

Federal Court



Cour fédérale

Date: 20180420

Docket: IMM-4190-17

Citation: 2018 FC 431

Ottawa, Ontario, April 20, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ALLAN MATWETWE MOMANYI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board [RAD] dated September 13, 2017 [RAD Decision], wherein the RAD confirmed the decision of the Refugee Protection Division [RPD] dated February 7, 2017 [RPD Decision], that the Applicant is not a Convention refugee or a person in need of protection.

[2] As explained in greater detail below, this application is dismissed because the Applicant's arguments do not demonstrate any reviewable error in the RAD's analysis which would undermine the reasonableness of the RAD Decision.

II. Background

[3] The Applicant, Allan Matwetwe Momanyi, is a citizen of Kenya who alleges that he is bisexual and has suffered several instances of abuse and persecution in Kenya because of his sexual orientation. His allegations are set out in a personal narrative he attached to his Basis of Claim form, which I would summarize as follows.

[4] Mr. Momanyi began to feel attracted to other boys growing up and had same-sex relationships during high school. These relationships were discovered and reported to the school administration. He was disciplined, physically abused, threatened with expulsion, publicly embarrassed, and suspended on a number of occasions. His parents found out about his sexuality through the school.

[5] Mr. Momanyi began another same-sex relationship after high school, with a man named Brian. Brian's parents disapproved of same-sex relationships. They threatened Mr. Momanyi, and he was subsequently attacked in the street by a group of men and raped. Mr. Momanyi believes that Brian's parents planned the attack. He was taken to hospital by some passersby who found him unconsciousness in the street. The hospital staff called the police, but instead of helping him they threatened to arrest him for being homosexual. Following his release from hospital, Mr. Momanyi's family accused him of being cursed and bringing shame on them. They

tried to arrange that he marry a woman and threatened to involve their tribe's militia group, the Sungusungu, if he did not obey them.

[6] Mr. Momanyi left home and went to medical school. He continued to see Brian secretly but pretended to be in a relationship with a female friend named Tracy. Brian moved in with Mr. Momanyi but, when other students found out they were living together, they were subjected to verbal and physical abuse. Following an attack outside their apartment, the couple made a police report, to no effect.

[7] Mr. Momanyi ended his relationship with Brian and went to stay with his grandmother in Kisii, but the Sungusungu were looking for him and his grandmother was afraid. He then moved to Mombasa, where he stayed with his cousin Nancy. She forced him to leave when she learned about his sexuality. He went next to Nakuru, where he stayed with a friend who was accepting of his sexuality.

[8] Brian appeared to have gone into hiding, and the police were looking for Mr. Momanyi. Mr. Momanyi's parents contacted him, asking him to come home. They wanted to help him escape Kenya. He returned home where he says he completed a visa application to study in Canada and was attacked once more.

[9] Mr. Momanyi's visa application was granted and he came to Canada on August 23, 2016. He claimed refugee status a month later on the basis that he fears detention, abuse, torture, or murder in Kenya because of his sexual orientation. His claim included corroborating affidavits

and letters, from Tracy, Nancy, a former neighbour, one of the boys with whom he had a relationship in high school, and his parents, all of whom describe him as bisexual. Mr. Momanyi also included a letter from the hospital where he was treated after the attack in the street, a number of letters from his high school about his suspensions for homosexual activity, and letters from community organizations with which he has been involved in Canada. With the exception of the letters from the Canadian community organizations [the Canadian Documents], all of these documents were obtained for Mr. Momanyi by his parents, who sent them to him in Canada for his refugee status application [the Kenyan Documents].

III. The RDP Decision

[10] The RPD rejected Mr. Momanyi's claim, finding that he did not provide sufficient credible and trustworthy evidence in support of his allegations of persecution or his sexual orientation as a bisexual man. The RPD found that his story lacked credibility because his testimony "was not easily forthcoming and key areas were hesitant and evasive, as well as inconsistent." It also took issue with inconsistencies in the timeline he presented and the lack of evidence that he was wanted by the police and the Sungusungu as alleged. On the subject of his alleged sexual orientation, the RPD noted that Mr. Momanyi was inconsistent during his interview (saying both that he was homosexual and that he was bisexual) and had no corroborative evidence about his alleged relationships with Brian or any of his previous same-sex partners. The RPD also had doubts about the provenance of the Kenyan Documents and held that the Canadian Documents were not persuasive.

[11] The RPD held that, because of its cumulative credibility concerns, it was not convinced that there was a serious possibility that Mr. Momanyi would be persecuted in Kenya or that, on a balance of probabilities, he would be subjected personally to danger of torture, or face a risk to his life, or a risk of cruel and unusual treatment or punishment in Kenya.

[12] Mr. Momanyi appealed the RPD Decision to the RAD.

IV. The RAD Decision

[13] Mr. Momanyi submitted new evidence on appeal, including a medical report from a psychiatrist, Dr. Friere, diagnosing him with Post Traumatic Stress Disorder, and a letter from a registered nurse, Ms. Hickey, saying that he had received an abnormally low score on a cognitive assessment memory test and that the problems with his testimony before the RPD may have been related to a possible concussion or learning disability. The RAD admitted this evidence under section 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. Mr. Momanyi argued that this new evidence helped to explain why he appeared to be vague or inconsistent during his testimony.

A. *General manner of testifying*

[14] The RAD conducted its own review of the record and listened to the tape of the hearing. It did not find Mr. Momanyi's manner of testifying to necessarily be indicative of a lack of credibility. However, it also didn't find it to be reflective of the diagnoses tendered in the nurse's or psychiatrist's reports. The RAD found that the nurse's conclusions were speculative and her

opinion was given in equivocal language. It also noted that she had no stated specialization or expertise in cognition or memory.

B. Timeline

[15] The RAD reached the same conclusion as the RPD, that the timeline of events was inconsistent and that Mr. Momanyi offered no reasonable explanation for this. It did not find the new evidence tendered by Mr. Momanyi to excuse these inconsistencies.

C. Police and the Sungusungu

[16] The RAD found that Mr. Momanyi had embellished his story about being sought by the police and that his parents' affidavit was inconsistent with his evidence as to why the police were looking for him, as it indicated that he was being sought by the police in connection with Brian's disappearance rather than because of his sexuality. Regarding the Sungusungu, the RAD found that there was no objective evidence that the group's activities extend to harassing the LGBT community. It concluded that there was insufficient trustworthy and credible evidence to support Mr. Momanyi's allegations that he is wanted by the police and the Sungusungu, that this is because of his alleged sexuality, and that both are actively searching for him.

D. Supporting evidence

[17] The RAD also gave little weight to the Kenyan Documents because they had been obtained by Mr Momanyi's parents and there were concerns that they had forged his signature on his visa application and related affidavit. In relation to the Canadian Evidence, the RAD

considered membership in LGBT support organizations to be insufficient evidence of Mr Momanyi's sexual orientation.

[18] As a result, the RAD confirmed the RPD Decision, holding that Mr. Momanyi is not a Convention refugee or a person in need of protection.

V. Issues and Standard of Review

[19] The Applicant presents five arguments in support of his position that the RAD Decision is unreasonable, which raise the following five issues for the Court's consideration:

1. Whether the RAD's rejection of the Applicant's claim was unreasonable because it had accepted his profile as a bisexual man;
2. Whether the RAD erred in its assessment of the medical reports;
3. Whether the RAD erred in its finding regarding the affidavit from the Applicant's parents;
4. Whether the RAD erred in requiring that the country condition documentation corroborate that the Sungusungu target people in the LGBT community; and
5. Whether the RAD erred in its treatment of the Kenyan Documents.

[20] Consistent with the Applicant's articulation of his arguments, and the Respondent's submissions, the standard of review applicable to these issues is reasonableness.

VI. Analysis

A. *Whether the RAD's rejection of the Applicant's claim was unreasonable because it had accepted his profile as a bisexual man*

[21] Mr. Momanyi submits that, even if the RAD had concerns about his credibility in relation to the persecution that he alleges he experienced in Kenya, it was obliged to consider whether he was entitled to refugee protection based on his profile as a bisexual man in a country where the LGBT community is subject to persecution. In support of his position, he refers the Court to the decision in *Burgos-Rojas v Canada (Minister of Citizenship and Immigration)*, 162 FTR 157 at para 14, in which Justice Rouleau accepted the applicant's argument that the Immigration and Refugee Board erred by failing to consider his assertion that, as a homosexual man, he had a well-founded fear of persecution in Chile:

[14] The applicant argues that the issue of credibility was not determinative of the question of whether the applicant was a Convention refugee. The Board did not state that it did not believe that the applicant was a gay man. As well, it cannot ignore the evidence demonstrating the abuse to which gay people are subjected in Chile. Therefore, even if the Board found that the applicant was not credible and rejected his account of what happened to him in Chile, it still had to consider the question of whether the applicant had a well-founded fear of persecution in Chile as a result of his sexual orientation.

[22] This argument is premised on Mr. Momanyi's interpretation of the RAD Decision as having accepted his profile as a bisexual man, notwithstanding the RAD's adverse credibility

findings. He notes that the RPD expressly stated its concerns with the credibility of his alleged sexual orientation and submits that the RAD Decision does not contain a similar finding. The RAD also stated its disagreement with the RPD's finding that Mr. Momanyi's testimony was not easily forthcoming and that key areas were hesitant, evasive, and inconsistent.

[23] I do not read the RAD Decision as demonstrating that the RAD found Mr. Momanyi to be a credible witness, in relation to his assertion of his alleged sexual orientation or otherwise. The RAD does begin its credibility analysis by explaining that, unlike the RPD, it did not find his manner of responding to questions at the hearing to necessarily be indicative of a lack of credibility. However, the RAD makes other adverse credibility findings against Mr. Momanyi and, at the conclusion of its decision, finds that the RPD's findings regarding Mr. Momanyi's credibility are correct and sustainable.

[24] I agree with Mr. Momanyi's position that this conclusion cannot be read as adopting credibility findings of the RPD that were not the subject of analysis in the RAD Decision. However, it is also not possible to conclude that the RAD accepted Mr. Momanyi's assertion of his sexual orientation. When considering the evidence that he submitted to corroborate his sexual orientation, the RAD found that membership in and attendance at LGBT support organizations in Canada were insufficient evidence of Mr. Momanyi's sexual orientation, especially given the concerns with his other evidence. It is clear from this conclusion that the RAD considered Mr. Momanyi's sexual orientation to be at issue and, reading the RAD Decision as a whole, it did not accept that he had established this profile. I therefore find that the RAD had no obligation to consider the risk that such profile would represent in Kenya.

B. Whether the RAD erred in its assessment of the medical reports

[25] Mr. Momanyi argues that the RAD erred by failing to consider the memory test results referenced in the report of the registered nurse, Ms. Hickey, as a possible explanation for inconsistencies in his evidence. He notes that Ms. Hickey refers to a Montréal Cognitive Assessment memory test having been conducted, which was abnormal at 23/30 (a normal score being 26 and up). While Mr. Momanyi recognizes the RAD's analysis that Ms. Hickey did not appear to have any qualifications or expertise in cognitive impairments or learning disabilities, he submits that such lack of qualification would relate only to her ability to opine on the cause of the memory deficit, and that the RAD was nevertheless required to take into account the fact of such deficit.

[26] I find no error in the RAD's treatment of the medical reports. It considered the report by Ms. Hickey and expressly noted her indication that Mr. Momanyi had scored three points below normal on a memory test. However, the RAD also noted Ms. Hickey's lack of qualifications in cognitive impairments or learning disabilities, and I cannot conclude that it was unreasonable for the RAD to decline to afford weight to her report, including the results of the memory test, on this basis. I also note the RAD's reference to the report of the psychiatrist, Dr. Freire, as indicating that, although memory and concentration were not formally tested, Mr. Momanyi did well during the interview. It was not unreasonable for the RAD to find the medical assessments inconclusive as an explanation for the problems with Mr. Momanyi's testimony.

C. Whether the RAD erred in its finding regarding the affidavit from the Applicant's parents

[27] The RAD found Mr. Momanyi's credibility to be undermined by an inconsistency between his allegation that the police were interested in him based on his sexual orientation and the statement in his parents' affidavit that the police were looking for him because of Brian's disappearance. He argues that the RAD erred by failing to consider the rest of his parents' affidavit, where they refer to him as bisexual and state that "he has been through a lot from rape ordeal to travelling around in search of safety including authorities threatening to arrest him and even conducting a search to arrest him."

[28] I find no error in the RAD's treatment of this evidence. While Mr. Momanyi's parents attest to his bisexuality, there is no express reference in their affidavit to the police being interested in him for that reason. There is no basis for a conclusion that the RAD failed to consider the entirety of the affidavit, and I find nothing unreasonable in the RAD's credibility analysis based on the inconsistency between Mr. Momanyi's allegation and his parents' express reference to Brian's disappearance being the reason the police were looking for him.

D. Whether the RAD erred in requiring that the country condition documentation corroborate that the Sungusungu target people in the LGBT community

[29] The RAD considered Mr. Momanyi's evidence that he was attacked by members of the Sungusungu, noting that the documentary evidence described the Sungusungu both as a

community vigilante group and as an organized criminal group. However, finding no corroborative documentary evidence that the Sungusungu's vigilante activities extended to actions against the LGBT community, the RAD concluded that there was insufficient trustworthy and credible evidence to support Mr. Momanyi's allegation regarding the Sungusungu.

[30] Mr. Momanyi submits that, while persecution of the LGBT community may not be a central mission of the Sungusungu, the documentary evidence refers to them being a militia for hire, prepared to become involved in family conflicts, and targeting weak members of society. He argues that this includes members of the LGBT community and that the country condition evidence is therefore consistent with his allegation, as set out in paragraph 11 of his Basis of Claim narrative, that his family threatened to involve the Sungusungu because of his sexual orientation.

[31] The RAD did not expressly refer to the portions of the documentary evidence upon which Mr. Momanyi's argument relies. However, the RAD is presumed to have considered all the documentary evidence unless the content of the evidence is a sufficiently inconsistent with its conclusions to rebut that presumption: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17, and *Boulous v Public Service Alliance of Canada*, 2012 FCA 193 at para 11, citing *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA). I do not consider the evidence to which Mr. Momanyi refers to fall into this category. In paragraph 11 of his Basis of Claim narrative, he describes the Sungusungu as being known for attacking and killing anyone who goes against the tribe's norms, morals, or values, and he states that he was afraid of them because being bisexual was perceived to be

against these norms and values. It was not unreasonable for the RAD to search for documentary evidence to corroborate this fear, that the Sungusungu would target Mr. Momanyi because of his alleged sexual orientation, and to conclude as it did in the absence of such evidence.

E. *Whether the RAD erred in its treatment of the Kenyan Documents*

[32] The RAD assigned little weight to the Kenyan Documents because they were all obtained by Mr. Momanyi's parents. In doing so, the RAD referred to Justice Annis' caution in *El Bouni v Canada (Citizenship and Immigration)*, 2015 FC 700 at para 25, that confirmatory evidence of family and friends, which is not subject to cross-examination, is not highly probative or credible. Mr. Momanyi submits that the preponderance of the authority from this Court supports a different proposition, as summarized recently by Justice Ahmed in *Nagarasa v Canada (Citizenship and Immigration)*, 2018 FC 313 [*Nagarasa*] at para 24:

[24] As stated above, the Officer also dismissed the letter authored by the Applicant's mother, dispensing with it in two sentences:

While the applicant provided letter (sic) from his mother to support his statement, as previously stated, I find that the evidence is subjective as she has a vested interest in the outcome of the application. As the evidence comes from a source close to the applicant, I find that it has a low probative value and I have, therefore, assigned little weight to it.

[Emphasis added]

[PRRA Decision, p. 9]

This approach is simply wrong. This Court has repeatedly held that any letter written in support of an applicant could be characterized as self-serving, and evidence is not to be attributed little weight on this basis alone: *Mata Diaz v. Canada (Citizenship and*

Immigration), 2010 FC 319 at para. 37; *Singh v Canada (Citizenship and Immigration)*, 2015 FC 1210 at para 12; *Varon v Canada (Citizenship and Immigration)*, 2015 FC 356 at para. 37.

[33] I agree with Justice Ahmed’s statement of the applicable law. However, in the present case, the RAD did not treat the Kenyan Documents as it did because they originated from people who were family members or friends. Rather, the RAD questioned the reliability of this evidence because of its concerns that Mr. Momanyi’s parents had forged his signature on his visa application and an accompanying affidavit, which raised doubts about the reliability of all the evidence provided by them. As such, the RAD’s analysis does not run afoul of the principle referenced in *Nagarasa*.

[34] Mr. Momanyi also argues that it was an error for the RAD to have discounted the probative value of his corroborative evidence based on its provenance, i.e. having been obtained by his parents, without otherwise engaging in an analysis of the evidence itself. He refers the Court to the principle expressed in authorities such as *Tshibola Kabongo v Canada (Citizenship and Immigration)*, 2012 FC 313, and *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 [*Chen*]. In *Chen*, at paragraphs 19 to 21, Justice Rennie explained that the following sort of reasoning can give rise to a reviewable error:

[19] Third, the Board failed to fairly consider the prison visiting card, stating that “...on the basis of having found that the raid of the claimant’s house did not occur, the panel finds that the Prison ‘Visiting Card’ in relation to the claimant’s introducer is not a genuine document.”

[20] It is impermissible to reach a conclusion on the claim based on certain evidence and dismiss the remaining evidence as inconsistent with that conclusion. Before concluding that the raid did not occur the Board must consider whether the prison visiting

card substantiated it. The reasoning has been inverted. This error in methodology or in assessing the evidence was best described by the British Columbia Court of Appeal in *Faryna v Chorny*, [1952] 2 DLR 354:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. [...] Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

[21] The Board identified no basis for concluding that the visiting card was fraudulent, other than its inconsistency with the conclusion already reached on credibility.

[35] In my view, the RAD did not engage in the sort of reasoning that is impugned in *Chen*.

The RAD would have been in error if it had rejected the corroborative evidence on the basis that it had found Mr. Momanyi not to be credible, concluded that past events he recounted did not actually occur, and therefore was not prepared to consider evidence that was inconsistent with that conclusion. However, this was not the RAD's analytical process. Rather, it rejected the corroborative evidence based upon concerns about the trustworthiness of the parents as the source of the evidence. I find no reviewable error in this analysis.

[36] Finally, Mr. Momanyi refers the Court to the document entitled *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression*, issued by the Immigration and Refugee Board on May 1, 2017 [the Guidelines] and submits that the RAD failed to assess the evidence through a lens appropriate for the specific nature of sexual orientation claims. He relies in particular upon section 7.2 of the Guidelines, which notes that corroborating evidence may not be available in all claims related to sexual orientation.

[37] I have considered this submission but find no error by the RAD. The RAD rejected corroborating evidence because of concerns about the trustworthiness of its source and rejected the claim because of the overall lack of trustworthy and credible evidence, including concerns about Mr. Momanyi's own credibility. The RAD Decision does not offend the principles in the Guidelines upon which Mr. Momanyi relies.

VII. Conclusion

[38] As the Applicant's arguments do not support a conclusion that the RAD Decision is unreasonable, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-4190-17

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4190-17

STYLE OF CAUSE: ALLAN MATWETWE MOMANYI V THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

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