Federal Court  Cour fédérale

Date: 20211008

Docket: IMM-4415-20

Citation: 2021 FC 1060

Ottawa, Ontario, October 8, 2021

PRESENT: The Honourable Mr. Justice Henry S. Brown

BETWEEN:

SINQOBILE SIBANDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board. The RPD determined the Applicant is neither a Convention refugee nor a person in need of protection pursuant to section 96 and section 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*]. The RPD made a general

no credible finding and found the claim was manifestly unfounded pursuant to section 107.1 of the *IRPA* [Decision].

II. Standard of Review

[2] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, majority reasons by Justice Rowe [*Canada Post*], which was issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority explains what is required for a reasonable decision, and importantly for present purposes, what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that

> any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[3] In the words of the Supreme Court of Canada in *Vavilov*, a reviewing court must be satisfied the decision-maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.
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> [Emphasis added]

[4] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a

> decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
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> [Emphasis added]

[5] Furthermore, *Vavilov* makes it clear that the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances":

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

III. Analysis

[6] The only issue in this application is whether the Decision is reasonable.

[7] The Applicant submits the RPD erred in its credibility findings. The Applicant broadly relies on *Bains v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1144 for

general propositions regarding credibility and implausibility findings and *Maldonado v Canada (Minister of Employment and Immigration),* [1980] 2 FC 302 for the submission an applicant's testimony is to be afforded a presumption of truthfulness.

[8] That said, I am of the view the RPD's credibility assessment is entitled to considerable defence where an oral hearing was held and where the RPD had the advantage of seeing and hearing the witness, unless the Court is satisfied the RPD based its conclusions on irrelevant considerations or ignored evidence. The Federal Court of Appeal has ruled that judicial review should not interfere or re-weigh evidence when the RPD's conclusions are reasonably based on the record. See: *Canada (Minister of Citizenship and Immigration) v Sellan,* 2008 FCA 381 [Nadon JA] at para 3.

[9] The Applicant also submits although the RPD acknowledged the *Women Refugee Claimants Fearing Gender-Related Persecution: Update* [*Gender Guidelines*], the decision did not consider the *Gender Guidelines* in light of the Applicant's testimony relating to her traumatic experiences, in finding the Applicant's testimony lacked detail and in finding certain aspects of her testimony implausible. The Applicant further submits the RPD was overzealous in making negative credibility findings because the Applicant was under stress and could not remember details as far back as 2014.

[10] However, in my respectful opinion, the RPD made several clear references to the *Gender Guidelines* and applied them during the course of its assessment. I am not persuaded the RPD failed to comply with the *Gender Guidelines* in this case, nor that it was overzealous.

[11] As mentioned, more recently the Supreme Court of Canada instructs that reviewing courts should not reweigh or reassess the evidence except in exceptional circumstances: see *Vavilov* at para 125.

[12] Turning to the basic facts and issues in dispute between the parties, the Applicant is a 30-year old citizen of Zimbabwe.

[13] In her Basis of Claim [BOC] the Applicant says she joined the Zimbabwe Movement for Democratic Change (MDC) in 2009. The Applicant also joined the Zimbabwe United Nations Association (ZUNA) as a Human Rights Junior Officer in May 2013.

[14] On December 12, 2013, the Applicant says she was participating in a ZUNA organized workshop when cars came out of nowhere, grabbed her and four other people from the organization, put sacks over their heads and threw them into a van. The Applicant says these people told them they were from the Central Intelligence Organization. Being the only woman, the Applicant was separated from the group and raped by her captors several times. After being held captive for a couple days, the Applicant was released into a forest where she was found by a woman who nursed her to health.

[15] Later, on December 28, 2013, the Applicant was approached by an officer from the Central Intelligence Organization who threatened her and said the government was watching her.

[16] In March 2014, the Applicant applied to travel to the United States of America [USA] for a National Youth Leadership Counsel conference in Washington, D.C. While she was in Washington, the Applicant says she received a WhatsApp call from a person who told her they knew where she was. The Applicant was scared and left for Texas, where her cousin lived.

[17] In 2014, the Applicant made a claim for asylum in the USA but in November 2018, her claim was denied. On December 12, 2018, she crossed the border into Canada and made a claim for refugee protection at a port of entry in Quebec. Her claim was based on her fear of the Zimbabwean government because of her anti-government political opinion and support of the opposition party, as well as her work as a human rights educator with the United Nations.

IV. Decision under review

[18] On July 6, 2020, the RPD found the Applicant was not a Convention refugee nor a person in need of protection. The determinative issue was credibility, in respect of which the RPD made a general no credibility finding while it could make under section 107(2) of *IRPA*. The RPD also found the Applicant's claim was "clearly fraudulent on central elements and thus manifestly unfounded" pursuant to section 107.1 of the *IRPA,* which provides:

Manifestly unfounded	**Demande manifestement infondée**
107.1 If the Refugee Protection Division rejects a claim for refugee protection, it must state in its reasons for the decision that the claim is manifestly unfounded if it is of the opinion that the claim is clearly fraudulent.	**107.1** La Section de la protection des réfugiés fait état dans sa décision du fait que la demande est manifestement infondée si elle estime que celle-ci est clairement frauduleuse

A. *The Applicant's testimony about her political activity was vague and inconsistent*

[19] The Applicant testified to working for a United Nations non-governmental organization [NGO] but was not able to provide any but the most cursory details about what she taught in her role as a human rights educator. The RPD acknowledged the passage of time since the Applicant was politically active in Zimbabwe but found her lack of knowledge undermined her credibility. In my view, this finding is reasonable on the record; her recollection of what the Applicant was teaching places this assessment within the range of reasonable findings. I note as well this Court is not to engage in re-weighing and reassessing the evidence per *Vavilov* at para 125.

[20] The Applicant testified to being released into a forest after being held captive and assaulted by security officers, and that a woman found her and nursed her for approximately one week. The Applicant was unable to provide the name and details of her rescuer. The RPD recognized victims of gender-based violence may have difficulty testifying about their experience but found in this case, the Applicant's lack of detail was not related to events surrounding her allegations of abuse and drew an adverse inference from her vague testimony. Again I am not persuaded this finding is unreasonable on the record; in addition this Court is not to engage in re-weighing and reassessing the evidence per *Vavilov* at para 125.

[21] The Applicant testified to contacting her parents who sent a family friend to pick her up from her rescuer's home and was brought to her parent's home. The RPD asked the Applicant who she stayed with and she testified to living with her parents; however, her BOC states her parents moved to South Africa in May 2013 [these events happened in December 2013]. The

RPD asked her to confirm whether she returned to live with her parents and she confirmed in the affirmative. After the RPD brought the contradiction to the Applicant, she shifted her testimony to claim she meant she was staying with her aunt at her parent's home. The RPD did not accept this aspect of her claim as credible; the contradiction and shifting testimony undermined her credibility. I cannot say this finding is unreasonable; her eventual explanation might be credible as submitted, but her answer evolved as did others.

[22] The Applicant testified to not telling her aunt or family friend about her experience, nor did they ask. The RPD was mindful victims of sexual assault may not feel comfortable sharing their experience but found it not credible that after being apprehended by security forces in public, taken to an unknown location for two weeks and returning badly injured, no one asked what happened to her. I agree as submitted that her parents had moved to South Africa by then, which may explain their apparent lack of interest, but the issue was why she did not tell the aunt and family friend, not whether she had told her parents who were in South Africa. Based on the record, this adverse credibility inference was not unreasonable.

[23] The Applicant testified she returned to work after the incident. When asked how the NGO responded to the incident, she testified the NGO continued to participate in human rights workshops and did not report to the police. Upon further questioning, the Applicant testified the NGO responded to the incident by changing offices; however, staff continued to host events at the old locations. The RPD did not accept her testimony as credible finding the Applicant's testimony was vague and lacking in detail. Specifically, the Applicant was asked about the functioning of the NGO while staff were missing and she provided testimony that the NGO

continued to operate and did not report the incident to the police. While it would have been fair if she testified to not knowing if this were the case because she was not there, instead, she provided testimony about the NGO's operations; testimony the RPD found was vague and lacking in detail. Given this I am unable to conclude this finding of fact is unreasonable, particularly given *Vavilov's* injunction at para 125.

[24] The Applicant testified she was invited to attend a conference in the USA in March 2014; however, she was unable to provide the name of the conference and her testimony about the reasons for the conference was vague. The RPD acknowledged the conference occurred several years ago but found her vague testimony failed to support her allegation of being a human rights activist and undermined her credibility. Again, this finding was within the jurisdiction of the RPD.

B. *Lack of Credible Documentary Evidence*

[25] The Applicant tendered into evidence a copy of her US asylum claim application, which differed from her Canadian claim. The Applicant claimed in her BOC that her parents moved to South Africa after her father was mugged during election related violence. However, in her testimony, she claimed her parents left because they are MDC supporters who fear being targeted by the government. When asked why she did not mention the mugging in her testimony, she said she forgot about what occurred. When asked why her US claim did not mention the mugging or their fear based on being MDC supporters, she said she did not know why she omitted these details. Given the credibility concerns about her parents' whereabouts in 2013 and the omission of her father's mugging in her initial testimony and US asylum claim, the RPD found this

incident did not occur and undermined the Applicant's credibility accordingly. With respect, this was a defensible finding for the RPD to make on the record before it.

[26] The Applicant claimed to be a member of MDC from 2009 to 2014 but did not provide corroborative evidence to confirm her membership. While her answer was her US lawyer had the membership card and she was not able to get it because it was part of her US claim and her lawyer was retired, the RPD drew an adverse inference from her failure to provide documentary evidence of her membership, because she was represented by senior counsel and knew of the need for corroboration but did not supply it to the RPD. I am not persuaded this finding is unreasonable, which is a matter of assessing and weighing evidence and testimony withheld from reviewing courts by *Vavilov* at para 125.

[27] On the day of the hearing, the Applicant provided a copy of a poster purportedly showing she was wanted for arrest by the Zimbabwe police. She also provided a letter from the NGO stating she was one of the employees who were arrested in December 2013. She testified to receiving copies of these documents from her aunt and specified she received them in 2017 before she attended her US asylum claim interview in August 2017. However, the letter from the NGO was dated June 12, 2018. The Applicant could not explain the discrepancy although in my view it was either a typographical error or evidence of a fraudulent document. The RPD also noted the letterhead for both documents was out of alignment with the body of the text and clearly shifted to the left. The Applicant could not explain the inconsistencies on the face of the document.

[28] The RPD found both documents were fraudulent. As such, the Applicant's general credibility was eroded because she was willing and able to use non-genuine documents, and her allegation that the documents purport to corroborate her persecution by Zimbabwean authorities was further called into question.

[29] Examination and assessment of documentary evidence is within the specialized knowledge of the RPD [see, *El-Khatib v Canada (Citizenship and Immigration)*, 2016 FC 471 [LeBlanc J] at para 6; *Matte v Canada (Citizenship and Immigration)*, 2012 FC 761 [Russell J] at para 67; *Kahumba v Canada (Citizenship and Immigration)*, 2018 FC 551 [Kane J] at para 37], and in any event, I am not persuaded these findings are unreasonable.

[30] In these circumstances, the RPD found the Applicant not credible and her lack of credibility extended to all relevant evidence emanating from her testimony. The RPD further found the Applicant's claim was manifestly unfounded pursuant to section 107.1 of *IRPA* and rejected her claim. I am unable to conclude the RPD's overall assessment of the evidence and testimony was unreasonable. Not only am I guided by *Vavilov* in terms of the evidence, but in matters such as this the Federal Court of Appeal's instruction is on point as found in: *Giron v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 481 (FCA) at para 1:

> [1] The Convention Refugee Determination Division of the Immigration and Refugee Board ("the Board") chose to base its finding of lack of credibility here for the most part, not on internal contradictions, inconsistencies, and evasions, which is the heartland of the discretion of triers of fact, but rather on the implausibility of the claimant's account in the light of extrinsic criteria such as rationality, common sense, and judicial knowledge, all of which involve the drawing of inferences, which triers of fact are in little, if any, better position than others to draw.

V. Conclusion

[31] In my respectful view, the Applicant has not shown the Decision is unreasonable. In my view, the Decision is transparent, intelligible and justified based on the facts and constraining law. Therefore, judicial review will be dismissed.

VI. Certified Question

[32] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-4415-20

THIS COURT'S JUDGMENT is that judicial review is dismissed, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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