

Federal Court



Cour fédérale

Date: 20170929

Docket: IMM-1642-17

Citation: 2017 FC 870

Ottawa, Ontario, September 29, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ANTON HOHOL

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the “IRPA”), of a decision made by the Refugee Protection Division (“RPD”) of the Immigration and Refugee Board, finding that the Applicant is not a Convention refugee or a person in need of protection and that his claim was manifestly unfounded.

II. Background

[2] The Applicant is a citizen of Ukraine. He came to Canada in early 2015 on a study permit to learn English.

[3] In July 2015, the Applicant made a refugee claim on the grounds that he fears persecution and violence in Ukraine due to his sexual orientation, pursuant to sections 96 and 97 of the IRPA. His supporting documents included country-conditions evidence, two medical reports and a police report allegedly related to beatings he experienced, a letter from his grandmother stating that the individuals who beat him returned to his house looking for him, photographs with a former romantic partner as well as from the Gay Pride Parade in Toronto, an orientation certificate from the 519 Church Street community centre (“The 519”) and other personal documents.

[4] On March 13, 2017, the claim was heard by the RPD. At the conclusion of the hearing, the RPD delivered an oral decision rejecting the Applicant’s claim and finding it to be manifestly unfounded. Subsequently, the oral decision was provided in an edited, written version.

[5] The RPD concluded that the Applicant had not established there was a serious possibility of persecution on a Convention ground or that, on a balance of probabilities, the Applicant personally would be subjected to danger of torture or face a risk to life or a risk of cruel or unusual punishment or treatment upon returning to Ukraine.

[6] The RPD found the determinative issue was credibility. In particular, the RPD found on a balance of probabilities that two documents submitted by the Applicant were fraudulent: the police report and the letter from his grandmother.

[7] In finding those two documents were fraudulent, the RPD gave no weight to other documents submitted by the Applicant. Furthermore, the RPD found that the Applicant's personal credibility and statements were seriously impugned.

[8] Regarding the Applicant's sexual orientation, the RPD gave no weight to the evidence submitted by the Applicant. The RPD found that the 519 orientation sheet, the photos of him at the Gay Pride Parade in Toronto and his claim to have attended gay bars and clubs, did not indicate his sexual orientation because those spaces were available to the public as a whole. As well, the RPD questioned the Applicant's failure to ask two ex-boyfriends to testify on his behalf.

[9] The RPD concluded that the Applicant failed to present credible evidence on the central part of the claim – that he was homosexual.

[10] Furthermore, the RPD found the claim was fabricated and was therefore a manifestly unfounded claim, pursuant to section 107.1 of the IRPA.

III. Issue

[11] Was the RPD's decision unreasonable?

IV. Standard of Review

[12] The standard of review is reasonableness (*Wa Kabongo v Canada (MCI)*, 2008 FC 348 at para 7).

V. Analysis

[13] The relevant provisions of the IRPA are attached as Annex “A”.

[14] The Applicant argues that the RPD committed a number of errors that resulted in an unfair and unreasonable assessment of the Applicant’s credibility. Specifically, the RPD erred by finding two of the documents submitted by the Applicant to be fraudulent, and then relied on that finding to summarily dismiss other documents submitted by the Applicant as well as the Applicant’s testimony without due consideration.

[15] The Respondent argues that the RPD provided detailed reasons why the Applicant’s claim was not credible. As well, an adverse credibility finding can affect all related evidence.

[16] The RPD found the police report was fraudulent. It found the report contained details the police couldn’t know about because the Applicant was not interviewed by the police; he only told the hospital that he had been beaten. Those details are the time the incident occurred and that the incident was not hooliganism but was based on suddenly arising hostility. As well, the Applicant claimed the letter was received in 2011 but it was dated 2012; however, this was a

minor issue for the RPD. Finally, the National Documentation Package for Ukraine indicated that fraudulent documents are readily available in that country.

[17] The RPD also found the grandmother's letter was fraudulent because the Applicant did not know who had beaten him, but the grandmother stated that the same people who had beaten him returned to his house. The RPD noted that the Applicant's only explanation was that his grandmother must have guessed they were the same people. As well, the RPD noted the Applicant referred to the incident as having occurred on December 5, 2011, but his narrative referred to the date as December 25, 2011; however, the RPD noted that this was a minor detail.

[18] The RPD's credibility findings are entitled to deference on judicial review: the Court is not in as good a position as the RPD to assess the credibility of the evidence; and the reviewing Court's analysis should not involve determining whether each point in the RPD's reasoning meets the reasonableness test (*Juarez v Canada (MCI)*, 2010 FC 890 at para 22).

[19] The RPD is also entitled to make general findings of lack of credibility. The accumulation of inconsistencies, contradictions, etc., taken as a whole, can lead to such a finding. As well, a general finding of lack of credibility can extend to all relevant evidence emanating from the Applicant's version and all documentary evidence he submitted to corroborate his version of the facts (*Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558 at para 22).

[20] However, the RPD must not be zealous to find a claimant is not credible (*Jamil v Canada (MCI)*, 2006 FC 792 at para 24).

[21] Moreover, sworn testimony is presumed true unless there is a reason to doubt its truthfulness. Furthermore, a lack of corroborating evidence of one's sexual orientation, in and of itself, absent negative, rational credibility or plausibility findings related to that issue, is not enough to rebut the presumption of truthfulness (*Sadeghi-Pari v Canada (MCI)*, 2004 FC 282 at para 38).

[22] As well, all evidence with respect to an applicant's claim for protection must be considered before a global credibility finding is made (*Owusu-Ansah v Canada (Minister of Employment and Immigration)*, [1989] 98 NR 312 (FCA)). Similarly, a finding that one or more documents are fraudulent does not necessarily mean that all documents are fraudulent, even in a situation where fraudulent documents are readily available. The RPD must make some effort to ascertain the authenticity of documents that appear to be genuine (*Lin v Canada (MCI)*, 2006 FC 84 at paras 11-13).

[23] While a tribunal may make a negative credibility finding based on implausibility of evidence, that finding should only be made in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant (*Valtchev v Canada (MCI)*, 2001 FCT 776 at para 7).

[24] In my opinion, it was unreasonable for the RPD to make a general finding of lack of credibility based solely on the problems it identified with the two documents considered.

Reasonable alternative explanations exist for those problems. Furthermore, the RPD misapprehended or ignored important corroborative evidence.

[25] The RPD found it implausible that the police and grandmother could have known the information they conveyed, given the Applicant's testimony. As noted above, such a finding should only be made in the clearest of cases. In my opinion, this is not a clear case.

[26] Furthermore, the RPD misapprehended or ignored important corroborative evidence:

- i. The Applicant submitted a record of orientation from The 519. The 519 "...is committed to the health, happiness and full participation of the LGBTQ community" and serves "...the evolving needs of the LGBTQ community, from counselling services and queer parenting resources to coming out groups, trans programming and senior's support" (The 519, "About", online: <<http://www.the519.org/about>>). The RPD found it "...unlikely that the claimant actually attended any events at The 519..." and "... [a]nyone member of the public who wishes can attend there." This Court has previously found it to be unreasonable for the RPD to find that a membership card at The 519 does not provide evidence that the member is homosexual (*Leke v Canada (MCI)*, 2007 FC 848 at paras 30-33).
- ii. The Applicant also submitted two medical reports. The first report, dated April 16, 2011, stated: "Attended on April 16 around 7:30 pm after being beaten (beaten by a group of persons unknown)... Diagnosis: multiple contusions in soft parts of the face and both

forearms, damage to the nasal septum, bleeding surface cut wounds on the parietal part of the head”.

- iii. The second report, dated January 8, 2015, stated: “The patient came to the trauma clinic at 10:30 am on January 1, according to his statement, having been beaten by a homophobic group the night before; criminal trauma reported to the police. Full diagnosis... An extensive hematoma of the lumbar region from a strike by a blunt object, an incised wound of the right hand, para-orbital hematoma of the right eye, injuries on the head, chest and lower extremities, psychological shock, depression”.

[27] The two medical reports were not considered by the RPD. Instead, the RPD stated:

I’m finding that at least two documents have been shown to be, on a balance of probabilities, fraudulent, leads the panel to give no weight to other documents produced from the same source.

[28] It was unreasonable for the RPD to give no weight to the medical reports. The reports are central to the Applicant’s claim of persecution and violence based on his sexual orientation, and corroborates the information contained in the police report and grandmother’s letter. The more important the evidence that is not mentioned specifically and analyzed, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact without regard to the evidence (*Cepeda-Gutierrez v Canada (MCI)*, [1998] 157 FTR 35 at para 17).

[29] Furthermore, the RPD provided no reason to suggest the medical reports were fraudulent, aside from its negative findings with respect to the police report and grandmother’s letter. A finding that one or more documents are fraudulent does not necessarily mean that all documents

are fraudulent. It was unreasonable for the RPD to not make any effort to ascertain the authenticity of the medical reports.

[30] While it may have been open to the RPD to give little or no weight to the police report or grandmother's letter due to the problems it perceived with respect to that evidence, it was not reasonable for the RPD to make a general finding of lack of credibility on questionable grounds, while ignoring or rejecting other, corroborative, important evidence fundamental to the Applicant's position and risk.

[31] For those reasons, the RPD's decision lacks transparency, justification and intelligibility and is unreasonable.

[32] I also find that the RPD erred in finding that the Applicant's claim was "manifestly unfounded". Even if I was to accept that the police report and grandmother's letter were fraudulent, which I need not determine, those documents did not relate to any dishonesty material to the determination of the claim, which is based on the Applicant's sexual orientation (*Warsame v Canada (Minister of Citizenship and Immigration)*, 2016 FC 596 at para 30).

[33] Finally, while the Applicant invited the Court to consider an annual research paper by Professor Sean Rehaag entitled "2016 Refugee Claim Data and IRB Member Recognition Rates", that paper was not properly based on any expert evidence or qualified in any acceptable manner – it is given no weight.

JUDGMENT in IMM-1642-17

THIS COURT'S JUDGMENT is that:

1. The application is granted and the matter is remitted to a different Board member for reconsideration;
2. There is no question for certification.

"Michael D. Manson"

Judge

ANNEX “A”

Immigration and Refugee Protection Act, SC 2001, c 27

Convention refugee

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or

Définition de réfugié

96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y

from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Manifestly unfounded

107.1 If the Refugee Protection Division rejects a claim for refugee protection, it must state in its reasons for the decision that the claim is manifestly unfounded if it is of the opinion that the claim is clearly fraudulent.

Demande manifestement infondée

107.1 La Section de la protection des réfugiés fait état dans sa décision du fait que la demande est manifestement infondée si elle estime que celle-ci est clairement frauduleuse.

FEDERAL COURT
SOLICITORS OF RECORD

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