Federal Court Cour fédérale

Date: 20230321

Docket: IMM-3622-21

Citation: 2023 FC 378

Ottawa, Ontario, March 21, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

KOREDE DAVID OLUWATUSIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a 30 year-old citizen of Nigeria. He sought refugee protection in Canada on the basis of his fear of persecution as a gay man. The Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada ("IRB") rejected the claim because it found that material aspects of the applicant's testimony and evidence – including his profile as a gay man – were not credible.

[2] The applicant appealed this decision to the Refugee Appeal Division ("RAD") of the IRB. In his appeal, the applicant challenged the RPD's adverse assessment of his credibility. He also contended that the appeal should be allowed on the basis of a reasonable apprehension of bias on the part of the RPD member.

[3] The RAD dismissed the appeal in a decision dated April 29, 2021. The RAD found that the applicant had not established a reasonable apprehension of bias on the part of the RPD member. The RAD also found that the applicant had not established his sexual orientation or that he is being sought by the police in Nigeria (as he alleged). Accordingly, the RAD confirmed the determination of the RPD that the applicant is not a Convention refugee or a person in need of protection.

[4] The applicant now applies for judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). He submits that the RAD fell into reviewable error in finding that the applicant had not established a reasonable apprehension of bias on the part of the RPD member and in its assessment of the evidence. As I will explain in the reasons that follow, I do not agree that the RAD erred in either respect. This application will, therefore, be dismissed.

[5] Apart from the issue of reasonable apprehension of bias, the parties agree (as do I) that the RAD's decision should be reviewed on a reasonableness standard. On the reasonable apprehension of bias issue, on the other hand, the applicant submits that this Court should apply

a correctness standard to the RAD's determination while the respondent submits that a reasonableness standard applies to this issue as well.

[6] I agree with the respondent. The RAD's conclusion that the applicant had not established a reasonable apprehension of bias on the part of the RPD member is part of its decision on the merits of the appeal, the merits of which are now being challenged on judicial review. Under *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10, there is a presumption that the merits of an administrative decision are reviewed on a reasonableness standard. A reviewing court "should derogate from this presumption only where required by a clear indication of legislative intent or by the rule of law" (*ibid*.). There is no basis to derogate from this presumption here, even though the RAD is addressing a question of procedural fairness: see *Ahmad v Canada (Citizenship and Immigration)*, 2021 FC 214 at para 13; *Acosta Rodriguez v Canada (Citizenship and Immigration)*, 2021 FC 1298 at para 5; and *Rodriguez v Canada (Citizenship and Immigration)*, 2022 FC 774 at para 17. In fairness, counsel for the applicant did accept in the alternative that this issue should be reviewed on a reasonableness standard.

[7] Judicial review on a reasonableness standard considers not only the outcome but also, where reasons are required (as is the case here), the justification for the result (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 29).

[8] 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"

(*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). On the other hand, "where reasons are provided but they fail to provide a transparent and intelligible justification [. . .], the decision will be unreasonable" (*Vavilov* at para 136).

[9] When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov* at para 125). At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review (*Vavilov* at para 13).

[10] The onus is on the applicant to demonstrate that the RAD's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[11] The applicant contended in his appeal to the RAD that the RPD member's conduct of the hearing gave rise to a reasonable apprehension of bias. The applicant based this submission on two exchanges between the RPD member and his counsel. The first exchange occurred when the applicant's counsel objected to questions the RPD was asking the applicant about information in his Basis of Claim ("BOC") form. The second exchange occurred when the applicant's counsel objected that the member was asking repetitive questions of the applicant. This latter exchange led to the applicant's counsel bringing an oral application for the member to recuse herself

(which was refused). The applicant also submitted in his appeal to the RAD that the RPD member's questions to him about his relationship with his mother – questions which, according to the applicant, implied that, as a gay man, he should have been closer to his father – also gave rise to a reasonable apprehension of bias.

[12] The RAD carefully considered these grounds and concluded that none established a reasonable apprehension of bias on the part of the RPD member. In my view, this determination is altogether reasonable.

[13] The first exchange between the RPD member and the applicant's counsel occurred when the member began to ask the applicant why he had testified that he had disclosed his sexual orientation to his parents in Nigeria in 2017 yet this fact was not included in his BOC form. When the member put to the applicant that "the instructions in the Basis of Claim form are to include everything that is important for your claim" and that he was represented by counsel when he filled out his BOC form, the applicant's counsel objected. The objection appears to have been two-fold. First, it was clear that the applicant had been assisted by counsel because that was what the BOC form itself stated. Second, there was no requirement to include this particular detail in the BOC form. The RPD member did not give effect to either objection.

[14] The RAD found that the RPD's line of questioning was proper and that there was no basis for counsel's objections. These are reasonable determinations. As framed, the first objection is frankly baffling. The RPD member was simply attempting to confirm that what appeared to be the case on the written record – that the applicant had been assisted by counsel

when he completed his BOC form – was indeed the case. The RAD also reasonably (and correctly, for that matter) determined that the second aspect of the objection was a matter for submissions on the significance of the omission and not the proper basis for an objection to a line of questioning.

[15] The second exchange occurred when the RPD member was questioning the applicant about why he had stated in his BOC form that his second same sex relationship (with a fellow university student in Nigeria) began in October 2011 yet he had testified that the relationship began in 2012. The applicant explained that while he had met his partner in October 2011, the two did not become intimate until 2012. When the member continued to press the applicant on the discrepancy, counsel for the applicant objected that the applicant had already provided his explanation. When the RPD member suggested that this was something that should be left to submissions, counsel for the applicant stated: "I think we have a problem." This then led to counsel for the applicant accusing the member of undermining his role, which is to raise proper objections, and to the member telling counsel that he was "detrimenting [*sic*] the claimant right now." This, in turn, led to counsel bringing a motion for the member to recuse herself on grounds of a reasonable apprehension of bias. The member refused the motion and the hearing continued.

[16] On appeal, the RAD agreed with the applicant "that the panel did not properly handle this objection, which was appropriate and should have been sustained." Nevertheless, the RAD concluded that this exchange did not taint the outcome of the hearing, finding that "Nothing ultimately turned on the start date of the relationship, and the hearing proceeded in a respectful

and professional manner." There is no basis to interfere with these findings. If anything, they are overly generous to counsel for the applicant, who escalated the matter unnecessarily when the RPD overruled his objection.

[17] The third basis for the reasonable apprehension of bias allegation was a question from the RPD member confirming that the applicant is close to his mother. Neither the applicant nor his counsel raised any concerns about the propriety of this question at the time. However, in his affidavit filed in support of his appeal to the RAD, the applicant states:

> The member asked me since I said that I am shy around women, why was I closer to my mother than my father. That question made me feel terrible. I felt that the member's question was insinuating that I should be closer to my father as opposed to my mother giving [*sic*] the circumstances that my sexual orientation is gay.

[18] The RAD found that how the applicant had framed the issue "is missing some much-needed context." This context was that, in both his BOC form and his earlier testimony, the applicant had attributed his sexual orientation to the fact that he had grown up around boys, he did not have a sister, and therefore did not feel comfortable around women. It was in this connection that, after confirming that the applicant was close to his mother, the RPD member asked him whether being close to his mother made him more comfortable with women. The applicant said that it didn't; his mother was the only woman he was close to "because she is my mom."

[19] On appeal, the RAD found as follows:

> In this context, I do not think it was inappropriate of the panel to ask the Appellant about his relationship with his mother. He had

> already discussed the role of his family composition in influencing his sexual orientation.

[20] In my view, this conclusion was altogether reasonable on the record before the RAD. Contrary to the applicant's submission, the RPD was exploring an issue that arose directly from his evidence. It did not demonstrate any form of stereotypical thinking on the part of the RPD. I would also add that the entire premise of the applicant's argument – that the RPD member had asked the applicant why he was closer to his mother than to his father (which made the applicant "feel terrible") – is not supported by the transcript of the RPD hearing. The applicant was asked no such question.

[21] In assessing grounds for the reasonable apprehension of bias allegation, the RAD stated the applicable test (deriving from *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 391) correctly. The RAD concluded that the allegations of bias had not been established, finding that "A review of the hearing shows that while there was tension between counsel and the panel at times, the hearing proceeded in a respectful and professional manner and counsel was given an opportunity to question the Appellant and provide submissions." The applicant has not provided any basis for me to interfere with these findings.

[22] I turn now to the applicant's second main ground for review – that the RAD's assessment of the evidence is unreasonable.

[23] In his appeal to the RAD, the applicant challenged two key findings by the RPD. On judicial review, he challenges the reasonableness of the RAD's conclusions upholding these findings. I am not persuaded that either of the RAD's determinations is unreasonable.

[24] First, the applicant claimed that, while visiting Canada, he had learned from his brother in Nigeria that the police had come by their apartment looking for him and accusing him of being gay. (According to the applicant, the police had found his partner at a "secret gay party" and his partner had outed him to the police when they found photos of the two of them on the partner's phone.) The applicant testified that the police took his brother into custody and detained him for an hour or so. However, while the applicant had described the police visit to the apartment in his BOC form, he did not mention his brother's arrest and detention. Nor did he mention his brother's arrest and detention in his Schedule 12 form; instead, he answered "No" to the question "Have you or any of your family members listed, ever been sought, arrested, or detained by the police or military or any other authorities in any country, including Canada?" The RPD found that these were material omissions that undermined the credibility of the applicant's claim that he is being sought by the police in Nigeria for being gay.

[25] On appeal, the RAD agreed, finding that the arrest of the applicant's brother was a material omission from both the BOC form and the Schedule 12 form that "went to the heart of the Appellant's allegations about being wanted by the police." The RAD also found that the applicant had not provided a credible explanation for these omissions. Finally, the RAD found that the applicant had provided inconsistent testimony about living alone and an evolving account of why his brother happened to be staying at his apartment at the critical time. On the

basis of these findings, the RAD concluded that the applicant had not established that his sexual orientation was disclosed to the police or that he is wanted by the police for being gay.

[26] The applicant obviously disagrees with these conclusions but he has failed to establish that they are unreasonable. On the contrary, they are all fully supported by intelligible reasons grounded in the record before the RAD.

[27] Second, the applicant claimed to have been friends with and then in a same sex relationship with his partner in Nigeria from October 2011 until February 2019 yet he had not produced any evidence to corroborate the existence of this relationship. The RPD found that the applicant's explanations for the absence of corroborative evidence were "confusing and evolving." The RPD also rejected the applicant's explanation for why he had not reached out to his alleged partner for supporting evidence.

[28] On appeal, the RAD agreed with these conclusions. The RAD was careful to note that it was not making an adverse finding on credibility simply on the basis of the absence of corroborative evidence. Rather, "given the material omissions and inconstancies in the Appellant's narrative and testimony, coupled with his lack of knowledge and vague testimony [about his partner in Nigeria], there were valid reasons to question the Appellant's credibility. His failure to provide any corroboration of his relationship further undermines the credibility of his claim."

[29] Once again, on the record before the RAD, these are altogether reasonable conclusions that are supported by sound reasons. Moreover, and contrary to the applicant's submission, these conclusions were all drawn with due sensitivity to the IRB Chairperson's Guideline in effect at the time for "Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression."

[30] The RAD also found that the supporting letters the applicant provided from his parents and his brother were insufficient to overcome the overall concerns with the credibility of the claim. The applicant submits that the RAD erred in giving this supporting evidence less weight because it is unsworn. I disagree. While there is no legal requirement that supporting evidence be sworn, a decision maker can reasonably give less weight to unsworn evidence. Absent a credible explanation for why sworn evidence was not available to support the claim while the same evidence in unsworn form was available, a claimant provides unsworn evidence at their peril.

[31] Finally, the applicant submitted in oral argument that the RAD breached procedural fairness by raising new arguments in support of the RPD's determination which the applicant did not have the opportunity to address. Ironically, this submission is not found in the applicant's Memorandum of Argument. In any event, it is without merit. To the extent that the RAD made additional findings to support the outcome, they all related to the applicant's lack of credibility (a live issue on the appeal) and rest on the evidentiary record before the RPD (of which the applicant was fully aware). In the circumstances of this case, these did not constitute new issues which, as a matter of procedural fairness, the applicant should have been permitted to address

(*Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 at para 31; *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at para 13; *Li v Canada (Citizenship and Immigration)*, 2022 FC 1407 at paras 34-38).

[32] For these reasons, the application for judicial review will be dismissed.

[33] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

JUDGMENT IN IMM-3622-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3622-21
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