantly impeded.

[36] Dr. Nica-Graham is certified by the Royal College of Physicians of Canada as a specialist in Psychiatry. She is a geriatric psychiatry fellow at the University of Toronto. She also has a special clinical interest in working with people who suffer from long-term mental health consequences of severe interpersonal trauma and childhood trauma. She has undertaken extra training and clinical supervision at the Women's College Hospital in Toronto in the Women Recovering from Abuse Program (WRAP) where she provided psychiatric assessments in therapy for women with psychiatric problems related to domestic and sexual abuse.

[37] Dr. Nica-Graham met with the Applicant for 2 ½ hours. Prior thereto she reviewed the Basis of Claim narrative as well as an affidavit and the prior psychiatric reports by Dr. Agarwal.

[38] Dr. Nica-Graham took an extensive and up-to-date personal history from the Applicant focussing on major life-events that had the most likely impact on her state of mind.

Dr. Nica-Graham concluded that since arriving in Canada the Applicant experienced severe symptoms of posttraumatic stress disorder including flashbacks and intrusive memories, dissociation, nightmares, hyper arousal, panic attacks, as well as symptoms of avoidance, feeling depressed and alienated from others. The Applicant was found to hold negative beliefs about herself such as feeling worthless. She was also described as feeling alienated from others and having persistent feelings of shame and fear.

[39] Dr. Nica-Graham found the Applicant's patterns of thinking and feeling were especially activated when she faced stressors. They affected the Applicant's interpretation of events in a negative way.

[40] The Applicant took medications for depression and PTSD as well as for nightmares and for sleep.

[41] At times during the interview the Applicant had difficulty remembering specific dates or times, but she was able to maintain a chronological order to her narrative.

[42] The report documented and explained why Dr. Nica-Graham found that the severity of the Applicant's symptoms were consistent with the severity of her traumatic history.

VI. The treatment of the Psychological Reports by the RAD was unreasonable

[43] The RAD began by noting that the RPD had considered the psychological reports and gave them little weight because they were based in part on the Applicant's allegations which it had found to be not credible or trustworthy. The RAD noted as well that the RPD indicated the Applicant "claimed ignorance in order to avoid answering questions, however, when necessary, she tried to provide an explanation when confronted with discrepancies."

[44] The RAD recognized the Applicant's submission that the RPD erred in its treatment of the psychological evidence by (1) unreasonably rejecting it because it was based on the Applicant's version of events and (2) by substituting its own judgment about her mental health based on observations made during the hearing.

[45] The RAD did not discuss those submissions nor did it analyse the reasons provided by the RPD to determine whether or not it was correct. The RAD simply found that the psychological reports did not sufficiently explain "the many significant anomalies noted in the [Applicant's] evidence" and that "the [Applicant's] mental state, as opined in her psychological reports, do (*sic*) not affect the credibility conclusions noted above."

[46] That conclusion runs afoul of the requirement in *Vavilov* to provide responsive reasons that meaningfully account for the central issues and concerns raised by the parties in order to demonstrate that it actually *listened* to them: emphasis in the original, *Vavilov* at paragraph 127. It also does not meet the *Dunsmuir* requirements of transparency, justification or intelligibility as it is not possible to discern how or why the RAD drew the conclusion in light of the submissions

and evidence or to determine whether the outcome falls within the range of possible, acceptable outcomes defensible on the facts and law.

[47] The RAD next noted that Dr. Agarwal found that the Applicant was a vulnerable person and that her capacity to testify in the hearing would be severely impaired. The RAD listed several possible issues with the Applicant's testimony that Dr. Agarwal had set out in her assessment. These included that the Applicant may not make eye contact and may not be able to present a linear and coherent narrative of her life.

[48] The RAD also noted that Dr. Nica-Graham "specifically addresses the extent to which [the Applicant's] psychiatric symptoms affect her ability to give coherent testimony." The RAD set out Dr. Nica-Graham's assessment that the Applicant quite possibly would have "substantial difficulties when asked to recount her traumatic past in the presence of authority figures, especially if they are men, in a formal hearing." The special accommodations recommended by Dr. Nica-Graham were also listed by the RAD.

[49] At that point, once again without any discussion or analysis, the RAD inexplicably found that it was "unclear from the psychiatrists' reports what to expect from the [Applicant] in terms of her testimony at the hearing."

[50] The conclusion drawn by the RAD does not logically or rationally flow from the reasons given by the RAD. The RAD failed to grapple with the contents of the psychiatrists' reports. It did not consider how or whether the Applicant's suffering from PTSD, Major Depressive

Disorder and Battered Women's Syndrome as outlined in the reports, might have affected her testimony. Neither the Applicant nor the reviewing Court can understand how or why the RAD arrived at the conclusion it did given the contents of the psychiatric reports.

[51] The RAD also found that the Applicant's "mental state, as opined in her psychological reports, do (sic) not affect the credibility conclusions noted above." This is another bald conclusion, asserted without an explanation. It is all the more puzzling given that the RAD stated it accepted the medical diagnosis in the psychiatrists' reports but gave the reports little weight in terms of justifying the anomalies in the Applicant's evidence, including her testimony at the hearing.

[52] The RAD discussed in general terms the utility of a psychological report in the last paragraph of this section of the Decision. After introductory remarks, with which there is no disagreement, that a psychological report does not prove the alleged persecution but might assist the RAD in conducting the hearing or considering whether credibility problems were the result of a psychiatric condition, the RAD set out how and why it determined that the Applicant's psychiatric reports should receive little weight:

The Court has indicated that just because a patient is suffering from psychological problems and manifests symptoms associated with those problems does not mean that the patient's account of past persecution as the cause of those problems can be believed. I have reviewed the Appellant's psychological/psychiatric reports, and there is nothing in the documents to suggest that the psychiatrists independently verified any of the allegations reported by the Appellant. It is the RPD and the RAD's responsibility to determine whether the Appellant is credible, and the RPD and the

RAD are not required to defer to a psychologist or psychiatrist's report when making findings of fact in respect to alleged past persecution.

(My emphasis)

[53] The Applicant points out that the psychological reports were not submitted to establish her husband's abuse. They were submitted to show that she suffered from conditions that were consistent with ongoing and severe domestic abuse and to explain her vulnerability and difficulties in testifying. It is unreasonable that the RAD failed to consider the reports for the purpose for which they were submitted only to then find that they did not explain the Applicant's impugned testimony.

[54] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 the Supreme Court addressed the issue of the utility of a psychological report based mainly on "hearsay" because the psychologist was not a witness to the events that led to the psychological problems opined upon. At paragraph 49, Madam Justice Abella noted:

[49] And while the Officer did not "dispute the psychological report presented", she found that the medical opinion "rest[ed] mainly on hearsay" because the psychologist was "not a witness of the events that led to the anxiety experienced by the applicant". This disregards the unavoidable reality that psychological reports like the one in this case will necessarily be based to some degree on "hearsay". Only rarely will a mental health professional personally witness the events for which a patient seeks professional assistance. To suggest that applicants for relief on humanitarian and compassionate grounds may only file expert reports from professionals who have witnessed the facts or events underlying their findings, is unrealistic and results in the absence of significant evidence. In any event, a psychologist need not be an expert on country conditions in a particular country to provide expert information about the probable psychological effect of removal from Canada.

[55] As in *Kanthasamy*, here the RAD did accept the psychiatric diagnoses in each of the psychological reports and then dismissed them for not being “independently verified” which amounts to saying they were based on hearsay.

[56] The RAD failed to reasonably consider the psychiatric reports. It was entitled to engage with the substance of the psychological reports and find them wanting. It was not entitled to simply dismiss the reports as being based on information that was unverified or unverifiable. By doing so, the RAD’s consideration of the credibility assessment of the Applicant failed to take into account important information that could have changed the understanding of her evidence.

[57] In my opinion, given the reliance the RPD and the RAD each placed on the major inconsistencies and vagueness of the Applicant’s testimony, had the psychiatric reports been considered for the purpose for which they were submitted, the outcome of the Applicant’s hearing may well have been in her favour.

VII. The Medical Report of Dr. Chris Keefer – July 27, 2016

[58] Dr. Keefer is a Family and Emergency physician who is licensed in Ontario. The Applicant was referred to Dr. Keefer for a medical assessment.

[59] Dr. Keefer reviewed the Applicant’s Basis of Claim narrative before meeting with her. He conducted a one-hour in-person appointment in which he discussed her general health and discussed with her the instance which left her with permanent injury, disability and/or scars. He

performed a physical examination which included an eye examination and an examination of the scar on the Applicant's left forearm.

[60] Dr. Keefer's assessment was that the Applicant bore scars and ongoing psychological symptoms consistent with the statements in her Basis of Claim narrative. Specifically, he found that the scar on her left arm was consistent with a defensive wound from an edged weapon. The left eye visual acuity of the Applicant was found to be 20/200 which is the level of legal blindness. It was markedly different from the visual acuity of her right eye which was 20/60.

[61] Dr. Keefer stated that the Applicant's physical findings and scars were consistent with the mechanism of injury described in her Basis of Claim and the doctor's history taking.

VIII. The treatment of the Medical Report by the RAD was unreasonable

[62] The RAD identified as a significant event the January 29, 2012 knife attack by the Applicant's husband in which she suffered a deep cut to her left forearm that required stitches.

[63] The RAD found that the RPD was not wrong to note major inconsistencies in the evidence of that attack and vague testimony by the Applicant who could not remember the time of day of the assault.

[64] I have already addressed the problem with the RAD finding that the psychiatrists' reports did not adequately account for the vagueness of, and inconsistencies in, the Applicant's evidence about the knife attack. It need not be repeated.

[65] The Applicant submitted to the RAD that the RPD erred when it did not mention the medical report of Dr. Keefer. She submitted that the report corroborates both the knife attack caused the scar on her arm and that her eye injury was caused by her husband stomping on her head.

[66] The RAD committed two errors in dismissing the medical report by giving it little weight.

[67] First, the RAD said the report simply outlined the scars and visual acuity. It did not provide a medical opinion regarding the causes of the scars and visual acuity other than their consistency with what the Applicant had alleged.

[68] Dr. Keefer examined physical evidence on the Applicant. He then confirmed that evidence was consistent with the nature of the attacks alleged by the Applicant. That is a medical opinion, rendered by a licenced physician.

[69] The RAD's reasons echo the issue identified in *Kanthisamy*. To require a physician to witness first hand the attack on the Applicant in order to provide an acceptable medical opinion of the likely cause of the harm it occasioned is unrealistic. Such a requirement would result in the absence of significant evidence: *Kanthisamy* at paragraph 49.

[70] Second, the RAD found that the Applicant's lack of credibility regarding her allegation of physical abuse by her husband and the finding that some of her documents lack authenticity extended to the credibility of the allegations of abuse in the medical report.

[71] The RAD found earlier in the Decision that the RPD was not wrong to find that the police and hospital reports submitted to corroborate the knife attack were likely fraudulent given the credibility concerns with the attack.

[72] The RAD's reasoning is problematic in that it is both circular and inverted.

[73] It is circular reasoning to have found that because the police and hospital reports were fraudulent the knife attack did not occur, and to also find that because the Applicant's evidence of the knife attack was not believed, the police and hospital reports were fraudulent.

[74] It is inverted reasoning because the jurisprudence requires that when making credibility findings "it is impermissible to reach a conclusion on the claim based on certain evidence and dismiss the remaining evidence as inconsistent with that conclusion. [. . .] The reasoning has been inverted.": *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 at paragraph 20.

[75] Applying *Chen*, before the RAD could dismiss the medical report for being based on the Applicant's allegations of abuse, it should have first reasonably determined whether the medical report supported the allegations of abuse. In other words, the Applicant's overall credibility

should have been examined and determined, including the contents of the psychological and medical reports, before arriving at a conclusion on her credibility.

IX. Summary and Conclusion

[76] The reasons provided by the RAD in this matter were extensive. Unfortunately, as set out in these reasons for judgment, by and large the RAD simply summarized arguments made by the Applicant or findings made by the RPD and then stated a peremptory conclusion. That does not allow this Court to understand the rationale underlying the decision.

[77] The RAD did not appreciate the importance of the medical and psychiatric reports in considering the Applicant's credibility. There is no dispute that the Applicant's allegations of persecution cannot be proven by those reports. However, the assessments and findings in the reports should have been considered in assessing whether the Applicant's testimony was credible. The RAD could find that the events causing the symptoms did not occur but it cannot fail to consider how the symptoms, verified by professionals, may have affected her testimony.

[78] For all of the foregoing reasons, I find that the reasons provided by the RAD contain sufficiently serious shortcomings such that the Decision cannot be said to exhibit the requisite degree of justification, intelligibility and transparency: *Vavilov* at paragraph 100.

[79] The application is therefore allowed, without costs, and the Decision is set aside.

[80] This matter will be returned to the RAD for redetermination by another member.

[81] There is no serious question of general importance on these facts.

JUDGMENT IN IMM-2216-19

THIS COURT'S JUDGMENT is that:

1. The name of the Respondent is amended to the Minister of Citizenship and Immigration.
2. The application is granted and the Decision is set aside.
3. This matter is returned for redetermination by another member of the RAD.
4. There is no serious question of general importance for certification.
5. No costs.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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