Federal Court Cour fédérale

Date: 20170714

Docket: IMM-92-17

Citation: 2017 FC 685

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 14, 2017

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MAMADOU PAYE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>JUDGMENT AND REASONS</u>

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board dated February 7, 2017, which confirms the decision of the Refugee Protection Division [RPD] that the applicant is not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The applicant is seeking the review of the RAD's decision essentially on the ground that the approach taken by the member was not consistent with the principles developed in *Minister of Citizenship and Immigration v Huruglica*, 2016 FCA 93, [2016] FCJ No. 313 at paragraph 70 [*Huruglica*]. The respondent argues that the RAD examined the RPD's decision on the standard of correctness and that it was completely justified in giving deference to the RPD's concerns regarding the applicant's oral testimony at the hearing, which the applicant contests.

[3] It should be noted that while the standard of review of correctness applies to the RAD when it decides an appeal, it must, however, carry out "its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred" (*Huruglica* at para 103). The standard of reasonableness applies to the review of the RAD's findings (*Huruglica* at para 35). The Court may intervene only if the RAD's decision is not intelligible, transparent, justified or defensible in respect of the evidence in the record and the applicable law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[4] This application for judicial review cannot succeed.

[5] First I will note some relevant facts.

[6] The applicant is a citizen of Senegal who arrived in Canada on May 23, 2012, with a visitor's visa. Three years later, on April 15, 2015, he claimed refugee protection, fearing for his life if he were to return to his native country, given his homosexuality, which all of his family members know about. In his Basis of Claim [BOC] form, the applicant states that he developed

an attraction to men despite the very tough education by his father and his Muslim religious convictions. It was while kissing a man named Pierre on May 21, 2012, two days before he left for Canada, that the latent homosexuality was established. That experience was a revelation, even if he had never before had sexual relations with a woman or a man in Senegal.

[7] In Canada, the applicant met Angela Maria Caicedo Ruiz, and the two were married on November 11, 2012 (slightly less than five months after his arrival). In his BOC form, the applicant indicates that the first time they had sexual relations left him feeling incomplete and disgusted. Their relationship deteriorated because of a lack of intimacy and because the applicant uttered Pierre’s name during his sexual relations with her. His wife finally broke up with him after she discovered two letters from Pierre. She left the applicant around February 14, 2015, and then apparently communicated with his family members, in particular his sister and his brother-in-law, to tell them about his homosexuality, after which he received several threatening letters from his family.

[8] While the refugee protection claim was under review, the Minister of Citizenship and Immigration Canada [Minister] intervened in the file to advise the RPD that a sponsorship application, still in process, had been filed in the applicant’s name by his spouse in 2013. The Minister points out that, in the sponsorship application, an anonymous letter was faxed to the Canadian immigration authorities on January 6, 2015, stating that the marriage of the applicant and his spouse was fraudulent and had been for immigration purposes and that the marriage had been administered by a counsellor and the applicant’s sister.

[9] At the hearings on June 15, and July 17 and 23, 2015, the RPD confronted the applicant with the contradictory statements submitted in his refugee claim and in his sponsorship application. Note the following problems identified by the RPD regarding the credibility and the subjective fear of the applicant:

(a) Concerning the failure to disclose the existence of his sponsorship application, the applicant responded that he simply thought that the application was no longer in process because when his wife left him on February 14, 2015, she threatened to terminate her sponsorship application. That explanation contradicts the computerized notes from the GCMS, according to which the applicant communicated with Immigration Canada on February 19, 2015, to postpone the interview scheduled for February 23, 2015, by 90 days because his wife was outside Canada, in Colombia, for family reasons. Confronted with that contradiction, the applicant testified at the hearing that he had assumed that she had gone home to Colombia after their break-up. The RPD noted, however, that nothing in the record indicates that his spouse had actually gone abroad. To the contrary, according to the applicant's testimony, she had focused on informing all of his relatives about his homosexuality.

(b) In his affidavit dated March 5, 2013, submitted in support of his sponsorship application, the applicant stated that his love for his wife Angela was real and that he was perfectly happy, whereas in his BOC form, he stated something different. In response to questions from the RPD, the applicant explained that, in his affidavit, he had been talking about his family. The applicant also testified that his

marriage had been orchestrated to hide his homosexuality from his family, but that it had been a marriage based on love.

(c) Following the Minister's intervention in June 2015, the applicant submitted an affidavit from his sister indicating that her husband had fought against her brother's homosexuality, in particular by sending the anonymous letter to the Citizenship and Immigration Canada office to cause his sponsorship application to fail. However, while the husband was told about his brother-in-law's homosexuality by Angela on February 14, 2015, the anonymous letter was faxed on January 6, 2015. When confronted with this contradiction, the applicant explained that he told his sister about his homosexuality when he received his visa, on April 2, 2012. The applicant therefore suspects that she told her husband before Angela did. The applicant also notes that his brother-in-law is two-faced. That response is a new contradiction with his account in his BOC form, in particular regarding his brother-in-law's role in his denunciation and regarding the fact that the applicant discovered his homosexuality in meeting Pierre on May 21, 2012. Also, the RPD finds it hard to understand why the husband would go as far as to denounce his own wife in his letter to the Canadian authorities to harm the applicant.

(d) At the beginning of the hearing before the RPD, the applicant stated that he felt that he was homosexual at the age of 25, after pressure from his father considering his Muslim beliefs. When asked about when he actually discovered that he is homosexual, the applicant replied that it was while kissing Pierre, in

2012, when he was 39 years old. A lot of questions between the applicant and the RPD followed, and the applicant's contradictory responses on several occasions at the hearing were reiterated (RPD's decision at paras 55 to 76). In the end, the RPD found that the applicant's oral and written testimony on the discovery and development of his homosexuality was awkward, inconsistent and contradictory.

(e) Lastly, concerning the reasons for the delay between his arrival in Canada and his refugee protection claim, the applicant explained that he was scared that his family would be made aware of his homosexuality via his refugee protection claim and that he did not know, at the time, that the whole process would remain confidential. However, the applicant testified at the hearing that when he told his sister that he was homosexual on April 2, 2012, she had reassured him by telling him that he could obtain protection in Canada. The RPD does not accept the applicant's explanations, pointing out that the applicant is an educated man and that in the space of three years, he had all the time needed to learn about the procedures, especially considering that he had his sister's support. The RPD was instead of the opinion that the applicant's conduct was inconsistent with that of a person who fears for his safety and his life in his country.

[10] Ultimately, the RPD found that in light of the multiples contradictions, inconsistencies and gaps in the applicant's record, he is not credible and his account was fabricated for the purposes of his refugee protection claim. In his appeal to the RAD, the applicant contested the RPD's non-credibility findings and submitted that his answers did not cause confusion concerning the authenticity of his homosexuality. Furthermore, the applicant tried to have two

letters admitted into evidence to prove his homosexuality and the risks he faces in his country in connection with his sexual orientation. The letters are from his lover, Pierre, and his mother.

[11] Relying on the admissibility criteria set out in subsection 110(4) of the IRPA and in the principles defined by the Federal Court of Appeal in *Minister of Citizenship and Immigration v Parminder Singh*, 2016 FCA 96 at paragraphs 38 to 51, the RAD refused to admit the new evidence. That part of the RAD's decision is not in issue today. Regarding the merits of the appeal, the RAD member pointed out that many inconsistencies were noted by the RPD in the applicant's written account and in the responses provided at the hearing. After carrying out an independent review of the record, the member found that the arguments made by the applicant in his memorandum of appeal should be rejected and that the RAD did not commit any error in its assessment of the applicant's credibility.

[12] Today, the applicant is criticizing the RAD for failing to conduct a complete analysis of his grounds of appeal or an independent analysis of the evidence to come to its own conclusions. The applicant argues that it is not evident in the wording of sections 110 and 111 of the IRPA or in the principles defined in *Huruglica* that the RAD must give deference to the RPD's findings of fact. In fact, the applicant points out that deference is far from automatic. Also, the Federal Court of Appeal has very clearly stated that each time the RAD gives deference to RPD findings of fact or mixed fact and law, it must provide the reasons for doing so, which is not the case here. To the contrary, the RAD's reasons are insufficient, and there was no basis in the record upon which such deference should have been given. In this case, the member simply summarized the RPD's finding and then concluded that it had come to the same conclusion. The applicant submits that

simply stating that an independent analysis was conducted is not sufficient to establish that the member carried out a thorough and complete review. In addition, there is no specific reference in the RAD's decision to any audio recording passages, but instead one general note, at the bottom of the page, that refers to the complete recordings. The applicant thus submits that the member erred in his analysis of the well-foundedness of the appeal, justifying the intervention of this Court.

[13] I cannot agree with the applicant's arguments. The member's general approach was consistent with the applicable law. In essence, I accept the arguments for a dismissal that were made by the respondent in his written memorandum. The RAD's decision must be read as a whole. After writing a short summary of the principles defined in *Huruglica* at paragraph 70, the RAD found that in this case it was appropriate to give some deference to the RPD's findings, which relied on the many inconsistencies between his testimony at the hearing and his narrative in his BOC form. In short, the RAD did not commit a reviewable error of fact or law that could be determinative in this case. In fact, the member was not required to conduct a separate analysis for each argument raised by the applicant in his memorandum of appeal.

[14] Furthermore, it is noted in the jurisprudence that in matters of credibility, the decision-makers, who see and hear the witnesses at the hearing, have an overwhelming advantage that a written transcript cannot replicate (*R v NS*, 2012 SCC 72, [2012] 3 SCR 726 at para 25). In fact, the RPD is in a better position to assess the conduct of the witness, that is, the manner in which the witness testifies and reacts to the cross-examination. On this point, the RAD noted that it nonetheless had the benefit of a little more than a transcript because it was able to

listen to the recordings of the hearing. Nonetheless, that did not replace the advantage of a hearing where oral testimony is heard. After conducting an independent analysis of the record, the RAD found that the RPD did not commit an error in its assessment of the applicant's credibility. The finding was based on the evidence in the record. The RAD reiterated the applicant's inconsistencies with respect to the role played by his brother-in-law and the delay between his arrival in Canada and his refugee protection claim. Noting in passing that it was up to the applicant to establish, on a balance of probabilities, the facts on which his refugee protection claim was based, the RAD dismissed the applicant's appeal and confirmed the RPD's decision.

[15] Even though the Federal Court of Appeal has pointed out various possible scenarios where decision-makers may rely on RPD findings, it found in *Huruglica* at paragraph 74, that the RAD must have the opportunity to develop its own jurisprudence in that respect, pointing out in passing that "there is thus no need for me to pigeon-hole the RAD to the level of deference owed in each case" (Justice Gauthier). In this regard, as it pointed out in a recent decision, the RAD is simply not placed in the same position as the RPD only by virtue of having access to the record of the proceeding (*X (Re)*, 2017 CanLII 33034 (CA IRB) at paras 44–46 [*X (Re)*] (footnotes omitted):

> [44] . . . Much of what transpires in that proceeding is not as clear to the RAD as it is to the RPD. The RPD chooses which issues to raise, the lines of questioning, and the explanations to be requested. The RAD may listen to the audio recording and possibly read a transcript, but has no ability to ask questions or seek clarifications; it is bound by the RPD's choices.
>
> [45] Whether a witness' pause in responding to a question is indicative of evasiveness, or is caused by the interpreter quietly consulting his dictionary, is clear to those in the hearing room but not to anyone listening to a recording. Whether a claimant's

> appearance corresponds to her identity documents cannot be ascertained from a paper record. Whether a witness is reluctant to answer questions or is struggling to understand the interpreter is best determined by a decision-maker in the hearing room. And, while the RAD shares the concerns raised by CCR/CARL with respect to the perils of demeanour evidence, it is of the view that the RPD may legitimately have regard to witness demeanour, though it is better if additional objective facts support a resulting credibility finding.
>
> [Emphasis added.]

[16] While the RAD's analysis and assessment could have been more detailed, in light of the evidence in the record, I am of the opinion that it was appropriate in this case for deference to be given to the RPD's findings, especially in relation to the applicant's many contradictions at the hearing and in his BOC form. Contrary to the regime established for the Immigration Appeal Division [IAD], the RAD generally does not hold hearings (110(3) IRPA), and therefore the RAD does not have the opportunity to see and question the appellant, and its capacity to admit new evidence or hold a hearing is limited.

[17] It is also apparent from the impugned decision that the member actually considered whether or not such deference was owed in the record in this case (RAD decision at paras 32, 42 to 44). Deference is not automatic in all cases where the applicant's credibility is in doubt. While the RPD enjoys a meaningful advantage in assessing inconsistencies, contradictions and omissions in oral testimony, that is not the case for implausibility issues (*X (Re)* at para 50). Implausibility findings are based on extrinsic criteria such as reasoning and common sense, which require the making of such findings. That being so, the RPD has, in most cases, no real advantage over the RAD, which is equally capable of making its own findings in this regard.

[18] In this case, the RPD could enjoy an advantage compared to the RAD regarding the inconsistencies raised in the applicant's testimony, in particular in connection with the discovery of his homosexuality and the contradictions with his sponsorship file. However, deference was not owed to the RPD's findings on the plausibility that the brother-in-law wanted to hurt his wife and the applicant by sending the denunciation to the immigration authorities. While the brother-in-law's involvement is one element among many in the analysis, the contradictions identified regarding the authenticity of the applicant's sexual orientation is a determinative factor in the RPD's decision. In addition, the member stated that he also listened to the recordings of the hearing. He was likely aware of the inherent weakness of transcripts where questions of credibility are at stake. There is no reason to doubt the fact that the member actually listened to the hearing recordings. The fact that the RAD made the same findings as the RPD does not mean that no independent analysis was done.

[19] In all respects, the RAD's decision is reasonable and there is no reason to intervene. This application for judicial review is therefore dismissed. There is no question of general importance to certify.

<u>JUDGMENT in IMM-92-17</u>

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-92-17
STYLE OF CAUSE:	MAMADOU PAYE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JUNE 29, 2017
JUDGMENT AND REASONS:	MARTINEAU J.
DATED:	JULY 14, 2017

APPEARANCES:

Jeanne LaRochelle	FOR THE APPLICANT
Suzanne Trudel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Handfield & Associés, Avocats Montréal, Quebec	FOR THE APPLICANT
Nathalie G. Drouin Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT