Federal Court Cour fédérale

Date: 20170724

Docket: IMM-223-17

Citation: 2017 FC 711

Ottawa, Ontario, July 24, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ABDUL HASEEB

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27, of a decision [Decision] of the Refugee Appeal Division of the Immigration and Refugee Board [RAD] dated December 23, 2016 upholding a decision of the Refugee Protection Division [RPD] denying the Applicant's claim for refugee protection.

[2] The Applicant is a citizen of Pakistan and claims he is at risk of persecution due to his sexual orientation as a gay male. He claims that his sexual orientation was discovered in Pakistan and that he was attacked and threatened as a result. The RPD concluded that the Applicant had not provided sufficient credible or trustworthy evidence to establish his sexual orientation as a gay male on a balance of probabilities and, as such, had not established the factual basis for his fear of return to Pakistan. The RAD concurred with the RPD and dismissed the appeal.

II. Issues and Analysis

[3] The standard of review of an RPD decision by the RAD is correctness. After carefully considering the RPD decision, the RAD must carry out its own analysis of the record to determine whether the RPD erred (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103 [*Huruglica*]). However, there may be cases where the RPD has an advantage over the RAD in making findings of fact, particularly where the findings require an assessment of the credibility or weight to be given to oral evidence; in these cases, the RAD should show some deference to the RPD's factual findings (*Huruglica* at para 70).

[4] The standard of review of this Court in reviewing the RAD's determination on a question of mixed fact and law is reasonableness (*Huruglica* at para 35). Reasonableness requires that the decision exhibit justification, transparency and intelligibility within the decision making process and must be within a range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]).

[5] The Applicant argues that the RAD member did not properly discharge her responsibility by following the *Huruglica* standard she set out in her Decision. In particular, the Applicant argues that the RAD simply adopted the findings of the RPD without conducting an independent review of the evidence. I do not agree.

[6] A review of the RAD Decision demonstrates that the member independently reviewed the evidence before the RPD in determining whether or not that decision was correct. That included listening to the tapes and reviewing the documentary evidence presented (no new evidence was tendered to the RAD).

[7] Next, the RAD proceeded to make its own findings of fact and draw its own conclusions from the record before it. In two instances, the RAD disagreed with the RPD's factual findings, although neither was determinative given the multitude of other negative credibility findings. The RAD made numerous references to the record throughout its reasons, including the audio recording of the RPD hearing. Having reviewed various portions of that audio recording and the RAD's reasoning, I find fault with neither the RAD's review of the RPD's findings, nor any other facet of its Decision. It displayed independence as required by *Huruglica*. Its reasons are nothing short of intelligible, transparent, and justifiable, as required by *Dunsmuir*.

[8] The mere fact that the RAD came to the same conclusion as the RPD does not mean that the RAD did not carry out its own independent analysis of the record or that the Decision was unreasonable. While the RAD does owe some deference to the RPD's credibility findings based on oral evidence, the RAD's conclusions on the record before it were well-reasoned, clear and

cogent, and explained why the RAD was of the same opinion as the RPD. Those conclusions were entirely reasonable and open to the RAD on the record before it.

[9] Before this Court, the Applicant is simply repeating arguments made to the RAD and explanations given to the RPD. Both the oral and written submissions included arguments with respect to unreasonable RPD findings that were simply parroted by the RAD, including in both division's findings about:

- returning to Pakistan as a gay man;
- the city noted on the visa application form;
- the risks that the Applicant took in the hospital with the alleged sexual activity;
- the actions of his alleged partner, and the actions that the said orderly allegedly took with the corpse;
- the Applicant's interpretation of those actions;
- the Applicant's failure to satisfactorily address the medical ethics of those actions and/or report them;
- the Applicant's lack of knowledge about the Canadian student permit application, and the 9 month delay in waiting for that when much quicker options were available;
- other long delays in claiming status after arriving in Canada, despite testifying that he chose Canada because of its ability to protect him as an openly homosexual male;
- the Applicant's joining of the various organizations claimed (519 and Access Alliance of the Pride) only after that long delay, and only after making his claim;

- the quality of supporting evidence; and
- the reliability of the Affidavit from the Canadian medical student in Kyrgyzstan.

[10] At the hearing Applicant's counsel argued that the RPD was simply "superimposing" its own views, rather than considering the Applicant's own evidence and experiences, which were used to "bolster" her conclusion. The Applicant says that those unreasonable findings then went unquestioned by the RAD. Counsel also said that the RAD member could have corrected the RPD.

[11] I find only the last statement to be correct. Having already reviewed why I find that the RPD's conclusions were reasonable and that the RAD independently reviewed the RPD's findings, it is true that perhaps other tribunal members might have come to different conclusions. But, in this case, they did not. Both decision-makers provided unassailable rationale as to why they did not accept the Applicant's story.

[12] Finally, the Applicant strongly criticized the findings regarding delay of claiming status, and explanation of same. Those findings were open to the RPD and, in turn, the RAD. As stated by Justice Scott in *Peti v Canada (Citizenship and Immigration)*, 2012 FC 82 at para 42:

> The respondent contends that [TRANSLATION] "possession of a visa does not rebut the presumption that a true refugee would claim protection at the first opportunity" (see paragraph 27 of the respondent's memorandum). The Court recognizes the soundness of that argument. An applicant's behaviour may become important in analyzing his or her credibility and determining his or her subjective fear. At paragraph 23 of *Niyonkuru*, Justice de Montigny wrote: "[i]t is true that the applicant had a visa which allowed him to remain in Canada until January 2003. The fact remains that his actions were not those of someone truly fearing

> for his life if he were to return home...” The IRB can take this factor into account when assessing Ms. Peti’s credibility.

[13] Similarly, both divisions of the Immigration and Refugee Board involved in this matter reasonably took the other factors enumerated above into account when assessing Mr. Haseeb’s credibility. It is neither the role of the Court on judicial review to reweigh nor re-evaluate existing evidence that was before the RPD and the RAD (*Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12 at paras 59, 61).

III. Conclusion

[14] The application for judicial review is dismissed.

JUDGMENT in IMM-223-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. Counsel presented no questions for certification, and none arose.

3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-223-17
STYLE OF CAUSE:	ABDUL HASEEB v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 19, 2017
JUDGMENT AND REASONS:	DINER J.
DATED:	JULY 24, 2017

APPEARANCES:

Peter Wuebbolt	FOR THE APPLICANT
Michael Butterfield	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Peter Wuebbolt Barrister and Solicitor Etobicoke, Ontario	FOR THE APPLICANT
Nathalie G. Drouin Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT