

Federal Court



Cour fédérale

Date: 20200522

Docket: IMM-1605-19

Citation: 2020 FC 638

Ottawa, Ontario, May 22, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

ADEBOWALE DAMILARE ADELUSI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision made on February 14, 2019 by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board in which it found that the Applicant was not a Convention refugee or a person in need of protection [Decision].

[2] For the reasons that follow, this application is granted.

II. **Background Facts**

[3] The Applicant, Adebowale Damilare Adelusi, is a citizen of Nigeria.

[4] The Applicant feared persecution based on his identity as a bisexual person. The Applicant alleged that when he disclosed his sexual orientation to his parents, his father threatened to disown him and forced him to undergo a “deliverance” ceremony at church. The Applicant also alleged that the police sought to arrest him after his partner, AJ, disclosed their relationship to them.

A. *Refugee Protection Division*

[5] On October 5, 2018, the Refugee Protection Division [RPD] found that the Applicant was neither a Convention refugee nor a person in need of protection. The determinative issue was credibility.

[6] The RPD found that there was insufficient credible evidence to find that the Applicant was bisexual. The RPD found that the Applicant failed to mention his university boyfriend of three years in his Basis of Claim [BOC] narrative, and he failed to provide corroborative evidence that his partner AJ existed. The RPD also found that the Applicant provided inconsistent evidence about where he lived in Nigeria.

[7] The RPD gave little weight to the Applicant’s corroborating evidence.

[8] An Affidavit from Jeffrey Agomate [Jeffrey] was given no weight as it was undated and attested to facts that were not explained properly. The affidavit also did not contain the address of the affiant. The RPD found that the Applicant provided inconsistent evidence about Jeffrey.

[9] The affidavit of Babatunde Oluwatomide Ayoola was found to be inconsistent with the information the Applicant gave in his Port of Entry Intake forms.

[10] The RPD determined that a letter from The 519 about the Applicant's membership with the organization did not overcome the credibility issues in his refugee claim. A psychological report was given no weight as it did not provide evidence of the Applicant's allegations of persecution, and because the Applicant provided inconsistent testimony about whether he had seen a therapist in Nigeria.

B. Decision Under Review

[11] The RAD stated that it would apply the correctness standard of review after conducting its own analysis of the record with a view to determining whether the RPD erred. The RAD would only show deference to RPD findings that were based on the assessment of the credibility or weight to be given to oral evidence, in situations where the RPD enjoyed a particular advantage. The RAD stated that if it found that the RPD had a particular advantage, it would indicate this in its reasons. No such advantage was identified by the RAD.

[12] The RAD acknowledged that the Applicant identified several alleged errors in the RPD's decision, but stated it would focus on the issues that it identified were determinative, based on its independent assessment of the record.

(1) The Applicant's testimony about AJ

[13] The RAD found the RPD erred in characterizing the Applicant's testimony about AJ as vague and lacking in detail, as the RPD failed to take into consideration the totality of the Applicant's evidence. However, the RAD concluded that the RPD did not err in finding that the Applicant failed to provide evidence that AJ exists by providing photos or text messages.

[14] The RAD found that, while the RPD's assessment of the evidence about AJ was flawed, other adverse credibility findings made by the RPD were entirely supported by the evidence.

(2) The Applicant's same-sex identity in university and relationship with Seun

[15] The RAD found the Applicant's failure to mention in his BOC his three year relationship with Seun that allegedly took place in university was a major omission. It undermined the Applicant's credibility, because the Applicant did not make an effort to provide corroborating evidence of this relationship to credibly establish his identity as a bisexual person.

(3) The Applicant's places of residence

[16] The RAD listened to the audio recording of the hearing and agreed with the RPD's finding that the Applicant changed his evidence about what year he moved out of his parent's

home. However, the RAD found that there was no merit to the RPD's finding that the Applicant "could not clarify which of the addresses were his parents' address."

[17] The RAD found that the RPD incorrectly interpreted the first sentence of the Applicant's BOC narrative as meaning that the Applicant lived with his parents at the time he came out to them. However, the RAD agreed with the RPD that the Applicant's oral testimony about where he lived immediately prior to his departure for North America evolved during the hearing.

[18] The RAD also agreed with the RPD that the addresses listed in the Applicant's immigration intake documents were inconsistent with his BOC narrative and that the Applicant's explanation for this discrepancy did not make sense.

[19] The RAD found that the RPD did not err in drawing negative credibility inferences from the omissions and inconsistencies in the Applicant's evidence about his places of residence in Nigeria.

[20] The RAD made an additional negative credibility finding based on an inconsistency between the Applicant's port of entry intake forms and his testimony at the hearing. The intake forms state that the Applicant lived in Benin City immediately prior to leaving for North America, but the BOC states that he went into hiding in Lagos immediately prior to leaving Nigeria.

(4) The Applicant's family composition

[21] The RAD noted that, based on the audio recording of the hearing, the RPD appears to have misunderstood the Applicant's testimony about a half-sibling who lives in Canada. The RAD noted that the RPD seemed to suggest the Applicant was being evasive, and that the RPD member chastised the Applicant for failing to answer her questions. The RAD concluded that the Applicant gave the RPD direct and consistent answers on this point.

[22] The RAD found that the RPD did not err in making a major negative credibility finding based on the Applicant's testimony about disclosing his sexual orientation to his parents, and his failure to provide an acceptable explanation for the inconsistency in his evidence on this point.

[23] The RAD found that the foregoing adverse credibility findings were sufficient to undermine the central elements of the Applicant's claim, including his identity as a bisexual person and the disclosure of this identity to his family in Nigeria. The RAD concluded that the alleged errors in the RPD's decision were not sufficient to overcome the serious credibility deficits in the Applicant's evidence.

[24] The RAD dismissed the appeal and confirmed that the Applicant is neither a Convention refugee nor a person in need of protection.

III. **Issues and Standard of Review**

[25] The Applicant identifies several issues with the Decision, all of which go to the issue of whether the Decision is reasonable.

[26] The Applicant argues that the Decision is unreasonable for three reasons.

[27] First, it is alleged that the RAD ignored evidence, including two affidavits and a psychological report, when it concluded that the Applicant was not credible.

[28] Second, the Applicant submits that the RAD's decision lacks transparency and intelligibility, because the RAD overturned many of the RPD's credibility findings and yet upheld the RPD's conclusion.

[29] Third, the Applicant says that the RAD failed to deal with the "most important incident in the claim," which was the religious cleansing performed on the Applicant after his parents found out about his sexual orientation.

[30] The Federal Court of Appeal has established that reasonableness is the standard of review to be applied by this Court to a decision of the RAD: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paragraphs 30 and 35.

[31] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*].

[32] A high degree of deference is owed by this Court when the impugned findings being challenged relate to the credibility and plausibility of a refugee claimant's story, given that the RPD and the RAD have expertise in that regard and considering their role as the trier of fact: *Vall v Canada (Citizenship and Immigration)*, 2019 FC 1057 at paragraph 15.

[33] Recently, the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] extensively reviewed the law of judicial review of administrative decisions. The Supreme Court confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness subject to certain exceptions that do not apply on these facts: *Vavilov* at paragraph 23.

[34] Citing *Dunsmuir*, the Court confirmed in *Vavilov* that a reasonable decision is one that displays justification, transparency and intelligibility with a focus on the decision actually made, including the justification for it: *Vavilov* at paragraph 15.

[35] As this application was argued on the basis that the standard of review is reasonableness, I find it is not necessary to receive further submissions from the parties. The result in this matter would be the same under the pre-*Vavilov* framework established in *Dunsmuir* and its progeny.

IV. Analysis

[36] As a general overview, the Applicant argues that, regardless of the submissions it received from previous counsel, the RAD was obliged to undertake a full independent review

and assessment of the entire record before the RPD. By failing to do so in some instances, the RAD erred and the Decision lacked transparency.

[37] The Respondent's position is that the RAD was only required to address those matters raised by the Applicant in his submissions to the RAD. In addition, the Respondent says that the Applicant did not challenge in this application the determinative independent negative credibility findings made by the RAD. The Respondent relies on *Quintero Cienfuegos v Canada (Citizenship and Immigration)*, 2009 FC 1262 at paragraphs 25 and 26 to say that by not challenging those findings the Applicant is presumed to have accepted the findings, which are therefore presumed to be true.

[38] The Applicant's response is that those findings were not determinative and the Respondent has not shown that they were. Moreover, the Applicant says that the crux of this case is that the RAD ignored important evidence.

[39] I am persuaded by the Applicant's arguments for the reasons that follow.

A. *The RAD made an erroneous finding of fact without regard to the evidence before it*

[40] The RAD did not make a negative credibility finding with respect to the Applicant's testimony concerning AJ. To the contrary, it found that the RPD had erred in its analysis.

[41] It is in this context that Jeffrey's affidavit becomes important.

[42] As mentioned, the Respondent has submitted that the RAD was only required to address matters the Applicant raised in his submissions to them. I agree with that statement. The RAD was required to address those submissions. However, they failed to do so with respect to Jeffrey's affidavit which contained critical evidence concerning AJ, whom the Applicant refers to as Deji.

[43] The Applicant's detailed submissions regarding Jeffrey's affidavit are found at paragraphs 8 and 9 of the RAD submissions:

8. In Section 15 the Panel makes reference to the Appellant not inquiring about the wellbeing of Deji and draws a negative inference. The Appellant testified at his hearing that he has (*sic*) called Jeffrey to find out what has happened to Deji but Jeffrey does not know.

(Recording at 1:54:10)

The Panel failed to take into consideration that Deji was arrested and found to be engaged in (*sic*) bisexual relationship which is prohibited in Nigeria. Jeffrey was also arrested but released. Given Jeffrey's position it is unrealistic for the Panel to have expected Jeffrey to follow up with the authorities about Deji's arrest when being gay/bisexual is a serious offence in Nigeria. Also being associated with such people and knowing their sexual orientation has its consequences too. So for the (*sic*) Jeffrey to put himself in harm's way lacks logic on the part of the Panel.

Reasons at page 7

9. In Section 24 the Panel refers to an affidavit from Jeffrey and states that it puts no weight on this affidavit because it is undated. During the hearing the Panel questions the Appellant as to when he received this affidavit. The Appellant provided the courier waybill that accompanied the affidavit but still yet the Panel concluded that there is no way of knowing when the affidavit was made.

(Recording at 33:15) This is an erroneous finding on the mere fact that the affidavit does have August 2018 as a date beside the Notary Public's stamp. Furthermore, the waybill with Jeffrey's name on it has the following shipping date: 2018-08-15 (August

15, 2018). Therefore, it is more than likely that the affidavit was sworn sometime in and around August 15, 2018. The Board failed to properly assess the evidence before it and erroneously dismissed a piece of evidence that was important to Appellant's claim in confirming facts that the Appellant testified to.

Reasons at page 9
Appellant's Affidavit at page 38-40, 71

[44] The RAD had found that the omission in the Applicant's BOC of a previous same-sex relationship with Seun was "a major omission" that had "a serious negative impact on the Appellant's credibility". As a result, the evidence in Jeffrey's affidavit that could support the Applicant's relationship with AJ and substantiate the risk to the Applicant in Nigeria was important.

[45] The RAD acknowledged the existence of, but did not engage with, the submissions about Jeffrey's affidavit. Given the importance of this evidence, that is a reviewable error from which I infer the RAD made an erroneous finding of fact without regard to the evidence before it: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, (1998) 157 FTR 35 at paragraphs 17 and 27.

[46] The Decision is unreasonable on that basis alone. However, it may be helpful for the future redetermination to briefly discuss another issue with the reasons for the Decision.

B. *The RAD analysis is not internally coherent and rational*

[47] I find it is not clear how and why the RAD came to the overall conclusion that it did.

[48] On review of the reasons provided in the Decision it is not apparent that the RAD weighed the evidence regarding the Applicant and AJ. After listening to the audio recording, the Applicant's testimony was generally accepted by the RAD and the vast majority of the negative findings of the RPD were found to be in error. Yet, the RAD upheld the RPD.

[49] The RAD found that the RPD erred in assessing the evidence about AJ's alleged arrest and the Applicant's efforts to find AJ after the arrest. The RAD said that the finding by the RPD concerning whether the Applicant was worried or made inquiries about AJ was "perverse and ignored the Applicant's testimony." This statement implies that the Applicant's sworn testimony about looking for AJ after he was arrested was believed by the RAD.

[50] Then the RAD concluded, without comment, that the RPD did not err when it found that the Applicant failed to provide evidence that AJ existed such as photos or text messages of him. This conclusion does not rationally flow from the analysis to that point. The RAD presented no foundation upon which to suddenly adopt the RPD finding that corroboration of the existence of AJ by way of photographs or text messages was required in addition to the Applicant's testimony.

V. **Conclusion**

[51] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. Provided that there is an internally coherent and rational chain of analysis that is justified in relation to the

facts and law, the application of reasonableness review requires the reviewing Court to defer to the decision under review: *Vavilov* at paragraph 85.

[52] I find that the requirements of a reasonable decision, as set out in *Dunsmuir*, that it evince justification, transparency and intelligibility, have not been met in this instance and the Decision was arrived at without regard to the evidence before the panel.

[53] For all the foregoing reasons, the application is granted.

[54] The Decision is set aside.

[55] This matter will be returned for redetermination by another panel.

[56] No costs are awarded.

JUDGMENT in IMM-1605-19

THIS COURT'S JUDGMENT is that:

1. The application is granted and the Decision is set aside.
2. This matter is returned for a fresh determination by a different panel of the RAD.
3. No costs are awarded.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1605-19

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APPEARANCES:

RICHARD WAZANA FOR THE APPLICANT

MEVA MOTWANI FOR THE RESPONDENT

SOLICITORS OF RECORD:

WazanaLaw FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario