

Federal Court



Cour fédérale

Date: 20161108

Docket: IMM-1409-16

Citation: 2016 FC 1244

Ottawa, Ontario, November 8, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

BANDESE MUTATYAMA AARON

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Bandese Mutatyama Aaron [Mr. Aaron], challenges a decision of the Refugee Appeal Division [the RAD] dated March 24, 2016, that found he was not a refugee. Mr. Aaron had applied for refugee status in Canada on the basis that he was persecuted for his sexuality and due to his employment at an HIV/AIDS clinic in Uganda.

[2] Mr. Aaron challenges the decision because the RAD ignored evidence, did not give explanations or was not reasonable in their assessment of his credibility. Mr. Aaron also argued that the RAD stated the test correctly from *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*], but then applied it incorrectly because they just put a stamp on the Refugee Protection Division's [RPD] decision without saying why the RPD had an advantage when doing a credibility assessment.

[3] This Judicial Review will be dismissed for the reasons that follow.

II. Background

[4] Mr. Aaron is a citizen of Uganda. He worked in Uganda as a medical professional at an HIV/AIDS clinic prior to his arrival in Canada. Mr. Aaron was married to a woman and self-identifies as bi-sexual.

[5] Mr. Aaron alleges that on March 21, 2015, he and his male partner were attacked by a gang of approximately twenty people who threatened to burn them alive because of their sexual orientation. Mr. Aaron escaped but his partner was detained by police and remains in custody.

[6] This incident led to Mr. Aaron leaving his work and going into hiding at which time his brother suggested he flee to Canada. His brother helped Mr. Aaron obtain a visa under the pretence of attending an HIV/AIDS conference in Vancouver, BC. He arrived in Canada on July 14, 2015, and claimed refugee status on September 17, 2015.

[7] The RPD rejected Mr. Aaron's refugee claim on the basis that he had failed to provide credible and trustworthy evidence to support his claim and "was not credible."

[8] The RPD drew negative inferences based on the following inconsistencies and omissions from his basis of claim form [BOC]:

- Mr. Aaron's undeclared visit to Kenya while in hiding;
- his conflicting evidence as to who prepared his trip;
- his conflicting testimony with respect to his marriage;
- banking information demonstrating ongoing income despite testimony he was in hiding;
- multiple bank withdrawals despite allegedly hiding;
- alleged statements by his wife and brother before the Ugandan Chief Magistrate Court which admit to helping Mr. Aaron flee the country; and
- the forgotten visit by the police on March 21, 2015.

[9] No oral hearing was requested and no new evidence was submitted by Mr. Aaron for the RAD.

[10] The RAD identified the same omissions and inconsistencies between Mr. Aaron's BOC and his testimony before the RPD. It reviewed the documentary evidence from both the National Documentation Package and articles provided by Mr. Aaron and found that the RPD had taken these into consideration.

[11] Despite the negative credibility findings, the RAD conducted a separate analysis under section 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [the Act], finding that Mr. Aaron would not face a personalized risk or danger due to his sexual orientation if returned to Uganda.

[12] The RAD concluded that Mr. Aaron had not satisfied his burden of establishing a serious possibility that he would be personally subjected to a risk to his life, or a risk of cruel and unusual treatment or punishment, or a danger of torture in Uganda. Mr. Aaron's appeal was dismissed.

III. Issues

[13] The issues raised by Mr. Aaron on judicial review are:

- A. Did the RAD correctly engage in the standard of review stated in *Huruglica*?
- B. Did the RAD reasonably conclude that Mr. Aaron is not a Convention refugee under either sections 96 or 97 of the Act?

IV. Standard of Review

[14] In *Huruglica*, above, the Federal Court of Appeal instructed the RAD to review the RPD's findings of fact and law on a correctness standard except in cases of credibility. The Federal Court of Appeal also determined that this was not a true *de novo* appeal, as the RAD proceeds on the record before the RPD, and also found that the RAD may still defer to the RPD

on credibility findings where the RPD enjoys a “meaningful advantage” based on the oral evidence that it hears.

[15] The parties agree that the standard of review that this Court will review the decision is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9).

V. Analysis

A. *Legal Test Applied to the Facts*

[16] Mr. Aaron submits that the RAD set out the test correctly in the decision but did not apply it correctly. His position is that the RAD accepted the RPD’s credibility findings without saying why the RPD was in a better position to make the determination. Further, he argued that if the RAD had done an independent assessment they would have found that his testimony was consistent with the documentary evidence. According to Mr. Aaron, the RAD has to explain why the RPD was in a better position than they were to assess the evidence.

[17] In this case, the RAD did an independent analysis of most of the credibility findings and all of the determinative findings but found there were “numerous other credibility findings made by the RPD” that they would rely on.

[18] The following are a few negative credibility findings that the RAD deferred to the RPD's findings:

- a. Mr. Aaron used his home address in his BOC rather than where he was allegedly hiding indicating he was not in fact hiding at all;
- b. Mr. Aaron claimed that he was reluctant to enter an arranged marriage and sex felt totally unnatural but later testified that he consented to the marriage and that he enjoyed having sex with his wife;
- c. Mr. Aaron claimed that his boss suspended him in January 2015 because he noticed his sexual orientation yet his banking shows that he was paid throughout January without interruption;
- d. Mr. Aaron claimed to be hiding as of March 2015 and to be continually paid for work he was no longer doing;
- e. Mr. Aaron admitted to making multiple small withdrawals from his bank despite the severe risk he alleges. His explanation of needing to pay back a taxi driver when he fled was not found credible. In particular, Mr. Aaron's visits to the bank while in hiding were similar in frequency to the period before he went into hiding contradicting his assertion that he was in hiding at all.

[19] I do not agree with Mr. Aaron that the RAD did not correctly engage in the standard of review stated in *Huruglica*. No oral hearing was requested before the RAD and no new evidence was submitted. The RPD was able to directly observe and ask questions over the course of two separate hearings. The RPD was unquestionably in a more favorable position to determine those

credibility findings. Especially when the RAD did assess fully any determinative credibility issues.

[20] There is nothing wrong with the RAD deferring on issues of credibility to the RPD (*Huruglica* at paras 70-73). Not stating why the RPD was in a more favorable position seems obvious in this case though there may be factually similar situations where the RAD should state why the RPD has an advantageous position. I find the RAD's application of *Huruglica* and its deference to the RPD to be reasonable.

VI. Reasonableness of sections 96 and 97 Analysis

[21] Simply stated, Mr. Aaron was unable to persuade the RAD that his fear of persecution was well founded under section 96 of the Act. Similarly, he failed to demonstrate that he faced a personalized risk under section 97 of the Act. Having heard the meticulous submissions of counsel and being directed to the record, transcript and both RPD and RAD decisions during their lengthy arguments, I am satisfied that the RAD decision was reasonable.

[22] Mr. Aaron gave detailed arguments regarding where the RAD and RPD made errors in some of the credibility findings. Mr. Aaron relies on *Maldonado v Canada*, [1997] FCJ No 248, to argue that statutory declarations should have been relied on as sufficient evidence to substantiate his claim.

[23] There is no reason to believe that the statutory declarations were ignored. Mr. Aaron's allegations were rebutted by the contradictions and inconsistencies identified above which lead

to adverse credibility findings. The reasons provided by the RAD are articulated clearly and demonstrate why it took issue with Mr. Aaron's assertions that he would be at risk if returned to Uganda.

[24] The RAD supported its findings by conducting a separate analysis under each of sections 96 and 97. In particular, it noted Mr. Aaron's failure in his BOC to mention a travel agent arranging his escape from Uganda (despite it being in his schedule 12). The agent was central to his later testimony and was alleged to have placed a fraudulent Kenyan visa in his passport. The RPD accepted Mr. Aaron's BOC and found that the travel agent acted as just that, a travel agent. During the hearing, Mr. Aaron said it was his brother that helped him get a passport and visa after the brother had identified the conference in Vancouver. The RAD found Mr. Aaron's testimony inconsistent and not credible and formulated to disguise his travel to Kenya and return to Uganda while allegedly in hiding.

[25] The RPD accepted that he worked in the HIV/AIDS field and that in Uganda workers in the field are sometimes mistreated. But the RPD found that he was a clinician much more than an activist; had never been targeted; worked for the Government Health Ministry that he would not be mistreated because of imputed HIV/AIDS or imputed homosexuality from his work. The RPD did not accept that the one husband being angry with him was enough. The RPD determined Mr. Aaron would not be exposed to a possibility of persecution under section 97.

[26] It is established law that if one finding is determinative then the errors with respect to the other findings are not material. Even if the RAD had been as microscopic as counsel in their analysis, the cumulative effect of the record would not make this decision unreasonable.

[27] The RAD reasonably concluded that there was insufficient credible evidence remaining. Mr. Aaron's counsel offered explanations and pointed to discrepancies that could have lead the RAD to making different findings but it is not my role on judicial review to reweigh the evidence. The findings of the RAD on both sections 96 and 97 are supported by the evidence and the findings as a whole are determinative.

[28] In sum, I conclude that the decision is reasonable and the RAD did not err in its application of *Huruglica*. The application for judicial review is dismissed.

[29] No question was presented for certified question and none arose.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed;
2. No question is certified.

"Glennys L. McVeigh"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1409-16

STYLE OF CAUSE: BANDESE MUTATYAMA AARON v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

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