Federal Court  Cour fédérale

**Date: 20180412**

**Docket: IMM-4391-17**

**Citation: 2018 FC 401**

**Ottawa, Ontario, April 12, 2018**

**PRESENT: The Honourable Mr. Justice Boswell**

**BETWEEN:**

**TENGIS BATAA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The Applicant is a 29 year old citizen of Mongolia who arrived in Canada from the United States on December 6, 2016. Shortly after his arrival, he claimed refugee protection, alleging persecution in Mongolia because he is homosexual. The Refugee Protection Division [RPD] of the Immigration and Refugee Board rejected the Applicant's claim in a decision dated September 19, 2017, with credibility being the determinative issue. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[*IRPA*] for judicial review of the RPD's decision. He asks the Court to set aside the RPD's decision and return the matter for redetermination by another member of the RPD.

[2] The RPD's assessment of the Applicant's credibility is to be reviewed on a standard of reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at para 4, 42 ACWS (3d) 886 (CA)). Accordingly, this Court should not intervene so long as the RPD's decision is transparent, justifiable, intelligible, and within the range of possible, acceptable outcomes based on the law and the facts (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339 [*Khosa*]). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708 [*Newfoundland Nurses*]).

[3] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Khosa* at para 43), although the Federal Court of Appeal has recently observed that the standard of review for issues of procedural fairness is currently unsettled in that Court (see *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at paras 11-14, 281 ACWS (3d) 472; also see *Canadian Copyright Licensing Agency (Access Copyright) v Canada*, 2018 FCA 58 at paras 151 and 175). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (see *Suresh v Canada (Minister*

*of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). The analytical framework is not so much one of correctness or reasonableness but, rather, one of fairness. In other words, a procedural choice which is unfair will be neither reasonable nor correct, while a fair procedural choice will always be both reasonable and correct. In practice, the court's inquiry may resemble review for correctness insofar as a court will never defer to a tribunal's action which it deems to be unfair. However, a reviewing court will pay respectful attention to a tribunal's procedural choices and will not intervene except where they fall outside the bounds of natural justice.

[4] The Applicant impugns the RPD's decision on several grounds; specifically, that the RPD breached procedural fairness by determining the matter without advising either the Applicant or the Minister that country condition evidence was at issue, that the RPD made unreasonable findings of fact, and that the RPD applied an incorrect test under section 96 of the *IRPA*.

[5] According to the Applicant, the RPD breached procedural fairness by stating at the outset of the hearing that "[t]he issue I have identified in this proceeding will be about your credibility." The RPD then made a finding regarding country condition evidence in reaching its conclusions without advising either the Applicant or the Minister that this was at issue. The Applicant claims he did not know that persecution and state protection would be at issue and, consequently, he did not know the case he had to meet and was not afforded an opportunity to respond to these issues.

[6] In my view, the record shows that the Applicant did make submissions about country condition evidence, not only during the course of the hearing but also in his submissions. He was not deprived of an opportunity to respond to the country condition evidence before the RPD. The RPD's decision was clearly based on credibility which, as noted above, was the central issue identified at the outset of the hearing. Although the RPD briefly discussed the issue of country condition evidence in two paragraphs near the end of its reasons, it did so only in the context of finding that the Applicant had led no credible evidence to show that he had faced persecution in Mongolia or that he met the profile of a person who would face persecution because of his homosexuality. I agree with the Respondent that the RPD's focus on credibility did not mean country condition evidence would not be considered in assessing whether the Applicant had the profile of a person who would face persecution due to sexual orientation.

[7] The decision in *Kaldeen v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1033, 64 ACWS (3d) 1190 [*Kaldeen*], does not support the Applicant's argument that the RPD breached its duty of procedural fairness. In *Kaldeen*, the applicant was denied procedural fairness because the panel had explicitly limited submissions to the issue of an internal flight alternative, yet then did not address that issue in its decision which dismissed the claim on the availability of state protection. In this case, the RPD did not restrict submissions to a specific issue (namely, credibility) and its decision clearly addressed and, ultimately, rested upon the central issue identified at the outset of the hearing.

[8] The Applicant challenges the RPD's findings that the conditions and difficulties faced by homosexual individuals in Mongolia do not rise to the level of persecution, and that there was no

marriage between him and Oyunaa in the face of independent and reliable third-party evidence which included a divorce petition and a state-issued marriage dissolution certificate. In my view, however, the RPD reasonably found that the Applicant had not satisfied the onus upon him of establishing how he fit the profile of a person affected and persecuted by reason of his sexual orientation since his narrative in that respect was simply not credible. I agree with the Respondent that the RPD assigned the Applicant's evidence little weight due to the numerous inconsistencies which led the RPD to find that the Applicant was not credible.

[9] It is well-established that administrative decision-makers, including the RPD, do not have to reference every piece of evidence in their decisions. In *Newfoundland Nurses*, Justice Abella remarked that a "decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). Similarly, in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 16, 157 FTR 35, Justice Evans stated that administrative agencies are not required "to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it." In this case, the RPD reasonably assessed the documentation provided by the Applicant as to his alleged marriage. It is clear that the RPD did not ignore this evidence as it referred to the inconsistences in the information used to obtain the certificate of marriage dissolution as compared to other evidence adduced by the Applicant in this regard.

[10] According to the Applicant, the RPD assessed his risk of persecution on a standard unknown to refugee law by finding that, while life in Mongolia may often be discriminatory and difficult for persons of the LGBT community, "the panel cannot conclude that such

discrimination and difficulty rises to persecution *en masse* against all persons of the LGBT community." In the Applicant's view, the RPD required him to show that the experiences of similarly situated individuals were universal and universally persecutory, while the correct threshold is whether there is a reasonable chance or more than a mere possibility of persecution. The Respondent says the RPD did not apply a new standard of proof to establish persecution under section 96 of the *IRPA*, requiring the Applicant to show that persecutory treatment was universal, and that the RPD reasonably assessed whether there was a link between the Applicant's profile and discrimination amounting to persecution in Mongolia.

[11] In my view, the RPD reasonably determined that the Applicant had not credibly shown that he had experienced any persecution by reason of his homosexuality. The RPD's reasoning does not, as the Applicant contends, show that it accepted his homosexuality and then assessed whether that fact alone could ground status as a Convention refugee. On the contrary, the RPD did not explicitly state that it did or did not accept that the Applicant was homosexual, stating that:

> [55] …The panel disagrees with the claimant's submission that the only issue is whether the claimant is homosexual. While the panel has considered the claimant's evidence of his involvement with the LGBTQ community here in Canada, the panel does not consider that sufficient to establish this claim. Upon the panel's review of the national documentation evidence for Mongolia, it is not sufficient for a person to demonstrate they are homosexual. This claimant has the onus of demonstrating how he fits the profile of a person affected and persecuted by his sexual orientation. He has not done so. His narrative in that respect was simply not credible…

[12] In order to establish fear of persecution for purposes of section 96 of the *IRPA*, a refugee claimant must establish that he or she subjectively fears persecution and that this fear is well-

founded in an objective sense (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 723, 103 DLR (4th) 1). In cases where a claimant is found to be credible, the subjective branch of the test will be met; but in cases where, as in this case, a claimant is found to be not credible, the claim will fail because of the absence of a subjective fear of persecution. The Applicant's credibility was the determinative issue for the RPD in this case, and it was open to, and reasonable for, the RPD to find the Applicant was neither a Convention refugee pursuant to section 96 of the *IRPA*, nor a person in need of protection pursuant to section 97.

[13] In conclusion, I find that the RPD reasonably considered the evidence before it and in its reasons provided an intelligible and transparent explanation for its decision to dismiss the Applicant's claim for Canada's protection. Ultimately, the RPD found that, because the Applicant's claim was not credible, he did not face a serious possibility of persecution if he returns to Mongolia, and that he was not a person in need of protection. This outcome is defensible in respect of the facts and the law.

[14] Neither party proposed a question of general importance for certification; so, no such question is certified.

**JUDGMENT in IMM-4391-17**

**THIS COURT'S JUDGMENT is that:** the application for judicial review is dismissed; and no question of general importance is certified.

"Keith M. Boswell"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4391-17 |
| **STYLE OF CAUSE:** | TENGIS BATAA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MARCH 22, 2018 |
| **JUDGMENT AND REASONS:** | BOSWELL J. |
| **DATED:** | APRIL 12, 2018 |

**APPEARANCES:**

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| Simon Wallace | FOR THE APPLICANT |
| Sharon Stewart Guthrie | FOR THE RESPONDENT |

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