

Federal Court



Cour fédérale

Date: 20230525

Docket: IMM-3442-22

Citation: 2023 FC 731

Toronto, Ontario, May 25, 2023

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

JARVIS MICHAEL CONLIFFE

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP CANADA**

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada dated March 30, 2022, which dismissed his appeal of the decision of the Refugee Protection Division [RPD] dated December 3, 2021. The RPD found that the Applicant is neither a Convention refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant, a 35-year-old citizen from the Bahamas, alleged before the RPD and the RAD that he is gay and experienced adversity in the Bahamas because of his sexual orientation, including being assaulted and enduring verbal abuse.

[3] In dismissing his appeal, the RAD found that the Applicant had not credibly established that he is gay or bisexual, that he was ever in a same-sex relationship or had any same-sex encounters, that he was threatened or harmed in the Bahamas because of his actual or perceived sexual orientation or that he is perceived to be gay or bisexual in the Bahamas.

[4] The Applicant asserts that the RAD made two key reviewable errors: (i) the RAD conducted an unreasonable assessment of the admissibility of new evidence (namely, the psychological report of Dr. Gerald Devins) that the Applicant sought to file pursuant to subsection 110(4) of the *IRPA*; and (ii) in failing to consider the report from Dr. Devins, the RAD conducted an unreasonable assessment of the Applicant's credibility.

[5] The parties agree and I concur that both of the issues raised by the Applicant are reviewable on a reasonableness standard. When reviewing for reasonableness, the Court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified. 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 [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 85]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of

justification, intelligibility and transparency [see *Adenjij-Adele v Canada (Minister of Citizenship and Immigration)*, 2020 FC 418 at para 11].

[6] Turning to the first issue, subsection 110(4) of the *IRPA* addresses the admission of new evidence on appeal to the RAD and provides:

Evidence that may be presented

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

Éléments de preuve admissibles

(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[7] Subsection 110(4) provides that the RAD can only consider new evidence if: (i) it arose after the RPD's decision; or (ii) if the evidence was not reasonably available at the time or the person could not reasonably have been expected to present it at the time of the RPD's negative decision. The strict statutory criteria reflect a restrictive approach to new evidence [see *Demberel v Canada (Citizenship and Immigration)*, 2016 FC 731 at para 31; *Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 at para 63]. The test set out in subsection 110(4) is disjunctive, meaning that the RAD must consider whether the new evidence fails to meet both conditions laid out in subsection 110(4) [see *Olowolaiyemo v Canada (Citizenship and Immigration)*, 2015 FC 895 at paras 19-20]. Further, even if the Applicants' evidence falls into one of the two categories

covered in subsection 110(4), the RAD still has the discretion to accept it or not [see *Olowolaiyemo, supra* at para 20]. However, if the RAD determines that the new evidence does not meet the requirements of subsection 110(4), the RAD has no discretion to admit the evidence [see *Figueroa v Canada (Citizenship and Immigration)*, 2016 FC 521 at paras 23, 45].

[8] If the new evidence meets the express criteria of subsection 110(4), the RAD must also be satisfied that it meets the implicit criteria of credibility, relevance and newness [see *Singh, supra* at paras 38 and 74].

[9] Before the RPD, the Applicant had filed a report from Jena Ledson, a registered psychotherapist [Ledson Report]. Ms. Jedson opined, in part, as follows:

It is my clinical impression that Jarvis Conliffe has experienced interpersonal trauma, the effects of which impede his daily functioning. Furthermore, the effects, such as symptoms of anxiety and depression and deficits to interpersonal relating, will likely ensure and intensity under prolonged strain.

[...]

In my opinion, Mr. Conliffe requires resources that will facilitate the development of his relationship with both self and other; additionally, he would benefit from further assessment in order to determine whether observed issues of comprehension are due to (or exacerbated by) stress, or have other causes or influencing factors. Furthermore, his diminished capacities for skillful engagement with others may impede his ability to advocate for himself effectively during future proceedings.

While cognitive difficulties (issues of concentration and memory) were not reported to any significant degree during our interview, they are a common effect of acute stress and therefore could also manifest or intensify during proceedings. Should difficulties become apparent during proceedings, consideration (in the form of repetition or, explanation of questions, pace of questioning, the provision of a break or additional time to respond, and other accommodations as deemed necessary) is recommended.

[10] Before the RAD, the Applicant sought to rely upon the report of Dr. Devins [Devins Report], a clinical psychologist, who conducted an independent psychological assessment of the Applicant on January 19, 2022 (after the RPD's decision). Dr. Devins diagnosed the Applicant as suffering from post-traumatic stress disorder with dissociative symptoms. With respect to the Applicant's testimony before the RPD, Dr. Devins opined:

PSYCHOLOGICAL FUNCTIONING

Mr. Conliffe was exposed to traumatic events in the Bahamas. Deleterious psychological effects persist. His distress intensified after he learned that his application for refugee protection was unsuccessful.

[...]

...Concentration problems interfere with reading and conversation. Mr. Conliffe frequently experiences intrusive ideation (i.e., memories of traumatic events and worries that erupt spontaneously into consciousness). Often, his mind simply goes blank (e.g., under questioning). He has become distracted and forgetful (e.g., he has difficulty recalling the dates and details of past events; he often forgets what he intended to retrieve after opening the refrigerator; he misplaces his keys, searching for them extensively before discovering them in plain view). Concentration and memory problems are common among people exposed to traumatic stress. Difficulties are exacerbated under pressure, such as arises in the high-stakes context of Immigration proceedings. Symptoms may arise in the form of difficulty understanding questions, requests for questions to be repeated or rephrased, inability to retrieve specific details of the past, contradictory responses, or an apparent inability to formulate a coherent response. A central feature of traumatic-stress responses is the suppression of memories associated with the original trauma. People often block – intentionally, unconsciously, or both – details, such as dates or other elements associated with traumatic events, rendering it very difficult, if not impossible, to recall such information. Stress-related cognitive problems can lead to difficulties in providing clear and consistent testimony. Indeed, Mr. Conliffe experienced difficulty concentrating when his refugee claim was heard: He experienced intrusive ideation, his mind went blank in response to questions, and he had difficulty recalling the dates and details of past events. Should he be given another opportunity to testify, it will be important to understand that such problems – should they become evident – likely reflect the

disorganizing effects of traumatic stress rather than an effort to evade or obfuscate.

[...]

DIAGNOSIS AND RECOMMENDATION

[...]

Mr. Conliffe experienced stress-response symptoms when his refugee claim was heard in June 2021. Concentration problems rendered it difficult to focus. He experienced intrusive ideation and his mind went blank under questioning. He had difficulty recalling the dates and details of past events. In light of his distress, cognitive problems, and vulnerability, it is advisable to allow Mr. Conliffe ample opportunities to take breaks during testimony should he be given another opportunity to do so.

[11] The Applicant asserted before the RAD that the Devins Report was admissible as new evidence as it was capable of demonstrating a change in the Applicant's mental health after the RPD's rejection of his claim and in particular, a change relative to that noted by the Ledson Report that was in evidence before the RPD. Counsel argued that these worsening psychological symptoms were relevant as they may have played a significant role in limiting the Applicant's ability to provide testimony before the RPD.

[12] The RAD determined that the Devins Report did not meet the requirements for new evidence under subsection 110(4). While the assessment conducted by Dr. Devins took place after the RPD's determination, the RAD held that the Applicant had not established how the symptoms identified by the Devins Report had arisen or intensified after the RPD's rejection of his claim.

[13] The RAD noted that the Devins Report: (a) described circumstances that pre-dated the RPD decision; (b) did not describe any symptoms existing before the RPD decision; (c) did not indicate

any examination or familiarity with the Applicant, his symptoms or circumstances prior to the RPD's decision; and (d) did not refer to the previous psychotherapist's report or finding. As to the substance of the Devins Report, the RAD's reasons for decision note that the only identified new or intensified symptoms experienced by the Applicant were vague:

[14] ... However, in terms of new or intensified symptoms experienced since the RPD decision, Dr. Devins only indicates that the Appellant's "distress intensified considerably after he learned that his application for refugee protection was unsuccessful" and that the Appellant reported losing weight since that time. However, this is vague, and while I have no reason to doubt that a refugee claimant would be upset by the news of the denial of his refugee claim, it is unclear in what way his distress "intensified."

[14] Considering the foregoing, the RAD concluded that it did not find that the Devins Report was capable of demonstrating a change in the Applicant's mental health since the RPD decision.

[15] The Applicant asserts that the RAD's assessment of the admissibility of the Devins Report was unreasonable, as the report met both the statutory requirements under subsection 110(4) as well as the *Raza/Singh* factors. Specifically, the Applicant asserts that:

- A. The RAD unreasonably focussed on whether or not the mental health symptoms identified by the Devins Report were ones that arose before or after the RPD decision. In doing so, the RAD ignored the basis for why the new evidence ought to have been admitted (namely, to demonstrate how his mental health symptoms affected his ability to testify before RPD) and that this error warrants this Court's intervention.
- B. Given that the report was responsive to the impact the Applicant suffered from receiving the RPD's rejection – which was what led him to seek further assistance

– the Applicant asserts that it was unreasonable for the RAD to expect the Applicant to have obtained the report prior to the rejection. The RPD’s rejection was what triggered the Applicant’s symptoms and his need to undergo a more detailed psychological assessment. The Applicant states that these symptoms may very well have predated the RPD’s rejection, however it was the severity of the impact of the rejection that led to the Applicant becoming aware of his need for further professional assistance.

- C. With regards to the *Raza/Singh* factors, the Applicant submits that the Devins Report: (a) is credible; (b) is relevant as to the ongoing existence and worsening of the psychological symptoms and particular vulnerabilities first noted in the Ledson Report; and (c) is new, in that the Devins Report is able to directly address the RPD’s negative credibility findings and provide further insight into the Applicant’s particular vulnerabilities.

[16] Having considered the RAD’s reasons for decision, I am satisfied that the RAD conducted a reasonable assessment of the admissibility of the Devins Report. Prior to the RPD hearing, the Applicant was alive to the issue of psychological trauma and its potential impact upon his testimony, which is why he placed the Ledson Report before the RPD. As noted above, the Ledson Report identified possible cognitive difficulties that the Applicant might experience when testifying and the Ledson Report was considered by the RPD.

[17] It was open to the Applicant to obtain an initial report from a mental health professional like Dr. Devins (who is qualified to make clinical diagnoses) rather than Ms. Ledson to address

the potential impact of his mental health disorder on his ability to testify, but he chose not to do so. As the Applicant was obligated to put his best foot forward before the RPD, he is bound by the choice he made. It was not open to him to file additional medical evidence before the RAD in an attempt to “bootstrap” and explain why he was found to lack credibility, inconsistent or otherwise unreliable by the RPD. It was therefore open to the RAD to find that a second expert report (now from a clinical psychologist) did not fit the category of evidence that “was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented” [see *Abdullahi v Canada (Citizenship and Immigration)*, 2016 FC 260].

[18] Moreover, with respect to relevance, I fail to see how the worsening of the Applicant’s symptoms after the RPD’s decision has any bearing on the RAD’s consideration of his testimony before the RPD in assessing his credibility, as his symptoms had not yet worsened when he testified before the RPD. In that regard, the Devins Report did not opine that these more severe symptoms were actually present but undetected at the time he testified before the RPD. In the circumstances, it was reasonably open to the RAD to find that the Devins Report was not relevant and to reject the evidence on that basis alone.

[19] Having found that the RAD reasonably determined that the Devins Report was not admissible, the Applicant’s second ground of review need not be addressed as it is based upon the RAD’s failure to consider the Devins Report.

[20] As the Applicant has failed to meet his burden of demonstrating that the RAD’s decision was unreasonable, the application for judicial review shall be dismissed.

[21] The parties proposed no question for certification and I agree that none arises.

JUDGMENT in IMM-3442-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The parties proposed no question for certification and none arises.

“Mandy Ayles”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3442-22

STYLE OF CAUSE: JARVIS MICHAEL CONLIFFE v MINISTER OF
IMMIGRATION, REFUGEES AND CITIZENSHIP
CANADA

PLACE OF HEARING: TORONTO, ONTARIO

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DATED: MAY 25, 2023

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