

Federal Court



Cour fédérale

Date: 20171207

Docket: IMM-1735-17

Citation: 2017 FC 1117

Ottawa, Ontario, December 7, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

OBAID ENAM

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review brought by the Applicant pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision made by the Refugee Appeal Division of the Immigration and Refugee Board [the RAD], dated March 28, 2017, dismissing the Applicant's appeal of the decision of the Refugee Protection

Division [RPD] which held that the Applicant is not a Convention Refugee or a person in need of protection [the Decision].

[2] The central issues are identity and the Applicant's change in gender identification he identified between the hearing of the RPD and the RAD appeal.

II. Facts

[3] The Applicant claims to be a 27-year-old citizen of Afghanistan of Hazara ethnicity.

[4] Consistent with his identification documents, the Applicant identified himself as female in his claim before the RPD. Female pronouns were used by his counsel and the RPD. No issue was raised concerning his gender identification, which was simply taken to be female.

[5] Significantly, however, in his appeal to the RAD, he tendered completely new allegations and evidence that, although he was assigned female at birth (and proceeded as a female before the RPD), he now identifies as a male.

[6] I emphasize that the Applicant's being transgender was not before the RPD.

[7] The Applicant alleged before the RAD that when he was born, his parents did not want a second daughter. Therefore, they raised the Applicant as a boy and gave him a male name. The evidence in this regard consisted of an affidavit of the Applicant to that effect, and an expert

report by Dr. Patricia Durish [the Durish Report]. Dr. Durish is a registered clinical social worker who interviewed the Applicant.

[8] In terms of risk, the Applicant alleges that while studying at the Behzad Institute in Afghanistan from July 2015 to January 2016, he became the target of a well-connected and powerful classmate. According to the Applicant, this classmate sought to rape and kill him. The Applicant describes an incident in January 2016 where he refused an invitation to accompany the classmate to help him install a computer program. When the classmate tried to get the Applicant into a car with tinted windows and two other individuals inside, the Applicant ran away. After the classmate called his cell phone, the Applicant says he disabled his SIM card and stopped attending school. He also says that a car with tinted windows and no license plate was frequently seen in his area. The Applicant claims he could no longer leave his home.

[9] The Applicant submits that a relative helped him to procure a visitor visa to Turkey. The Applicant claims to have used his Afghan passport to enter Turkey, where he stayed for three weeks. According to the Applicant, he was then introduced to smugglers who took his passport and brought him to Canada on a false Turkish passport. The Applicant claims never to have held the fraudulent passport in his hands as the smuggler kept it and directed the Applicant through customs. He could not recall, with precision, the name he used upon his arrival at the airport in Canada. He provided the RPD with several variants. The Applicant believes the name on the passport was 'Ozel Ibrahim', 'Osai Ibrahim', 'Ozal Ibrahim' or 'Uzel Ibrahim'.

[10] Upon arrival in Canada, the Applicant says that the smuggler kept the Applicant's original Afghan passport, put the Applicant in a taxi and gave him the address of a shelter. The Applicant filed an inland claim for refugee protection based on what he then considered his gender (female), and based on his ethnicity (Hazara).

[11] The Applicant had a hearing before the RPD over two days in June and July 2016. The RPD found that the Applicant was not a credible witness and that he did not provide sufficient reliable and trustworthy evidence to establish his identity (which at the time was female) on a balance of probabilities. The Applicant's failure to establish his identity was fatal to his claim for refugee protection.

[12] As noted above, the Applicant identified himself as female before the RPD. Therefore, the RPD approached the Applicant's claim as if he was an Afghan woman. The RPD applied the *Chairperson's Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution*, considered the unique set of circumstances faced by Afghan women in terms of accessing personal identification documents and other official documents, and the obstacles and abuses Afghan women often face in their daily lives.

[13] The RPD had several issues with the Applicant's application, including:

- the "claimant who appeared before the panel was of significantly older age than 26 years old";
- the Applicant's appearance did not correspond with photographs on certain documents he submitted;

- the Applicant's appearance was identical on various documents dated 2003 to 2015;
- the Applicant's Secondary School Transcript was visibly altered without any satisfactory explanation by the Applicant;
- the Applicant alleged to not possess her genuine Afghan passport because the smuggler maintained it, and despite stating that his sister paid the smuggler by transferring funds from a bank account, the Applicant could provide no evidence of any bank transfer, even when asked by the RPD;
- the Applicant's Ministry of Public Health Certificate contained sections that had been whited out;
- the Applicant modified the birthdates of his parents on a declaration from his sister;
- a search of the Immigration and Customs Enforcement database revealed no record of an individual entering Canada on or around March 23rd, 2016 under the name Ozel Ibrahim or Obaid Enam;
- the Applicant claimed to have no documentary evidence to establish her entry to Canada, including tickets, boarding passes, luggage tags, etc., because the smuggler kept everything; and
- although the Applicant claimed to have attended an all-girls school, according to documentary evidence before the panel, girls did not attend school during Taliban rule in Afghanistan during the years the Applicant alleges to have attended school.

[14] The RPD found that the Applicant provided insufficient explanations for each of these issues. Having found that the personal and national identity of the Applicant had not been

established on a balance of probabilities, the RPD did not assess the refugee aspect of the Applicant's claim.

[15] At his RPD hearing, the Applicant was represented by counsel.

[16] He retained different counsel to represent him at the RAD, who also represented him before this Court.

[17] On appeal to the RAD, the Applicant brought forward new evidence relating to his gender identity, the Durish Report, a money transfer receipt, a school transcript and certificate, and country documents regarding school during Taliban rule.

[18] He filed an affidavit addressing his different gender identity from that before the RPD. This affidavit among other things, criticized his former lawyer. It is significant that the Applicant did not file a complaint against his former counsel. In oral argument, his new counsel conceded there was "no blame" against former counsel for not representing the Applicant as a transgender male instead of a female. This was a wise concession; former counsel was blameless.

[19] As noted above the RAD dismissed the Applicant's appeal.

III. Issues

[20] In my view the determinative issue on this appeal is the reasonableness of the RAD's decision.

IV. Standard of Review

[21] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is not necessary where “the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question.” The Federal Court of Appeal stated in *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*], at para 70 that the RAD is to review the RPD’s findings on the standard of correctness, but may defer to the RPD on credibility findings “where the RPD enjoys a meaningful advantage.” *Huruglica* also determines that reasonableness is the standard of review to be used by this Court when reviewing decisions of the RAD, see paras 31-35, and *Fu v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1074 at para 10 per Diner J:

The RAD’s assessment of the evidence, and findings of mixed fact and law, are to be reviewed on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 (CanLII) at para 35; *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII) at paras 47, 51, 54, and 57) [...].

[22] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[23] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole:

Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

V. Discussion and Analysis

[24] The RPD confirmed the determination of the RPD, finding that the Applicant is neither a Convention refugee nor a person in need of protection.

[25] In making this decision, the RAD considered a number of pieces of new evidence:

1. Assessment of the Appellant by Dr. Patricia Durish, Ph.D. [Item 1];
2. New letter from the Applicant's sister corroborating the Applicant's new allegations regarding his gender identity and the risks he faces [Item 2];
3. Online article about gender identity, Misgendering is Violence [Item 3];
4. Online articles regarding the practice of Afghan girls posing as boys [Item 4];
5. Money transfer receipt regarding payment made to smuggler [Item 5];
6. Original school transcript and certificate issued June 25, 2016 [Item 6]; and,
7. Country documents regarding schooling during the Taliban Rule [Item 7]

[Collectively, the New Evidence]

A. *RAD's findings of admissibility of New Evidence*

[26] The RAD summarized the Applicant's submissions regarding his gender as follows:

The Appellant has submitted a new allegation that was not before the RPD. He argues that, although he was female assigned at birth, he was raised as a male by his parents. Since that time, he has identified as a male. He argues that, in Afghanistan any form of trans-identity placed him in immediate danger, and, as such, he developed coping mechanisms around his gender identity, which include extreme avoidance when these issues arise. The Appellant submits that, although he suffered extreme and protracted abuse and bullying in addition to severe ostracization and isolation as a male-presenting woman in Afghanistan, because of his psychological profile, he could not have reasonably been expected to present the evidence with regard to his sexual identity at the RPD because he would not think or be able to volunteer this information about himself, and would not object to a female identity being imposed on him. To support his new allegations in this regard, the Appellant has tendered an assessment by Patricia Durish Ph. D, a letter from his sister Aahar Enam, as well as online articles dealing with gender identity and the practice of Afghan girls posing as boys.

B. *New Evidence regarding gender identity*

[27] The RAD found that Items 1-4 met the requirements to be admitted as new evidence.

[28] However, while the RAD accepted the Durish Report (Item 1), the RAD concluded it should be afforded little weight. I will review the RAD's assessment of the Durish Report on the reasonableness standard, and consider each factor identified by the RAD:

- (i) First, the RAD found that the Durish Report was not a "psychiatric assessment" because Dr. Durish is not a medical doctor, psychiatrist, nor psychologist. Court Comment: I agree that she is not a doctor, psychiatrist, or psychologist. That said, the Durish Report is nonetheless a report of a person qualified as a registered clinical

social worker. It must be reviewed in that light. I am not satisfied that this took place here. I note that clinical social work is a regulated profession under Ontario's *Social Work and Social Service Work Act, 1998*, SO 1998 c 31, and its regulations and by-laws. Under that legislation and subsection 27(4) of the Ontario *Regulated Health Professionals Act* SO 1991, c 18, registered clinical social workers are authorized to perform the controlled act of "treating [...] an individual's serious disorder of thought, cognition, mood, emotional regulation, perception or memory that may seriously impair the individual's judgment, insight communication or social functioning";

- (ii) The RAD criticized the Durish Report because it communicated a diagnosis, which is not permitted according to section 27 of the *Regulated Health Professionals Act*, SO 1991, c 18. Court Comment: I agree both that the Durish Report appears to communicate a diagnosis, and that Dr. Durish is not permitted to make diagnoses under Ontario law. However, that is not the end of the matter, because as a registered clinical social worker, Dr. Durish nonetheless had expertise which, acting reasonably, the RAD should have considered. As just noted, I am not satisfied that occurred here;
- (iii) Third, the RAD noted inconsistencies between the Durish Report and the evidence. In particular, Dr. Durish had noted that "much of the trauma [the Applicant] suffered in Afghanistan manifests as extreme deference and submission to authority". The RAD pointed to examples of the Applicant defying authority and taking actions that were in his own best interests, such as when he ran away from his classmate. Court

Comment: In my view, while these observations were relevant, they were only marginally so, considering the RAD's overall assessment of the Durish Report;

- (iv) Finally, the RAD criticized the Durish Report because it "advocated" for the Applicant to remain in Canada. The Durish Report concluded that the Applicant's: "[...] fear is so great and the certainty of his capture, and torture and eventual death is so strong that it is my professional opinion that there is a real threat of [the Applicant] committing suicide if he is forced to return to Afghanistan." Court

Comment: While this aspect of the Durish Report should be given no weight because it calls for expertise on Afghan country conditions, which Dr. Durish did not possess, I am not persuaded it went over the line into advocacy; the RAD's "advocacy" finding was unreasonable.

[29] The RAD gave the Durish Report little weight; in my view, this finding taken alone was unreasonable as outlined above. As will be seen below, there will be a redetermination of this matter. The Durish Report should not simply be accepted without more; its consideration must take into account the professional's qualifications and what the report says in that regard, together with other factors including, but not limited to, the thoroughness of the analysis, the information the claimant gave the professional in advance of the interview, other information the professional relied upon, instructions and questions counsel put to the professional, the time the professional spent with the Applicant, whether the report crosses the line into impermissible advocacy, and of course whether matters underlying or considered in the report are consistent with the new decision-maker's findings of fact.

[30] In the normal course, I would assess other findings made by the RAD, and consider other factors raised by the parties. However, that is not necessary because of the importance of my finding with respect to the Durish Report, and the additional finding discussed below.

[31] As of May 1st, 2017 (*i.e.*, after the RAD made its Decision) the IRB released *Chairperson Guideline 9 - Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression* [the *SOGIE Guidelines*]. The *SOGIE Guidelines* seek to address “the particular challenges individuals with diverse SOGIE may face in presenting their cases before the Immigration and Refugee Board of Canada (IRB) and establishes guiding principles for decision-makers in adjudicating cases involving SOGIE”.

[32] The *SOGIE Guidelines* set out considerations for the RPD including:

- An individual’s self-awareness and self-acceptance of their SOGIE may present as a gradual or non-linear process;
- Many individuals with diverse SOGIE conceal their SOGIE in their country of reference out of mistrust or fear of repercussion by state and non-state actors, or due to previous experiences of stigmatization and violence. These circumstances may manifest themselves as an individual being reluctant to discuss, or having difficulty discussing, their SOGIE with a decision-maker based on a fear or general mistrust of authority figures, particularly where intolerance or punishment of individuals with diverse SOGIE are sanctioned by state officials in an individual's country of reference;

- Individuals with diverse SOGIE may face a heightened risk of experiencing mental health challenges, often stemming from a history of social isolation, mistreatment and lack of social support in their countries of reference. Individuals with diverse SOGIE may experience internalized homophobia, sexual stigma or oppression. They may also have depression, post-traumatic stress disorder relating to past physical or sexual violence, anxiety, suicidal tendencies, dissociation, decreased capacity for trust, and other trauma based on their SOGIE. These issues may manifest themselves in a variety of ways and can have an impact on an individual's ability to testify in a proceeding before the IRB; and,
- Some individuals with diverse SOGIE may be particularly vulnerable due to mental health issues or traumatic circumstances experienced because of their SOGIE.

[33] The *SOGIE Guidelines* also emphasize the importance of using proper language and terminology in SOGIE claims. The RAD accepted the change in the Applicant's gender identification which leads me to conclude the Applicant was entitled to an assessment that was considered, among other things, pursuant to the *SOGIE Guidelines*. In my respectful view, the *SOGIE Guidelines*, although not released at the time of the RAD's decision, require the RPD to be cognizant of the particular issues facing the LGBTQ community, including transgender claimants such as the Applicant. Because the Applicant is still in the immigration system, in my view, he is entitled to the benefit of the *SOGIE Guidelines*. This he did not receive; a matter which again is of central importance to the disposition of this case.

[34] Stepping back and viewing the RAD decision as an organic whole, and not approaching judicial review as a treasure hunt for errors, I am not satisfied that the Decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, as required by *Dunsmuir*. As noted, I have come to this conclusion having regard to the unreasonable assessment of the Durish Report and because the Applicant did not, but should have had, the benefit of the *SOGIE Guidelines* at a hearing. To recall, these matters are of central importance in this disposition.

[35] Therefore, the Decision is set aside and will be remanded for reconsideration by the RAD in accordance with these reasons.

[36] Neither party suggested a question of general importance for certification, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the Decision of the RAD is set aside, the matter is remanded to the RAD for redetermination in accordance with these reasons, no question of general importance is certified, and there is no order as to costs.

“Henry S. Brown”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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