Federal Court  Cour fédérale

Date: 20150722

Docket: IMM-7767-14

Citation: 2015 FC 895

Ottawa, Ontario, July 22, 2015

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

OLATUNJI AGBOOLA OLOWOLAIYEMO (A.K.A. OLATUNJI AGBOOL OLOWOLAIYEMO)

Applicant

And

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant Olatunji Agboola Olowolaiyemo is a citizen of Nigeria. Mr. Olowolaiyemo arrived in Canada in 2012 and in November 2013, he submitted a claim for refugee protection based on his sexual orientation. On February 28, 2014, the Refugee Protection Division [RPD] of

the Immigration and Refugee Board refused his claim for lack of credibility as the RPD did not believe he was bi-sexual. The RPD thus concluded that Mr. Olowolaiyemo was neither a Convention refugee nor a person in need of protection.

[2] On March 11, 2014, Mr. Olowolaiyemo appealed the RPD decision to the Refugee Appeal Division [RAD]. In support of his appeal, Mr. Olowolaiyemo submitted two new pieces of evidence for consideration by the RAD: (i) a statutory declaration from Mr. Bidemi Johnson, dated May 7, 2014, corroborating that he was dating Mr. Olowolaiyemo in 2012 while the latter was in a relationship with a female; (ii) a sworn affidavit dated April 28, 2014 submitted by Ms. Dupe Bakare, the sister of Mr. Olowolaiyemo's previous male partner in Nigeria.

[3] On October 31, 2014, the RAD rejected Mr. Olowolaiyemo's appeal. The RAD found that the lack of a reasonable explanation for the delay in claiming refugee status in Canada, Mr. Olowolaiyemo's four-year sojourn in the United States before 2012, the contradictions between Mr. Olowolaiyemo's testimony and other witnesses, the paucity of details regarding his three-year relationship with a female in the U.S., and the absence of corroborative evidence supporting his claim of bi-sexuality all contributed to an adverse credibility finding.

[4] In reaching its decision, the RAD refused to admit the additional evidence adduced by Mr. Olowolaiyemo as it did not constitute new evidence pursuant to subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The RAD found that the affidavit from Ms. Bakare did not meet the statutory requirements of subsection 110(4) since it could reasonably have been obtained prior to the rejection of Mr. Olowolaiyemo's refugee claim and Mr. Olowolaiyemo did not provide an explanation as to why it was not available. With

respect to the statutory declaration of Mr. Johnson, the RAD concluded that, while it satisfied the statutory requirements, it did not meet the factors set out in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] regarding the acceptability of new evidence as it failed to provide sufficient detail on the relationship with Mr. Olowolaiyemo and was not material.

[5] In this application for judicial review, Mr. Olowolaiyemo contends that the RAD unreasonably interpreted subsection 110(4) of the *IRPA* and unreasonably applied the *Raza* factors to assess the admissibility of new evidence, and therefore committed a reviewable error in refusing to admit the new documentary evidence he had submitted.

[6] For the reasons that follow, I am satisfied that the RAD erred in its findings regarding the statutory requirements of subsection 110(4) and the conditions governing the admissibility of new evidence in the context of a RAD appeal. I must, therefore, allow Mr. Olowolaiyemo's application for judicial review.

[7] There are three issues to be determined:

1. What is the applicable standard of review?
2. Did the RAD unreasonably interpret the requirements of subsection 110(4) of the *IRPA*?
3. Did the RAD unreasonably apply the *Raza* factors in assessing the admissibility of new evidence under subsection 110(4)?

[8] In light of my conclusion, I do not need to deal with the more general question raised by the Minister as to whether the RAD decision as a whole is reasonable.

II. **Analysis**

A. *What is the applicable standard of review?*

[9] The questions raised by this application involve the RAD's determination of the appropriate analysis to be conducted in assessing the admissibility of new evidence on an appeal of a RPD decision before it. This involves the interpretation of subsection 110(4) of the *IRPA*, a question of law which is not of central importance to the legal system as a whole and outside the expertise of the RAD, as well as its application to the facts of the case, which is a question of mixed fact and law. I conclude that both questions are reviewable on the standard of reasonableness. The issue is whether the RAD's rejection of the new evidence is reasonable.

[10] I agree with the Minister that the determination, by the RAD, of the appropriate analysis for the admissibility of new evidence under section 110 of the *IRPA* involves a tribunal considering and applying its home statute, thus attracting more deference than a correctness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-49 [*Dunsmuir*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,* 2011 SCC 61 at paras 45-46; *Canadian Artists' Representation v National Gallery of Canada*, 2014 SCC 42 at para 13). This Court's jurisprudence on the admissibility of new evidence before the RAD has indeed confirmed that the applicable standard of review is reasonableness, both with respect to the RAD's interpretation of subsection 110(4) and to its application to the facts (*Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1022 at paras 36-42 [*Singh*]; *Khachatourian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 182 at para 37 [*Khachatourian*];

Ngandu v Canada (Minister of Citizenship and Immigration), 2015 FC 423 at para 13 [*Ngandu*]; *Ching v Canada (Minister of Citizenship and Immigration)*, 2015 FC 725 at para 46 [*Ching*]).

[11] When reviewing a decision on the standard of reasonableness, the analysis is concerned with the existence of justification, transparency and intelligibility within the decision-making process. Findings involving questions of facts or mixed fact and law should not be disturbed provided that the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]). In conducting a reasonableness review of factual findings, it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor (*Dunsmuir* at para 47; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 99). Under the reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency, and intelligibility, a reviewing court should not substitute its own view of a preferable outcome.

[12] Counsel for Mr. Olowolaiyemo submits that an alleged breach of procedural fairness would be reviewable on a standard of correctness and, as a result, a decision-maker is owed no deference in such circumstances (*Khosa* at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Singh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 855 at para 24). I agree with that general proposition. However, in the present case, the issue of admissibility of new evidence under subsection 110(4) relates to the interpretation and application of an *IRPA* provision more than to a procedural fairness matter, and thus calls for a review under the

reasonableness standard. While counsel for Mr. Olowolaiyemo argued that the standard of review should be correctness, he indicated at the oral hearing that, in the present case, it did not matter as the RAD committed an error which would be reviewable under either the correctness or the reasonableness standard.

B. *Did the RAD unreasonably interpret the requirements of subsection 110(4) of the IRPA?*

[13] In its decision, the RAD stated that, to decide on the admissibility of new evidence presented on appeal, it must first determine if the express statutory conditions contained in subsection 110(4) of the *IRPA* have been met, and then consider the factors developed in the *Raza* decision to assess new evidence. In *Raza*, the Federal Court of Appeal had held that new evidence should be considered for its newness, credibility, relevance, and materiality, in addition to any express statutory provision. The RAD did not admit the Bakare affidavit because it failed to meet the conditions of subsection 110(4) and it refused the Johnson declaration because it did not satisfy the factors set out in *Raza* even though it had been found to comply with the statutory requirements.

[14] The Minister contends that the Bakare affidavit was properly rejected because it was reasonable for the RAD to determine that it could reasonably have been available prior to the rejection of Mr. Olowolaiyemo's claim by the RPD and that there was no explanation as to why it was not provided. Given that the affidavit was reasonably available for the hearing before the RPD, it was not new according to subsection 110(4) of the *IRPA*.

[15] I disagree with the Minister. I am of the view that the RAD misconceived the requirements set out in subsection 110(4) of the *IRPA* and unreasonably interpreted the statutory language contained in the provision.

[16] The relevant portions of section 110 of the *IRPA* read as follows:

Appeal	Appel
110. (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.	110. (1) Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.
[…]	[…]
Procedure	Fonctionnement
(3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High	(3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou mandataire du Haut-Commissariat des Nations

Commissioner for Refugees and any other person described in the rules of the Board.	Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.
Evidence that may be presented	Éléments de preuve admissibles
(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[17] Subsections 110(3) and (4) thus provide that the RAD may accept documentary evidence but that an appellant may only present two types of additional evidence on appeal:

> Evidence that arose after the rejection of his or her claim; or
>
> Evidence that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[18] The wording of the English version may arguably suggest that the provision in fact refers to three different options and that the second one should be broken down into two independent possibilities. However, the French version of subsection 110(4) makes it clear that the last two possibilities described at the end of the provision are alternatives to one another rather than two distinct options: it refers to the "éléments de preuve (…) qui n'étaient alors pas normalement

accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet".

[19] Given the use of the word "or", there can be no doubt that the test set out in subsection 110(4) is disjunctive, not conjunctive. At the oral hearing, counsel for the Minister acknowledged that the provision did not establish a conjunctive test. This means that new evidence may be accepted by the RAD either if it arose after the rejection of the claim or if it was not reasonably available or the person could not have been expected to have presented it at the time of the rejection. It therefore suffices that an appellant's new evidence meet one of these two elements for the RAD to consider accepting it. Conversely, in order for the RAD to conclude that a new piece of evidence does not meet the statutory requirements of subsection 110(4), it must consider whether the evidence fails to meet both of the conditions laid out in the provision.

[20] I observe that, even if an appellant's evidence falls into one of the two categories of evidence covered by subsection 110(4), the RAD still has the discretion to accept it or not.

[21] In the present case, Mr. Olowolaiyemo submits that the RAD committed an error as it viewed and applied the test in subsection 110(4) as a conjunctive test. I agree. The RAD only considered whether the additional evidence presented by Mr. Olowolaiyemo was not reasonably available or could not have been expected to be presented at the time of the rejection of the claim before concluding that the Johnson declaration met the statutory requirements and the Bakare affidavit did not. At no point in the decision did the RAD consider whether the two new pieces of evidence "arose after the rejection of the claim". In other words, its analysis ignored the first

part of the test under subsection 110(4). This error is compounded by the fact that both the Bakare affidavit and the Johnson declaration were, on their face, clearly dated after the RPD rendered its decision on February 28, 2014.

[22] It may have been right that the Bakare affidavit could reasonably have been available prior to the rejection of the claim, but this fact was not sufficient for the RAD to conclude that this new evidence did not meet the statutory requirements of subsection 110(4) and could not be admitted. The RAD could not just stop there. In order to be able to conclude that the Bakare affidavit failed to satisfy the statutory requirements, the RAD also had to at least consider whether it arose after the rejection of Mr. Olowolaiyemo's claim. It did not. As the date of the document, April 28, 2014, clearly indicated that the affidavit was created after the RPD decision, the RAD certainly had to make a determination on this point.

[23] By viewing the test as conjunctive and not considering the first part of subsection 110(4), the RAD committed a reviewable error as it cannot be reasonable to ignore one part of express statutory language contained in a provision and not determine whether the new evidence complied with that portion of the test. The RAD committed a similar error with respect to the Johnson declaration as it did not assess whether it arose after the claim despite being dated May 7, 2014.

[24] In the circumstances, it cannot be said that the RAD's finding falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. I therefore conclude that the RAD erred by unreasonably interpreting the statutory requirements of

subsection 110(4) of the *IRPA* and by refusing to admit the new evidence produced by Mr. Olowolaiyemo on that basis.

C. *Did the RAD unreasonably apply the Raza factors to assess the admissibility of the new evidence under subsection 110(4)?*

[25] The Minister contends that the RAD reasonably applied the *Raza* test to assess whether to admit new evidence. This analysis led the RAD to reject the Johnson declaration even though it was considered to respect the statutory requirements of subsection 110(4). The *Raza* decision was issued in regards to the admissibility of new evidence in the context of a Pre-Removal Risk Assessment [PRRA] application. Given that the wording used at subsection 113(a) of the *IRPA* for new evidence on a PRRA is very similar to the language of subsection 110(4) governing the admissibility of new evidence in the context of a RAD appeal, the Minister affirms that it was reasonable and appropriate for the RAD to rely on the factors listed in the *Raza* decision (*Iyamuremye v Canada (Minister of Citizenship and Immigration),* 2014 FC 494 at paras 44-46; *Ghannadi v Canada (Minister of Citizenship and Immigration),* 2014 FC 879 at para 17; *Denbel v Canada (Minister of Citizenship and Immigration),* 2015 FC 629 at paras 40, 43-44). If Parliament had intended to establish different or more flexible admissibility rules in a RAD appeal, it would not have replicated the restrictive language which governs a PRRA application.

[26] I disagree. In my view, it was unreasonable for the RAD to merely import, and automatically transplant, the criteria from *Raza* in its determination under subsection 110(4) of the *IRPA*. The *Raza* factors, which include consideration of the newness, credibility, relevance

and materiality of the evidence, are not necessarily applicable to the admissibility of new evidence in the context of a RAD appeal.

[27] A RAD appeal is an appeal and a reconsideration of the RPD's decision whereas a PRRA officer's role does not include revisiting the RPD's factual findings. Since the role of the RAD on appeal materially differs from that of a PRRA officer, I agree with the reasoning outlined by Justice Gagné in *Singh*, at paras 49-58. In that decision, Justice Gagné discussed why the *Raza* factors developed in the context of PRRA applications cannot simply be transposed over to the RAD framework. Unlike a PRRA officer, the RAD is a quasi-judicial administrative tribunal, trusted to act as an instance of appeal of the RPD's determination of a refugee claim, with the power -- expressly granted under paragraph 111(b) of the *IRPA* -- to set aside the RPD's decision and substitute a determination that, in its opinion, should have been made. While the language formulated at paragraph 113(a) is similar to that of subsection 110(4), the RAD "considers this evidence in a very different light than does the PRRA officer" (*Singh* at para 51). The different context is an important distinguishing factor.

[28] It was indeed recognized in the *Singh* decision, and in several others following it, that the RAD was created to give a "full fact-based appeal" and to conduct a reconsideration of the RPD's decision (*Singh* at paras 55-57; *Khachatourian* at para 37; *Ngandu* at para 22; *Ching* at paras 55-58; *Sow v Canada (Minister of Citizenship and Immigration)*, 2015 FC 295 at paras 14-15; *Geldon v Canada (Minister of Citizenship and Immigration)*, 2015 FC 374 at para 18). Such a full fact-based appeal requires that the criteria for the admissibility of evidence be "sufficiently flexible" to ensure that a proper appeal can occur and to afford some leeway in order to allow the

claimant to respond to the deficiencies raised by the RPD. The criteria developed in *Raza* cannot simply be applied in the context of an appeal before the RAD as they may not give the appellant the full-fledged appeal to which he or she is entitled under subsection 110(4).

[29] As the *Raza* factors may not offer the accompanying flexibility to admit evidence called for in an appeal context, this Court has therefore held that it is unreasonable for the RAD to merely assume that these factors apply in the context of a RAD appeal (*Singh* at paras 56-57; *Ching* at paras 55-58).

[30] In the present case, the RAD referred extensively to the *Raza* factors and relied more specifically on "materiality" to conclude that the Johnson declaration did not constitute "new" evidence pursuant to subsection 110(4) of the *IRPA*. The RAD did not consider whether or how those factors should be adapted in the context of new evidence submitted on an appeal. For those reasons, I conclude that it was unreasonable for the RAD to import and strictly apply the *Raza* test in interpreting subsection 110(4) of the *IRPA* and in refusing to admit the new evidence submitted by Mr. Olowolaiyemo on that basis.

[31] I agree with counsel for the Minister that an appeal to the RAD may not qualify as a true *de novo* appeal because of the various legislative constraints imposed on the powers of the RAD, and that it is acceptable for the RAD to verify whether the evidence is credible or trustworthy in the circumstances. But by failing to appreciate that its role is different from that of a PRRA officer and to take a flexible and more generous approach to the acceptance of additional

evidence, the RAD did not give Mr. Olowolaiyemo the appeal he was entitled to (*Awet v Canada (Citizenship and Immigration)*, 2015 FC 759 at para 10).

[32] Once again, the RAD's determination does not fall within a range of possible, acceptable outcomes defensible in respect of the facts and law.

[33] The Minister further contends that, even if the Johnson declaration had been admitted as new evidence, it would not have been relevant or material to the appeal and would not have changed the credibility deficiencies in the claim of Mr. Olowolaiyemo given its lack of probative value. As such, it was not unreasonable for the RAD not to admit it (*Ngandu* at para 22).

[34] I cannot agree. The Court cannot tell whether the new evidence would have changed the outcome or the RAD decision materially or not. I only note that the new evidence submitted by Mr. Olowolaiyemo dealt with a primary issue in his refugee claim, his sexual orientation, and could have been determinative of Mr. Olowolaiyemo's credibility. The two new pieces of evidence could be crucial to whether the RAD accepts or rejects the RDP's findings; or the RAD could conclude that they are not sufficient to change its analysis. It is for the RAD to decide this question, not the Court.

[35] The RAD erred in refusing to admit the new evidence, and I am unable to say whether a more flexible approach would have caused the RAD to accept the Bakare affidavit and the Johnson declaration into evidence, nor whether this would have enabled Mr. Olowolaiyemo to obtain an oral hearing or given him an opportunity to satisfactorily explain the inconsistencies

and deficiencies that caused the decision-maker to make adverse findings of credibility. Because I am unable to conclude whether the RAD's decision would have been different if the new evidence had been admitted, the application for judicial review must be allowed and the decision must be sent back for redetermination.

[36] I note that the following questions have been certified by Justice Gagné in *Singh* and the Minister has started an appeal process in this matter (A-512-14), which is scheduled to be heard in October 2015 by the Federal Court of Appeal:

> What standard of review should be applied by this Court when reviewing the Refugee Appeal Division's interpretation of subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27?
>
> In considering the role of a Pre-Removal Risk Assessment officer and that of the Refugee Appeal Division of the Immigration and Refugee Board, sitting in appeal of a decision of the Refugee Protection Division, does the test set out in *Raza v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 385 (F.C.A.) for the interpretation of paragraph 113(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 apply to its subsection 110(4)?

III. **Conclusion**

[37] For the reasons detailed above, I conclude that the RAD erred in its findings regarding the statutory requirements of subsection 110(4) of the *IRPA* and the consideration of the conditions governing the admissibility of new evidence in the context of a RAD appeal. The result was an unreasonable refusal of the new evidence submitted by Mr. Olowolaiyemo. I must, therefore, allow Mr. Olowolaiyemo's application for judicial review and order another panel of the RAD to reconsider his application for refugee protection.

[38] Neither party has proposed a serious question of general importance for certification, and I am satisfied that none arises on the particular facts of this case (*Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637 at para 4).

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The RAD decision is set aside;
3. The matter is referred back to the RAD for re-consideration of admissibility of the new evidence and re-determination on the merits by a differently constituted panel;
4. No serious question of general importance is certified for appeal.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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