Federal Court  Cour fédérale

Date: 20220414

Docket: IMM-3889-21

Citation: 2022 FC 541

Toronto, Ontario, April 14, 2022

PRESENT: Madam Justice Go

BETWEEN:

DAVID GITHUKA KAIYAGA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. David Githuka Kaiyaga [Applicant] seeks judicial review of a decision of the Refugee Appeal Division [RAD] dismissing his refugee claim against Kenya [the Decision]. The RAD agreed with the Refugee Protection Division [RPD] that the Applicant is not a Convention refugee, or a person in need of protection pursuant to s.96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, as he lacked credibility.

[2] The Applicant argues that the RAD unreasonably relied on several inconsistencies and discounted his corroborating documentation. The Respondent argues that the Applicant is repeating the arguments he made at the RAD and asking the Court to reweigh the evidence.

[3] I find the Decision reasonable and I dismiss the application.

II. Background

A. *Factual Context*

[4] The Applicant is a citizen of Kenya. He fled Kenya on March 17, 2019, making his refugee claim in Canada the same month. The Applicant alleges persecution in Kenya as a result of false rumours that he is gay, which had been spread by the Mungiki gang and a wealthy and well-connected cousin of Kenya's president named John Muhoho. The Applicant's allegations are summarized below.

[5] In 2006, the Applicant was working in Ongata Rongai when he was kidnapped and tortured by the Mungiki. He escaped and fled to Gachie, his hometown. The Mungiki located him there. The Applicant moved further away for the next few years. After the 2009 government crackdown on the Mungiki, the Applicant returned to Ongata Rongai and Gachie where he worked as a taxi driver. He started his own taxi company and later bought a "matatu" (a 14-seat minibus). He also got married and the couple currently have two children.

[6] In order to operate his matatu, the Applicant had to register with a "Sacco", a regulatory organization for matatu routes. He met with the Sacco in September 2018 and recognized one of them as Muhoho, the man who had led the Mungiki gang which had kidnapped him over a decade earlier. He made an excuse to leave and ran to a local police station, where he relayed the tale of his 2006 kidnapping and his meeting that day with Muhoho. The police told the Applicant Muhoho was a member of Kenya's Kenyatta family. Muhoho was then called to the police station where he admitted to have accosted the Applicant in Ongata Rongai in 2006, but stated that he did so because the Applicant had been recruiting local high school students into homosexuality, and that the purpose of their recent meeting was to warn him against doing the same in Nairobi. The police appeared to believe Mr. Muhoho and slapped the Applicant, before releasing both men and indicating that they would continue to investigate.

[7] Rumours went around the town that the Applicant was gay, so he left and stayed away until November 2018 when the rumours had died down. The night after he returned, on November 11, 2018, his home was attacked by a group of masked men, who beat him badly, and mentioned his messing with Muhoho. The assailants fled when his wife's scream alerted the neighbours. The Applicant was hospitalized for three days as a result of this attack.

[8] After his release from the hospital, the Applicant reported the attack to the police, so as to obtain a police report which was required for his hospital treatment to be covered. Upon arriving at the police station on November 19, 2018, the Applicant was arrested, charged for crimes involving homosexuality, and imprisoned. At his first hearing in court, Muhoho attended and witnessed against the Applicant.

[9] The Applicant's brother arranged to have the charges dropped and secure his release with a large bribe paid for with the sale of the Applicant's matatu and a loan. The Applicant was released on November 28, 2018. He went into hiding and with the help of an agent, obtained a visa to Canada, where he fled in March of 2019, leaving his wife and children in Kenya.

B. *RPD Decision*

[10] On November 10, 2020, the RPD denied the Applicant's refugee claim, finding that he lacked credibility. The RPD found the presumption of truthful testimony in *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA) was rebutted based on several inconsistencies relating to: (1) the date of a letter from the hospital where he was treated, (2) the point at which he realized the charges against him related to being gay, (3) whether he was able to sign documents in prison, and (4) his port of entry [POE] interview vis-à-vis his Basis of Claim narrative [BOC]. The RPD concluded that he was not credible with respect to his hospitalization, imprisonment, or court proceedings.

C. *Decision under Review*

[11] On May 14, 2021, the RAD upheld the RPD's decision concluding that, with one exception, the RPD had not erred in finding inconsistencies that undermined the Applicant's credibility nor in disregarding his documentary evidence. The RAD disagreed with the RPD's assessment regarding the inconsistences in the Applicant's knowledge about the charges against him, which the RAD found to be minor and peripheral to his claim.

III. Issues and Standard of Review

[12] The Applicant argues that the RAD erred by impugning his credibility on the grounds of: (1) an inconsistent date on a medical record he provided to corroborate the November 11, 2018 attack, (2) inconsistent testimony about his ability to sign documents while incarcerated, (3) his POE interview, which exaggerated his claim and made no mention that his risk of persecution for homosexuality was the result of a false allegation, and (4) insufficient corroborative evidence to overcome the inconsistencies.

[13] The parties both submit that these issues are reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[14] 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. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov*, at paras 88-90, 94, 133-135.

[15] For a decision to be unreasonable, the Applicant must establish the decision contains flaws that are sufficiently central or significant: *Vavilov*, at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov*, at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep": *Vavilov*, at para 100.

IV. Analysis

[16] The Applicant challenges four aspects of the RAD's credibility findings which I will address below.

Issue 1: RAD's finding regarding the date of the hospital record

[17] The Applicant's BOC narrative indicated that he was attacked on the night of November 11, 2018, causing him to be hospitalized for several days. The RPD decision noted that the Applicant testified that his wife went to the hospital in September 2020 to obtain a medical letter for his refugee claim, which was then prepared by the doctor; however, the letter is dated November 30, 2018. The Applicant did not have an explanation for the date of the letter when asked by the RPD Member. Later, during questioning from his counsel, the Applicant testified he did not know how his wife obtained the letter. The RPD concluded that his testimony was evolving and drew a negative credibility inference.

[18] The Applicant challenged this finding at the RAD, and the RAD concluded the following:

> [10] Based on my independent assessment, I do not find the RPD erred. The RPD member asked the Appellant "the letter that was given did the doctor right [write] it when she requested it." The Appellant's response was "yes" and then he went on to say, "she went to the doctor and she explained that I had already left and that is when the doctor prepared the letter." Based on a plain and ordinary reading of these excerpts, with consideration of the RPD's use of the words "write" and the Appellant's use of the word "yes," I find it was the Appellant's initial testimony that the letter was written in September 2020, and that this is inconsistent with the letter being dated November 30, 2018.
>
> [11] I do not accept the Appellant's submission that his initial testimony was an assumption. The Appellant was specifically informed at the outset of the hearing not to guess, and that if he were to guess an answer, to please indicate such to the Board. However, the Appellant did not express any suggestion that his initial answer was speculation, a guess, or an assumption when he

> gave his answer. It was only later in questioning from his own counsel that he changed his evidence and said he did not know the circumstances around the creation of the medical report.

[19] In support of his judicial review, the Applicant reiterates the same arguments that he made in support of his appeal to the RAD, stating it was unreasonable to impugn his credibility on this point, as the analysis relied on a weak, artificial, and unfair interpretation of his testimony, manufacturing a contradiction when one was not really there, contrary to *Sheikh v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15200 (FC).

[20] There is some merit to this argument. While the Applicant initially did indicate that the letter was prepared when his wife went to see the doctor sometime around September 2020, as soon as he was questioned by the RPD why the letter was dated November 30, 2018, the Applicant replied that he did not know, and he did not remember. The Applicant gave the same reply when asked by counsel. Based on the testimony, I agree with the Applicant that there might not have been a contradiction in his response, contrary to the findings of the RPD and RAD.

[21] However, the RAD's concern regarding the date of the hospital record went beyond the above noted testimony. The RAD also found there was no adequate explanation as to why the hospital would create patient records 11 days after a patient was discharged.

[22] The Applicant argues that the RAD made a plausibility finding without regard to his argument on appeal, which was that the date of the letter was pulled from records created shortly after his hospitalization, when his wife went to obtain the letter in 2020. Doing so, the Applicant argues, the RAD made an implausibility finding without evidence to support it and thus ran afoul

of *Divsalar v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 653 [*Divsalar*] at para 24.

[23] I reject the Applicant's argument.

[24] I note, first of all, that the letter began with: "To whom it may concern" and ended with: "Kindly accord David the necessary assistance." No evidence was given by the Applicant with respect to why the hospital would prepare a letter of this nature and have this placed on record on November 30, 2018.

[25] The RAD in this case questioned the Applicant's credibility because the Applicant could not explain the anomaly in the hospital record that he has provided to support his claim. The RAD took note of the Applicant's attempt to explain the date, and found it to be speculative. This finding, in my view, was reasonable. Indeed, at the hearing, the Applicant conceded that he does not have an explanation for the November 30, 2018 date.

[26] The Applicant submitted at the hearing that he proposed alternative explanations in order to make a point about the issue with the RAD's implausibility finding. In his written submission, the Applicant also argues that he ought to have been accorded some leeway as a layperson in explaining the situation.

[27] Neither of these arguments explain why the hospital would prepare a letter 11 days after he was discharged, as the RAD noted.

[28] In *Zaiter v Canada (Citizenship and Immigration)*, 2019 FC 908, Justice Norris sets out that implausibility can be a *component* of a negative credibility finding but should not be the *only* basis for that finding:

> [9] It is important to remember that the ultimate question for the decision-maker is not whether the events in question occurred but whether the claimant is to be believed when he or she says that they did. Adverse credibility determinations based on implausibility should not be made simply on the basis that is it unlikely that things happened as the claimant contends. Individual experiences need not always follow the norm. Unlikely events can still happen. Something more is required before a claimant may be found not to be credible on the basis of implausibility alone. Importantly, this restriction on this type of fact-finding helps mitigate the risk of error if a claimant's account is rejected.

[29] This Court also explained in *Divsalar* at para 22: "The jurisprudence of this Court has clearly established that the CRDD has complete jurisdiction to determine the plausibility of testimony, so long as the inferences drawn are not so unreasonable as to warrant intervention, its findings are not open to judicial review."

[30] In this case, the Applicant has not provided any explanation – other than his speculation – for the November 30, 2018 date for the hospital record. As the Respondent submits, and I agree, ultimately, the Applicant asserts no evidence to indicate when the hospital created their patient records, nor has the Applicant provided any explanation as to why the letter would have been written let alone written then.

[31] In view of an absence of explanation for the November 30, 2018 date, and the absence of evidence about how that letter came to be written, I thus find it reasonable for the RAD to

conclude it was unlikely that a hospital would create patient records 11 days after a patient was discharged.

[32] Finally, the Applicant argues that even if there is a contradiction, the dating of the letter and the circumstances in which it was obtained are minor and peripheral matters, and such a technical contradiction ought not to have been used to impugn his overall credibility.

[33] I disagree that the dating of the letter is minor and peripheral, nor it is technical, as the letter was relied upon by the Applicant to establish a key aspect of his claim, namely, the attack on him on November 11, 2018, which led to his subsequent arrest by the police. I also disagree that the RAD relied on this one finding to impugn his overall credibility. As can be seen below, the issue with the hospital letter was but one of several negative credibility findings confirmed by the RAD.

[34] In conclusion, I find that the RAD was entitled to make an implausibility finding with respect to the hospital letter as one of the reasons for impugning the Applicant's credibility, and that this finding was reasonable in the context of the rest of the Decision.

Issue 2: RAD's finding regarding loan document and agreement of sale undermined credibility

[35] The Applicant's evidence was that he was released from prison thanks to a bribe paid for by the sale of his vehicle in combination with a loan. The loan contract was signed on November 23, while the Applicant was in prison. The Applicant was released from prison on November 28, and the vehicle sale contract was not signed until November 29. The Applicant testified that he

could only sign for the vehicle sale after he left prison. In response, the RPD Member asked how he could have signed the loan contract on November 23, while he was still in prison. The RPD found that the Applicant could not provide an explanation and drew a negative credibility inference.

[36] On appeal, the Applicant argued that the RPD erred by interpreting his statement "I could only sign after I had left which was on the 29th" as meaning it was only after he left prison that he could sign documents. According to the Applicant, this statement was broad and could be interpreted in many other ways. The Applicant also pointed to his explanation that "it's not that I wasn't allowed to sign any documents."

[37] The RAD rejected these arguments, finding that they were "overly microscopic examination of the semantics and an attempt to obscure a plain reading or understanding of the testimony." The RAD found that the Applicant had the opportunity before the RPD to explain how he was able to sign the loan while in prison, but he did not explain the difference between being able to sign the loan contract but not the vehicle sale contract. The RAD also agreed with the RPD that the Applicant's testimony was evolving, given that he could not provide an explanation when asked by the RPD Member but later, when asked by his counsel, "suddenly remembered" that the loan document was brought to him in prison. The RAD concluded that the inconsistent evidence is material because it undermines the credibility of the circumstances surrounding his alleged imprisonment and the payment of a bribe, which are central allegations to his claim.

[38] Before this Court, once again the Applicant argues that the RAD relied upon an unreasonably strict and zealous reading of his testimony to create a contradiction. According to the Applicant, there are many ways of interpreting his testimony at the RPD hearing which could mean that he could only sign after he had left custody because his brother did not bring the agreement to him in prison.

[39] I reject the Applicant's argument. Regardless of how he came to sign the vehicle sale contract, the question remains that the Applicant never explained the difference between being able to sign the loan contract but not the vehicle sale contract, which was the main reason for the RAD to impugn his credibility.

[40] The Applicant also argues that the RAD's description of his "suddenly" remembering the circumstance of signing the loan document, while not being able to recall the circumstances earlier, is artificial. I agree with the Respondent that nothing comes of the RAD's use of "suddenly", as the Member's point stands regardless.

[41] I also reject the Applicant's argument that the details of how he signed or could not sign documents are minor and peripheral to the claim. The Applicant's ability to secure a loan and sell his matatu allegedly allowed him to buy back his freedom, which was a central element of his claim.

Issue 3: RAD's finding of inconsistencies between testimony, BOC and POE notes

[42] The RAD agreed with the RPD that “a number of drastic inconsistencies” between the Applicant’s POE interview and his BOC narrative undermined his credibility. The RAD noted that at the POE, the Applicant informed CBSA officers that he was at risk in Kenya because he was “practising gayism”, he said he was afraid of being beaten by his family members who are Mungiki, he said he was charged with rape and paid a fine of 50,000ksh but received no jail time, and he made allegations of gang rape. The RPD and RAD both noted that the Applicant attested at the POE that he could read, write and communicate in English, and that he subsequently requested, and received, the assistance of an interpreter.

[43] The Applicant does not deny that there were significant inconsistencies between his POE interview and his BOC narrative; however, he argues that the RAD failed to account for the explanation he gave. He also asked a CBSA officer if he could change his story, demonstrating that he was trying to rectify his error at the earliest opportunity.

[44] Specifically, the Applicant challenges the following characterization of and response to his arguments by the RAD:

> [23] The Appellant submits the RPD “ought to have recognized that people may in fact lie if they believe a lie to be necessary to save their lives, and that such a lie does not give good reason to suspect their credibility when it is abandoned at the first reasonable opportunity.” I am not persuaded by this submission. The Appellant has not provided any authority for its assertion that it is okay or excusable to lie to Canadian immigration authorities. Rather, such a dangerous precedent would undermine the integrity of Canada’s refugee system. Also, the Appellant’s “lies” to the border authorities were not minor.

[45] According to the Applicant, the RAD made a snide criticism of him for failing to "provide any authority for [the] assertion that it is okay or excusable to lie to Canadian immigration authorities", demonstrating the RAD's failure to appreciate or consider the actual argument being put forward, as no such proposition was ever suggested. The Applicant submits he was attempting to advance the argument that although a claimant may misrepresent facts at the POE, they may nonetheless be capable of later providing truthful evidence about their claim – he was not arguing that no moral blameworthiness attaches to a misrepresentation at the POE. As such, he argues that the RAD's hyperbolic assertion that "such a dangerous precedent would undermine the integrity of Canada's refugee system" misses the point he was making.

[46] While the parties have not referenced cases on this issue, this Court has confirmed that the RPD may consider an applicant's statements to immigration authorities at the POE, and material omissions and inconsistencies among POE notes, the BOC narrative and oral testimony at an RPD hearing can properly form the basis of an adverse credibility finding where the omission or inconsistency is central to the claim: *Gaprindashvili v Canada (Citizenship and Immigration)*, 2019 FC 583 at para 24.

[47] The jurisprudence also establishes that the Immigration and Refugee Board [the Board] "should be careful not to place undue reliance on the POE statements. The circumstances surrounding the taking of those statements is far from ideal and questions about their reliability will often arise": *Wu v Canada (Citizenship and Immigration)*, 2010 FC 1102 [*Wu*] at para 16, although the Court in *Wu* found the Board's refusal of the claim reasonable.

[48] Furthermore, "[i]n evaluating the applicant's first encounters with Canadian immigration authorities or referring to the applicant's Port of Entry Statements, the Board should also be mindful of the fact that 'most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority': see Prof. James C. Hathaway, The Law of Refugee Status, (Toronto: Butterworth, 1991) at 84-85": *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 13.

[49] The key question, based on the case law, is whether inconsistencies between a claimant's statements at the POE and testimony before the Board are about "crucial elements of a claim" so as to sufficiently taint the claimant's credibility: *Chen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 767 at para 23.

[50] Applying this principle, I find the inconsistencies in this case go to the crucial elements of the Applicant's claim. The RPD's finding that the Applicant's "lies" were "not minor" was, in my view, reasonable.

[51] Even accepting the difficulties that the Applicant faced immediately upon arrival in Canada, it still does not explain why the Applicant chose to, in his own words, make up claims of being gang raped and being charged with rape, while leaving out any mention of John Muhoho, one of the key agents of persecution, anywhere in the POE documents.

[52] As to the Applicant's argument that he had tried to rectify his mistake at the POE, and that it should not be fatal to the Applicant's having a fair hearing by telling the truth

subsequently, I note first of all there is no evidence to suggest that the Applicant did not receive a fair hearing before the RPD. Secondly, the RAD did consider the Applicant's argument about the stressful circumstances under which these statements were made at the POE but in the end determined that this was not a case where the discrepancies could be ignored. While the Applicant may not agree with the RAD's conclusion, the Applicant has not demonstrated any gaps in the RAD's reasoning, or any break in chain of rationality as required by *Vavilov* to warrant intervention by this Court.

[53] I agree with the Respondent that the Applicant did not raise any error in fact or logic that the RAD made in assessing the inconsistencies between the POE notes, the BOC and the testimony. The RAD's conclusion that these inconsistencies were significant was defensible based on the law and the facts.

Issue 4: Corroborative documentary evidence

[54] Before the RAD, the Applicant argued that the RPD failed to consider his seven corroborating affidavits and a psychological report. The Applicant now argues that the RAD committed the same error. The Applicant argues that "proper" consideration of his various affidavits and the psychologist's report "ought to have been more than sufficient to overcome" credibility concerns.

[55] I note, first of all, that the RAD did review the affidavits and acknowledge they were sworn. However, the RAD concluded that these documents did not overcome the other credibility concerns, citing *Raza v Canada (Citizenship and Immigration)*, 2021 FC 299 [*Raza*]

at para 43. I see no reviewable error here, given the negative credibility findings made by the RAD based on the inconsistencies and discrepancies as noted above, the RAD was entitled to reach the conclusion as it did. It is not the role of this Court to reweigh these documents to see if they overcome the RAD's credibility findings.

[56] I reject the Applicant's argument that *Raza* can be distinguished on facts. Justice McDonald's comment at para 43, that once a negative credibility finding is made, it was open to the RAD to find that corroborating evidence was insufficient to outweigh the credibility concerns with the Applicant's direct evidence, is equally applicable here.

[57] I acknowledge, as the Applicant submits, that refugee claimants are often forced to use irregular travel documents, as established in *Jagernauth v Canada (Citizenship and Immigration)*, 2013 FC 29 at paras 13 and 19, and that "whether a person has told the truth about his or her travel documents has little direct bearing on whether the person is indeed a refugee": *Rasheed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 587, at para 18. I nonetheless find, in this case, the RAD reasonably concluded that the corroborating documents did not outweigh the credibility concerns based on all of the above noted inconsistencies.

V. Conclusion

[58] The application for judicial review is dismissed.

[59] There is no question for certification.

JUDGMENT in IMM-3889-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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