Federal Court  Cour fédérale

Date: 20221118

Docket: IMM-9585-21

Citation: 2022 FC 1582

Toronto, Ontario, November 18, 2022

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

C. D.

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a Refugee Appeal Division [RAD] decision finding the Applicant is neither a Convention refugee nor a person in need of protection. For the reasons that follow, I find the Decision to be reasonable and will dismiss this Application.

II. Background

[2] The Applicant is a citizen of Uganda. He initiated a claim for refugee protection in 2018 claiming a risk of persecution on the basis of his alleged political affiliation with Forum for Democratic Change [FDC], and as an individual living with HIV positive status.

[3] The Applicant alleges that after approximately a decade of active involvement with the ruling party of Uganda, he began to reject their policies and in September 2017, officially joined FDC, an opposition party. The Applicant alleges that he was subsequently threatened, arbitrarily detained, and tortured by Ugandan security forces.

[4] The Refugee Protection Division [RPD] heard the Applicant's testimony over the course of three sittings. It rejected the Applicant's claim, finding that his central allegations of political involvement with the FDC lacked credibility and that on a balance of probabilities, he was never detained, assaulted, or tortured due to his political opinion. With respect to his status as a person living with HIV, the RPD found that the evidence failed to establish an objective basis for the Applicant's fear that he would face persecution, or a risk to life, torture, or cruel and unusual punishment.

III. Decision under Review

[5] The RAD dismissed the appeal, upholding the RPD's findings that the Applicant's allegations of political involvement with the FDC were not credible. The RAD identified numerous inconsistencies in the Applicant's evidence, including a finding that the Applicant

relied on fraudulent evidence to bolster his allegations, which seriously undermined the credibility of his overall claim. The RAD also found that while there was evidence of potential stigma and discrimination on the basis of his HIV status, it failed to establish that the Applicant would face treatment that amounts persecution.

IV. Issues and Standard of Review

[6] The Applicant raises two issues: (i) the RAD erred in declining to hold an oral hearing, and (ii) the RAD failed to engage in an independent assessment of the RPD's findings regarding HIV positive individuals in Uganda.

[7] There has been some diversity of opinion on the Court regarding the standard of review for the first issue regarding the Applicant's position that the Board erred in failing to hold an oral hearing where there is discretion under the legislation. This has occurred both in the context of the RAD, as in this case, as well as with pre-removal risk assessments (PRRAs). On the latter, Justice Rochester recently reviewed the case law in *Balogh v Canada (Citizenship and Immigration)*, 2022 FC 447 [*Balogh*]. She concludes that the reasonableness standard of review should be applied when reviewing a PRRA Officer's decision of whether to hold an oral hearing.

[8] On the other hand, Justice McHaffie explained why he felt the correctness standard applied, in *Iwekaeze v Canada (Citizenship and Immigration*, 2022 FC 814 [*Iwekaeze*]. He provided a detailed analysis at paragraphs 7-14, including addressing *Balogh*, as to why a PRRA officer's decisions regarding an oral hearing should rather be held to a standard of correctness.

[9] The present case, however, concerns whether the RAD – and not a PRRA Officer – erred in declining to hold an oral hearing. In the oft-cited decision of *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, [*Singh*] at para 74, which primarily concerned the application of other aspects of appeals before the RAD – namely the interpretation of admissibility of new evidence in RAD appeals – the Federal Court of Appeal found that the principles applicable to the PRRA analysis on oral hearings are also applicable to the RAD, in answering the two questions that this Court had certified:

> 1. What standard of review should be applied by this Court when reviewing the Refugee Appeal Division's interpretation of subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27?
>
> Answer: The RAD's interpretation of subsection 110(4) of the IRPA must be reviewed in light of the reasonableness standard, in accordance with the presumption that an administrative agency's interpretation of its home statute should be shown deference by the reviewing court.
>
> 2. In considering the role of a Pre-Removal Risk Assessment officer and that of the Refugee Appeal Division of the Immigration and Refugee Board, sitting in appeal of a decision of the Refugee Protection Division, does the test set out in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 for the interpretation of paragraph 113(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 apply to its subsection 110(4)?
>
> Answer: To determine the admissibility of evidence under subsection 110(4) of the IRPA, the RAD must always ensure compliance with the explicit requirements set out in this provision. It was also reasonable for the RAD to be guided, subject to the necessary adaptations, by the considerations made by this Court in *Raza*. However, the requirement concerning the materiality of the new evidence must be assessed in the context of subsection 110(6), for the sole purpose of determining whether the RAD may hold a hearing.

[10] Similar to the division of the case law in the context of oral hearings in the s. 113 PRRA context, there have also been decisions falling on both sides of the reasonableness/correctness divide in the RAD context under subsection 110(6). For instance, I note that while the correctness standard was applied in the recent case of *Shen v Canada (Minister of Citizenship and Immigration)*, 2022 FC 1456 at para 31, Justice Ahmed found that the RAD had correctly assessed the issue, and there was no breach of fairness.

[11] Other recent cases, however, have held that reasonableness applies to RAD determinations of whether to hold an oral hearing. In *Faysal v Canada (Citizenship and Immigration)*, 2021 FC 324, the Court succinctly explained at para 13: "[r]easonableness is the applicable standard of review for both the RAD's admission of evidence under subsection 110(4) of *IRPA* and its decision to hold an oral hearing under subsection 110(6), as both issues involve the RAD's interpretation and application of its home statute." See also *Singh v Canada (Citizenship and Immigration)*, 2021 FC 1464 at paras 8 and 13; and *Akinyemi-Oguntunde v Canada (Citizenship and Immigration)*, 2020 FC 666 at para 15.

[12] Given the observations above, I agree that the RAD's decision not to hold an oral hearing in this case, should be reviewed on the basis of reasonableness. This standard also clearly applies to the second issue of the analysis regarding the Applicant's HIV status.

[13] As the reasonableness standard applies to both issues in this case, the RAD's decision must be based on an internally coherent and rational chain of analysis and justified under the

facts and law (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 83-85).

V. Analysis

A. *The RAD did not err in declining to hold an oral hearing*

[14] The new evidence accepted by the RAD consisted of two news articles, which were general in nature. One of the articles describes the situation for HIV positive individuals living in Uganda. The second article describes how the ruling party has poached members of the political opposition. The RAD considered the Applicant's request for an oral hearing and found that although the articles were sufficiently new, credible, and relevant for the purposes of admissibility, they failed to satisfy any of the criteria under subsection 110(6) of the IRPA.

[15] The RAD's conclusion was reasonable, in that an oral hearing is not required simply because it admits new evidence. Indeed, subsection 110(3) of the IRPA sets out that the RAD must proceed without an oral hearing, unless the three conditions of subsection 110(6) are met, and even then, the RAD can still opt not to hold a hearing (*Singh* at paras 48 and 71). And while the credibility of the Applicant was at issue here, those issues arose from the record before the RPD, and not from the new evidence.

[16] In his appeal submissions to the RAD, the Applicant argued that the new evidence was capable of overcoming one of the RPD's credibility concerns with respect to his immediate appointment as a youth mobilizer, because it showed defecting party members could be given

"big roles" despite having minimal knowledge of the party. The RAD disagreed, reasonably finding that the new evidence was not capable of reconciling what both the RPD and the RAD held to be a serious contradiction in the Applicant's evidence.

[17] Further, even if the RAD had accepted that the new evidence proved the Applicant's assertions on that specific point, it certainly did not address the balance of the credibility findings made by the RAD.

[18] Finally, I note that the Applicant has not actually challenged the reasonableness of the bulk of the RAD's credibility findings. The issues raised by *R.K. v Canada (Citizenship and Immigration)*, 2015 FC 1304, on which he relies, are distinguishable. That case concerned questions about the extent of evidence to be heard once the RPD grants a new hearing request, which is not the case here.

B. *The RAD reasonably assessed the HIV Evidence*

[19] The Applicant submits that the RAD failed to conduct an independent assessment of the RPD's reasons with respect to its findings on the experience of individuals living with HIV, and instead merely relied on similar conclusions.

[20] I do not agree with the Applicant's characterization of the RAD's assessment of the evidence in this regard. Rather, the RAD reasonably found the Applicant failed to establish an objectively well-founded fear of persecution on the basis of his HIV status, and instead seeks a re-weighing of the evidence by this Court. The Applicant has failed to point this Court to a

concrete example in the Decision where the RAD failed to undertake an independent assessment of the evidence. Contrary to the submissions of counsel, the RAD undertook a more extensive assessment of the evidentiary record than the RPD did in its analysis of the HIV issue, including referring to additional sources in the record.

[21] While the RAD did recite and endorse portions of the RPD's findings, I can find no instance where it did so without addressing them independently. The mere fact that the RAD agrees with the RPD's findings does not mean that it did not conduct an independent analysis of the file (*Ademi v Canada (Citizenship and Immigration)*, 2021 FC 366 at para 28). Indeed, the RAD, at paras 66-68 of its Decision, stated explicitly why it agreed with the RPD. The RAD considered all of the evidence before the RPD and found that it was insufficient to establish a sustained or systematic violation of human rights, noting that the objective evidence demonstrated that violations were minimal and had diminished since 2013.

[22] Lastly, the RAD also considered the Applicant's new evidence – which of course was not before the RPD – regarding the experience of those living with HIV in Uganda. This did not change the RAD's overall analysis. The analysis of the Applicant's new evidence further demonstrates it undertook an independent analysis.

VI. Conclusion

[23] The RAD' decision to dismiss the Applicants' appeal was reasonable. The Application for judicial review is dismissed. The Parties propose no question of general importance for certification, and I agree that none arises.

JUDGMENT in IMM-9585-21

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. No questions for certification were argued and I agree none arise.

3. There is no award as to costs.

4. The Applicant's name in the Style of Cause be amended, with immediate effect, to reflect the initials agreed to in the judicial review hearing of this matter.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9585-21
STYLE OF CAUSE:	C.D. v THE MINISTER OF IMMIGRATION, REFUGEES AND, CITIZENSHIP
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 14, 2022
JUDGMENT AND REASONS:	DINER J.
DATED:	NOVEMBER 18, 2022

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