Federal Court  Cour fédérale

Date: 20191217

Docket: IMM-2749-19

Citation: 2019 FC 1608

Ottawa, Ontario, December 17, 2019

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

GEORGE YANKSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] George Yankson is a citizen of Ghana who claimed refugee protection in Canada on the basis of his sexual orientation as a gay man. The Refugee Protection Division (RPD) dismissed his claim because it did not believe that he is gay. The Refugee Appeal Division (RAD) dismissed his appeal. He now seeks judicial review of the RAD decision.

[2] The Applicant states that he has always been attracted to men, but did not act on his feelings because homosexuality is forbidden and illegal in Ghana. He states that he had his first sexual experience in November 2013, when he was 18 years old. His partner was killed in a car

accident shortly after their relationship started. He began a relationship with another partner a short time later, and that relationship continued for some time. In March 2014, the Applicant and his partner were discovered at school, and the Applicant was forced to flee to escape. His mother was informed of what had happened, and he was forced to leave the school.

[3] The Applicant says he endured harassment and mistreatment by people in his community because of his sexual orientation. He eventually left to visit his grandmother in another city, but during his stay there, she discovered him with this partner, and ordered him to leave. He returned to live with his mother. The Applicant says that his mother's bakery business lost customers and eventually closed because people were hostile towards her because of his sexual orientation.

[4] The Applicant says he was attacked by a neighbour who burned his arm with a hot iron. He then decided that he had to flee Ghana. With the assistance of an agent, he obtained a student visa in March 2016 and arrived in Canada in early May 2016. He claimed refugee protection upon his arrival.

[5] The RPD dismissed the Applicant's claim, finding that his testimony lacked credibility and that the supporting evidence he filed should be given very little weight. The RPD noted that there were significant discrepancies in the Applicant's testimony about how long his first relationship had lasted, and that his evidence contradicted the information in his Basis of Claim Form. It also found that his inability to state the full name, date of birth or address of his second partner when he was questioned during his second port of entry interviewalso undermined his credibility.

[6] The supporting evidence provided by the Applicant included letters from his mother and cousin in Ghana, together with a letter from a friend in Canada as well as information that he attended community group meetings involving the lesbian, gay, bisexual and transgender community in Canada. This evidence was discounted by the RPD, because it was not contained in sworn documents, the authors were not available to testify, and the information about his participation in the LGBT community in Canada did not establish his sexual orientation.

[7] The RPD therefore concluded that the Applicant had not established that he is gay, and it dismissed his refugee claim. The Applicant appealed this to the RAD.

[8] The RAD dismissed the appeal, finding that the RPD had not erred in concluding that the Applicant was never in a same sex relationship in Ghana. It found that the Applicant's inability to give his second partner's last name or date of birth to the officer at the port of entry did impugn his credibility, as did the contradictions about when that relationship had ended. The RAD referred to the *Chairperson's Guideline 9: Sexual Orientation and Gender Identity and Expression* (the *SOGIE Guideline*) and noted that discomfort with authority figures and fear of being turned away could conceivably affect a claimant's reluctance to disclose his or her sexual orientation.

[9] On the facts of this case, however, the RAD concluded that the Applicant had explained in some detail his fear of being sent back to Ghana because he owed money to people and he did not have the funds to repay them. It was only at the end of his second interview that the Applicant made any reference to his sexual orientation. In addition, when the process of making

a refugee claim was explained to him, the Applicant expressed concern that he would not be able to go back to Ghana to visit his family.

[10] Based on this, the RAD found, at paragraph 14:

> While I acknowledge that his belated statement about his sexual orientation could be due to discomfort with the officers, the more simple explanation is more credible to me: the [Applicant] was telling the truth when he was first asked about his fear. This explanation is also consistent with his desire to return to Ghana to visit his family after he had earned some money to repay his lenders, which money would not protect him if his real fear was of anti-gay violence.

[11] The RAD also found that the Applicant's evidence regarding his first same sex relationship was vague and contradictory, and combined with the other difficulties with his evidence, this undermined his credibility. The RAD rejected the argument that the RPD had breached procedural fairness by giving little weight to the supporting documentation the Applicant had filed, without giving him notice or an opportunity to respond. The RAD found that the RPD engaged in the ordinary process of weighing evidence, and that it was simply giving effect to the well-known legal principle that sworn documentation and live testimony by witnesses will be given more weight than unsworn letters. The RAD's review of this evidence confirmed that it should be given little weight in establishing the Applicant's sexual orientation.

[12] Based on its review of the evidence, the RAD concluded that the Applicant had not established that he is gay or perceived to be gay, and therefore it rejected his claim.

[13] The Applicant seeks judicial review of this decision, arguing that the RAD erred by: (i) failing to properly follow the SOGIE *Guidelines*; (ii) denying the Applicant procedural fairness

by requiring sworn affidavits and live witnesses; and (iii) misapprehending the evidence on crucial points.

[14] The standard of review for the first and third issues is reasonableness: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35. The issue of procedural fairness is assessed in a manner which resembles the correctness standard, but in the end a reviewing court must determine whether the process was fair and reasonable in the circumstances: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54.

[15] The key question in a judicial review on the standard of reasonableness is summarized in *Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38, [2016] 2 SCR 80:

> [18] Reasonableness review is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome. The reasoning must exhibit "justification, transparency and intelligibility within the decision-making process": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47. The substantive outcome and the reasons, considered together, must serve the purpose of showing whether the result falls within a range of possible outcomes: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14. While the adequacy of a tribunal's reasons is not on its own a discrete basis for judicial review, the reasons should "adequately explain the bases of [the] decision": *Newfoundland Nurses*, at para. 18, quoting *from Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, at para. 163 (per Evans J.A., dissenting), rev'd 2011 SCC 57, [2011] 3 S.C.R. 572.

[16] To put it another way, in a judicial review on the deferential standard of reasonableness, a key concern is whether the process and decision indicate that the decision-maker truly "engaged"

with the evidence, applying the appropriate legal test. The standard is not perfection. It must be recalled that Parliament assigned the task of conducting the initial inquiry into the facts to the administrative decision-maker. Deference is due to a decision-maker, especially in a context where the inquiry is primarily factual, the subject-matter is within the decision-maker's area of expertise, and where greater exposure to the nuances of evidence or a greater awareness of the policy context may provide an advantage.

[17] If the chain of reasoning of the decision-maker can be understood, and if it shows that this type of engagement occurred, the decision will generally be found to be reasonable: see *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431. It is not a reviewable error for the decision-maker to omit reference to every piece of evidence that was considered, or to fail to mention a particular step in the sequence of analysis.

[18] On the other hand, a reviewing court is not to ignore the reasons actually given. A decision cannot be upheld because of what it might or ought to have said, if doing so involves ignoring or discounting the reasoning that was actually expressed in the decision. As Chief Justice McLaughlin (as she then was) said in *Delta Air Lines Inc. v Lukács*, 2018 SCC 2, [2018] 1 SCR 6 at para 24: "In other words, while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. Additional reasons must supplement and not supplant the analysis of the administrative body."

[19] In this case, I find the decision of the RAD to be unreasonable because of the accumulation of instances in which its reasons focus on microscopic, tangentially relevant or

inaccurate statements of the evidence. While I find that there may have been reasonable bases to discount the Applicant's testimony and supporting documentation, the actual reasons expressed by the RAD do not rely on these as a basis for its credibility findings. The decision is unreasonable and must be sent back for reconsideration.

[20] The Applicant argues that the RAD failed to follow the letter and spirit of the *SOGIE Guidelines* in its consideration of all of the evidence. It mentions the *Guidelines* and appears to follow them in its assessment of the credibility of the Applicant's statements at the port of entry, but not in relation to any of the other evidence. This is not reasonable.

[21] The *Guidelines* are not binding, but they must be applied by decision-makers or an explanation must be given for not following them. That is stated explicitly in the introduction to the *Guidelines* as well as the jurisprudence: see the discussion in *McKenzie v Canada (Citizenship and Immigration)*, 2019 FC 555 at paras 44-46. In this case the RAD cites the *Guidelines* and then demonstrates how it is applying them in the context of its consideration of the ontradictions and difficulties with the Applicant's evidence at the port of entry.

[22] I agree with the Applicant that it is not evident whether or how the RAD considered the *Guidelines* in its assessment of any of the other evidence. On its own, however, this is not a sufficient basis to overturn the decision.

[23] The Applicant points to a number of instances in which the RAD engaged in a microscopic analysis of a particular detail as its basis to discount the credibility or probative value of the information.

[24] The RAD found that the Applicant gave contradictory evidence about the schools he attended, noting that in the student visa application and Basis of Claim form he submitted, the Applicant stated he attended one school while at the port of entry he gave the name of another school. At the RPD hearing, he reverted to the school in his student visa application, though he had admitted at the POE that the visa application was fraudulent.The RAD rejected the Applicant's explanation that he was tired and stressed when he gave the wrong information at the port of entry. It finds instead, at paragraph 15:

> Again, a simple explanation is more credible to me: the [Applicant] was telling the truth when he was first asked about his education at the POE. In my view, the evidence is consistent with a fabricated narrative about the [Applicant's] sexual orientation. Since the BOC narrative depended on the [Applicant] attending boarding school, he reverted to the school names in the fraudulent visa application, contradicting his spontaneous first declaration at the POE.

[25] The Applicant argues that this reasoning is flawed because his refugee narrative is not dependent in any way on his attendance at a boarding school. His first sexual encounter was at his partner's house, and while he and his second partner were discovered having sex near their school, it was not in a residence or any facility associated with a boarding school. It is not clear why the RAD found that the narrative "depended on" his attendance at a boarding school in the face of this evidence, and this is not a reasonable or rational basis to find his evidence to be lacking in credibility.

[26] The RAD gave little weight to a letter from the Applicant's friend in Canada, since it found that the letter "indicates that person's belief but it does not purport to be from a partner who would have a more reliable view of the [Applicant's] sexual orientation. Had he appeared as

a witness, the RPD would have been able to test the basis for the friend's belief" (at para 21). The Applicant submits that this finding is in direct contradiction to the *SOGIE Guidelines*, because the RAD does not demonstrate an understanding that it may be difficult or impossible for a person to obtain evidence from sexual partners, and it is, in effect, requiring oral testimony rather than weighing written evidence in support of a claim. There is no indication the RAD actually engaged with the content of the letter, but rather made its findings on matters of form.

[27] The Applicant also submits that the RAD erred in giving no weight to letters from the Applicant's cousin, or the letters from his uncle and the uncle's wife. The RAD rejected the cousin's letter at paragraph 22:

> I find that this letter is not credible and further impugns the credibility of the [Applicant] because it names and repeatedly refers to his two younger sisters, contradicting the [Applicant's] BOC, which names three younger sisters from his parents' marriage, all under the age of 15. I find that a true family member would know how many sisters the [Applicant] has, and that this letter was fabricated to support a false claim.

[28] The Applicant argues that this is a microscopic analysis of an irrelevant point. The number of sisters the Applicant has is irrelevant to his complaint. The basis of claim form that the RAD refers to indicates that his third sister has a different last name. It is not reasonable for the RAD to completely reject the letter on this basis, without any analysis of its actual contents, the context within which it was written or any other features that may affect its probative value. This is another example of the RAD seizing on an irrelevant point to discount the Applicant's credibility and to attribute fraudulent intent to him.

[29] In addition, the Applicant notes that the RAD gave no weight to the letters provided by the Applicant's uncle or the uncle's wife, because it found that the uncle had assisted the Applicant to complete the original Basis of Claim form, and had signed the form indicating that he had interpreted it for the Applicant. The Applicant contradicted this in his testimony, and so the RAD found at paragraph 23 that the uncle's letter should be given no weight since "the allegation that this person himself signed an untrue statement about the interpretation of the BOC and urged the [Applicant] to sign an untrue statement calls into question his credibility."

[30] The Applicant points to a number of incorrect or inaccurate statements in the original basis of claim form, and suggests that this makes it evident that although the uncle did his best to help the Applicant complete the form, it is obvious that he made a number of mistakes. It is unreasonable for the RAD to seize on one such error and to then conclude that it demonstrates fraudulent intent on the part of the uncle and the Applicant.

[31] The Applicant points out that the RAD failed to refer to the letter from the Applicant's mother, despite her personal knowledge of the key events that led him to flee Ghana and claim refugee status.

[32] Finally, the Applicant argues that the RAD breached procedural fairness when it failed to meaningfully address its submission that the RPD failed to consider the key evidence in the letters because they were not sworn and without advising the Applicant of its concerns.

[33] The Respondent contends that the RAD reasonably found that the RPD did not err in applying the general rules of evidence, preferring sworn evidence to unsworn letters, and oral testimony to written documentation.

[34] The Respondent submits that the decision and outcome must be viewed as an organic whole, and that the RAD's assessment of credibility is owed significant deference. In this case, there was ample support in the record for the RAD's finding that the Applicant was not credible, including the contradictions and basic omissions from his narrative at the point of entry. The Applicant gave contradictory evidence about the length of his first relationship, and failed to provide basic information about his second partner. In addition, the Applicant contradicted himself about when the most recent relationship ended. The RAD did not err in finding that these omissions and contradictions about the core of the claim affected the Applicant's credibility: *Ogaulu v Canada (Citizenship and Immigration)*, 2019 FC 547 at para 20.

[35] Furthermore, the Respondent argues that the discrepancies in the Applicant's evidence about which school he attended were material. He claimed that he attended the same school as his second partner, that they were caught in a sexual encounter at that school and that he was then expelled. This makes the evidence about which school he attended relevant, and the RAD did not err in finding that the contradictions undermined the Applicant's credibility.

[36] It was both reasonable and appropriate for the RAD to consider the credibility and reliability of the documentary evidence in light of its earlier findings about the Applicant's credibility, and the decision makes clear that the RAD carefully considered the evidence in its

totality. The details that the Applicant points to are in fact indications of the care with which the RAD examinedthat evidence. It is not the role of the Court to re-weigh the evidence.

[37] I agree with the Applicant that the RAD's decision is not reasonable, because several significant evidentiary findings were based on a microscopic analysis of particular, specific aspects of the evidence, and there is no indication that the RAD engaged in any analysis or weighing of the evidence on its merits. To recall the words of the Supreme Court, it is not the role of the Court to ignore or replace the words the RAD actually used to explain its findings.

[38] It is not necessary to review each instance in detail; a few examples will suffice to make the point. The RAD discounted the supportive letter from the cousin because he referred to the Applicant's two sisters and contradicted the evidence showing that the Applicant has three sisters. As the Applicant notes, the number of sisters the Applicant has is irrelevant to his refugee claim, and his third sister has a different last name, which may explain why the cousin did not mention here. It is not otherwise evident why this is a basis to discount the cousin's letter. The RAD mentions that the cousin's letter outlines his suspicions about the Applicant's sexual orientation and recounts what he was told by the Applicant's mother, but these are not referred to as the basis for the RAD's conclusion. Instead, the RAD explains its credibility finding only with reference to the number of sisters. This is not an indication that the RAD actually engaged with the substance of the evidence before assessing its credibility or probative weight.

[39] The RAD analyzed the letter from the uncle in a similar manner. The RAD seizes on a prior basis of claim form that the Applicant completed with the assistance of the uncle, notes that he contradicted the statement on that form that it had been translated to him, and then concludes

that this called into question the uncle's credibility to such an extent that the letter was given no weight. Again, this is not an analysis of the substance of the letter, or the context within which it was written, and it involves a microscopic analysis of one aspect of the evidence, without any explanation for how the other evident mistakes in the original basis of claim form were analyzed.

[40] I agree with the Respondent's argument that there are significant omissions and contradictions in the Applicant's evidence, which could raise legitimate questions about his credibility. However, this does not remove the RAD's obligation to consider the rest of the evidence on its merits, and to demonstrate that it analyzed and considered the evidence in a reasonable manner. The RAD's decision falls short on several key fronts in this regard, as demonstrated above.

[41] In conclusion, it is important to step back and to recall the proper approach to reasonableness review, as summarized earlier. Judicial review of a RAD decision should not be a line-by-line treasure hunt for error, but rather the court is required to examine the reasons and outcome to determine whether they demonstrate that the result falls within the range of reasonable outcomes. This is a deferential process. Parliament has assigned the task of reviewing and assessing the evidence to the RPD and then the RAD. It is not the role of this Court to usurp that role. The standard is not perfection, but rather reasonableness.

[42] In this case, there was much in the evidentiary record that could have supported the RAD's conclusion on the merits of the claim. However, for the reasons explained above, I find that at several key points in its analysis the RAD's explanation for its reasoning simply cannot be ignored.

[43] It is not clear whether the RAD applied the *SOGIE Guidelines* to its consideration of all of the evidence. It is not clear whether it analyzed the substance of much of the evidence, since its explanation for questioning the credibility of the Applicant, his cousin and his uncle are explained with reference to microscopic analysis of tangential details rather than the substance or overall context for the evidence. The letter from the Applicant's mother, which provides more direct evidence, is not mentioned.

[44] I find that while I can follow the chain of reasoning of the RAD, at several key points it appears that it has based key determinations on largely irrelevant or minor points of detail, without any analysis of the substance of the evidence or the context within which it was given.

[45] The reasoning does not demonstrate "justification, transparency and intelligibility" within the decision-making process, as required by *Dunsmuir* (and see the discussion in *Jakutavicius v Canada (Attorney General)*, 2011 FC 311 at para 31).

[46] For the reasons set out above, I find the decision is unreasonable. In light of my conclusion on this issue, it is not necessary to address the procedural fairness argument in any detail.

[47] I am therefore granting the application for judicial review. The RAD decision is overturned and the matter is sent back for reconsideration by a different panel of the RAD.

[48] No question of general importance was proposed for certification, and none arises in this case.

JUDGMENT in IMM-2749-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision of the Refugee Appeal Division is overturned.

3. The matter is sent back for reconsideration by a different panel of the Refugee Appeal Division.

4. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Monique Ann Ashamalla	FOR THE APPLICANT
Margerita Braccio	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ashamalla LLP Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT