

Federal Court



Cour fédérale

Date: 20220509

Docket: IMM-5327-20

Citation: 2022 FC 656

Ottawa, Ontario, May 9, 2022

PRESENT: Madam Justice St-Louis

BETWEEN:

DAOUDA NDIAYE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Mr. Daouda Ndiaye, challenges the decision the Refugee Appeal Division [RAD] rendered on October 7, 2020, dismissing his appeal and confirming the decision of the Refugee Protection Division [RPD]. The RAD found that the RPD was correct in its assessment and credibility findings, and was correct as well to conclude that there was no residual evidence to support a claim pursuant to either sections 96 or 97(1) of *the Immigration and Refugee*

Protection Act, SC 2001, c 27. The RAD confirmed that Mr. Ndiaye is neither a Convention refugee nor a person in need of protection.

[2] For the reasons that follow, I will dismiss Mr. Ndiaye's application for judicial review.

II. Context

[3] Mr. Ndiaye is a citizen of Senegal. On January 1, 2016, he left Senegal for Ecuador, and on January 1st, 2017, he arrived in the United States where he claimed asylum, and was denied. On July 7, 2018, Mr. Ndiaye entered Canada between ports of entry in Manitoba, and was brought to the port of entry where he claimed refugee protection and where he was interviewed by a Border Service Officer.

[4] On July 25, 2018, Mr. Ndiaye signed his basis of claim form [BOC]. He alleged to be at risk in Senegal due to his perceived homosexuality. In the narrative he attached to his BOC, Mr. Ndiaye stated, *inter alia*, that in January 2015, he moved from Dakar back home to Taiba Ndiaye to work on his family's farm, and that on November 30, 2015, his family told him that they wanted to marry him to a lady, or to her sister. He refused, as he did not want an arranged marriage. He indicated that in the past, his family would sometimes jokingly call him a homosexual because of the way he dressed. He added that his family labeled him as a homosexual after he refused to marry, and in December 2015, his family went around their community and told everyone that he was homosexual. He added that on December 20, 2015, his family and neighbours came and beat him, and that his parents then broadcasted his homosexuality on the radio and promised a reward if anyone could locate him.

[5] On March 1 and April 3, 2019, the RPD heard Mr. Ndiaye's claim and his testimony, and on April 3, 2019, at the end of the hearing, the RPD denied said claim. The PRD determined that Mr. Ndiaye was neither a Convention refugee nor a person in need of protection.

[6] The RPD had credibility concerns in regards to the following: (1) contradictions as to the date on which Mr. Ndiaye returned to his family home as between January 2015 (in his BOC) or November 2015 (in his testimony before the RPD); (2) the number and the extend of conversations that he had with his parents regarding the arranged marriage as between before November 30, 2015 or only on November 30, 2015, and as to whether the conversation was very short or lasted about five hours while riding from Dakar to Taiba Ndiaye; (3) the time he had been staying with his family before the conversation; (4) where the conversation took place; (5) the timing of the proposal to marry the younger sister; (6) the moment when his family first accused him of being homosexual, before or on December 20, 2015; (7) contradictions as between his testimony and his BOC as to whether he was accused of being homosexual prior to his refusal to marry these women; (8) contradiction as between what Mr. Ndiaye testified that his friend in Dakar thought and what the friend actually wrote in his letter of support; (9) discrepancies as between the content of Mr. Ndiaye's letter of protest in Senegal and his testimony in regards to who wrote it and when; and (10) the letter of assistance allegedly from the Ministry of Interior.

[7] The RPD found that the two documents Mr. Ndiaye had submitted before the second hearing were likely fraudulent. These documents consisted of (1) a letter of protest with the stamp of the Ministry of Foreign Affairs, whereby Mr. Ndiaye himself asks for help and signs on

December 20, 2015 in Dakar, although he had indicated in his narrative that he had not sought help; and (2) a letter from the Minister of Interior granting Mr. Ndiaye protection, also signed on December 20, 2015 in Dakar. The RPD also found that Mr. Ndiaye had not provided or even attempted to obtain reasonably expected corroborative documents, such as the content of his US asylum claim, despite having been asked to provide them.

[8] Mr. Ndiaye appealed the RPD decision before the RAD, and on October 7, 2020, the RAD denied the appeal. Essentially, the RAD shared the RPD's concerns on credibility.

[9] The RAD identified Mr. Ndiaye's arguments on appeal at paragraph 4 of its decision. The RAD identified the determinative issue to be whether the RPD made errors in assessing the Mr. Ndiaye's credibility. The RAD addressed (1) the discussions with the family about marriage; (2) the past accusations of homosexuality; and (3) credibility generally – inconsistencies, fraudulent documents, lack of corroboration.

[10] In regards to the discussion between Mr. Ndiaye and his family about the arranged marriage, the RAD reviewed the RPD's conclusions and Mr. Ndiaye's arguments on appeal, and at paragraphs 23 to 25 of its decision, outlined its own opinion. It confirmed that Mr. Ndiaye was unable to provide a timeline clearly and consistently for when things happened and the lack of context and description of how his family spoke to him about their proposal of an arranged marriage negatively impacted his credibility. The RAD noted that Mr. Ndiaye argued and explained that his family had been hinting about the arranged marriage in the past and took a

firm stance in November, but noted as well that if that was the case, Mr. Ndiaye would have been able to explain this before the RAD and did not do so.

[11] In regards to the past accusations of homosexuality, the RAD indicated that the RPD asked Mr. Ndiaye if he had been accused of homosexuality in the past, i. e., before refusing the arranged marriages, and that Mr. Ndiaye responded more than once that he had not been accused of homosexuality before November 2015 when he refused the arranged marriages. The RAD noted as well that Mr. Ndiaye's BOC stated that he was accused of homosexuality in the past before the refusal of the arranged marriages, and more specifically, that his family would allude to this and joke about the way he dressed. The RAD noted that the RPD put this contradiction to Mr. Ndiaye who explained that he had not understood the question properly. The RAD noted that in appeal, Mr. Ndiaye repeated that this BOC said that there were accusations in the past, but that the RPD question was not clear and he could not respond properly. The RAD did not agree and found that the RPD did ask him more than once and he repeatedly said they were no past accusations.

[12] In regards to credibility generally, the RAD noted that Mr. Ndiaye agreed there were numerous inconsistencies, adding that none raised to the level of serious discrepancy. The RAD noted that Mr. Ndiaye's arguments did not mention what negative credibility findings he was referring to and that he had not provided specific arguments to rebut them. Ultimately, the RAD found that the credibility issues were significant and went to the core of Mr. Ndiaye's claim and credibility.

III. Issues before the Court

[13] Before the Court, Mr. Ndiaye filed a further memorandum, but did not file any affidavit.

[14] Mr. Ndiaye essentially submits that the RAD decision is unreasonable and that it was made without regard to the facts. Mr. Ndiaye submits that a consideration of the facts of the case show that the credibility concerns were misplaced. He particularly raises issues with (1) the move to Taiba N'Diaye; (2) the conversation; (3) the repetition and inconsistency; (4) the jokes and accusations; (5) the corroboration (the need for corroboration; when created; expertise; appearance); and (6) his US Documents.

[15] The Minister first responds that five of the six issues raised before the Court actually challenge findings made by the RPD at first instance, which Mr. Ndiaye did not challenge on appeal to the RAD.

[16] The jurisprudence confirms that “[...] an application for judicial review cannot be based on grounds that could have been raised before the RAD, but were not” (*Essel v Canada (Citizenship and Immigration)*, 2020 FC 1025 at para 10 citing *Canada (Citizenship and Immigration) v RK*, 2016 FCA 272 at para 6 and *Adams v Canada (Citizenship and Immigration)*, 2018 FC 524 at paras 28-29; see also *Ghauri v Canada (Citizenship and Immigration)*, 2016 FC 548 at para 34; *Shaibu v Canada (Citizenship and Immigration)*, 2022 FC 109 at paras 6-9 [*Shaibu*]).

[17] I therefore agree with the Minister that only arguments that were raised before the RAD can be raised before the Court. The Applicant's failure to raise issues about the RPD decision before the RAD, will prevent him from raising these issues for the first time on judicial review (*Shaibu* at para 9).

[18] Mr. Ndiaye's arguments before the RAD are found at pages 31 to 33 of the Certified Tribunal Record [CTR]. Mr. Ndiaye submitted generally that the RPD erred in finding him not credible. He limited his representations and challenged three aspects of the RPD decision: (1) erroneous conclusion on the discussions with the family about the marriage in that (a) the RPD failed to recognize that the big discussion was in November of 2015; (b) the family had hinted about this before November 30, 2015; and (c) it was never a one-minute discussion as it was discussed a lot since he had come home; (2) error on the topic of homosexuality as his BOC and narrative clearly confirmed that *he had been accused* of being homosexual in the past, but the question put to him during the hearing was not clear; and (3) on the topic of credibility, each and every explanation put forward was rejected based on credibility and the RPD conclusion is not supported by the evidence provided.

[19] Notably, before the RAD, Mr. Ndiaye agreed that there were numerous inconsistencies between his BOC, his narrative and his testimony, but argued that none of these inconsistencies raised to the level of serious discrepancy.

[20] It is clear that (1) the move to Taiba N'Diaye; (2) the repetition and inconsistency; (3) the corroboration (the need for corroboration; when created. expertise; appearance); and (4) the

failure to submit the US documents were raised in this Court, but were not challenged before the RAD. I will therefore not address these arguments.

[21] Mr. Ndiaye did raise an argument regarding the accusations of homosexuality before the RAD, but it is in complete opposition to the argument he is now raising before the Court.

Mr. Ndiaye submits that he was justified to testify he had not been *accused* of homosexuality in the past, since the reference in his BOC were labeled as jokes, not as accusations, and since jokes and accusations are distinguishable. However, he did not make this distinction before the RPD, nor in the argument he raised before the RAD. He then argued, quite to the contrary, that his BOC clearly indicated that he had in fact been accused of being homosexual in the past, but that the question put to him by the RPD was not clear and so he was not able to respond accordingly and properly. Having clearly confirmed to the RAD that his BOC states he had been accused of homosexuality in the past, Mr. Ndiaye cannot now come to the Court and argue that his BOC does not state he had been so accused. The RAD cannot be faulted for addressing the argument that Mr. Ndiaye's raised before it. I will thus consequently decline his invitation to consider this argument.

In conclusion, I find that only one of Mr. Ddiaye's argument is properly before the Court which is the one challenging the RAD's conclusion regarding the conversation between Mr. Ndiaye and his family about the marriage. It includes the argument regarding the mistake that the RAD made on the date, i.e., November 20 instead of November 30.

A. *Standard of review*

[22] The applicable standard of review of the RAD decision is presumptively that of reasonableness as none of the exceptions to this presumption applies here. The Court must thus determine if the Applicant, who bears the burden, has shown the RAD decision to be unreasonable.

[23] In *Canada (Public Safety and Emergency Preparedness) v Bafakih*, 2022 FCA 18 at paragraph 27 [*Bafakih*], the Federal Court of Appeal recently outlined again that on a reasonableness review, the focus of the inquiry “must be on the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 83 [*Vavilov*]). Ultimately, the reviewing court must be satisfied that the administrative decision is “based on an internally coherent and rational chain of analysis and [...] is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). The Federal Court of Appeal also reminded us that, as affirmed in *Vavilov*, a reviewing court applying the standard of reasonableness must refrain from deciding itself the issues that were before the administrative decision-maker (*Bafakih* at para 52). The Federal Court of Appeal further outlines that “[i]n other words, it ‘does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the ‘range’ of possible conclusions that would have been open to the decision maker, conduct a de novo analysis or seek to determine the ‘correct’ solution to the problem.’” (*Vavilov* at para 83)” (*Bafakih* at para 52).

[24] Furthermore, the Court is mindful of the particulars when credibility findings are at play. As stated in *Lawal v Canada (Citizenship and Immigration)*, 2010 FC 558 at paragraph 11, “[...] the credibility finding is a question of fact that deserves deference and ought to be reviewed under the reasonableness standard”. In her decision *Charles v Canada (Citizenship and Immigration)*, 2021 FC 520 at paragraph 22, Justice Walker recently held that “[t]he Court owes deference to the RAD’s credibility findings (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 42). The RAD closely examined the RPD’s findings, the evidence and the arguments in the applicants’ appeal memorandum. The RAD does not conduct a ‘line-by-line treasure hunt for error’ (*Vavilov* at para 102)”. The Court must “[...] defer to the RAD’s credibility findings and consider the reasons as a whole in light of the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53; *Odia v Canada (Citizenship and Immigration)*, 2018 FC 363 at para 6)” (*Ba v Canada (Citizenship and Immigration)*, 2019 FC 233 at para 10).

B. *Error in the date*

The RAD wrote the date of November 20, 2015 throughout its decision rather than November 30, 2015. Although this issue has properly been raised before the Court, it has no merit. The inaccurate recitation of a specific date in the context of this decision is not sufficiently material to undermine the reasonableness of the decision and does not warrant judicial intervention. It is distinguishable from the contradictions and inconsistencies found in the record, which cannot reasonably be construed as clerical mistakes.

C. *Conversation between Mr. Ndiaye and his family*

[25] Mr. Ndiaye essentially submits that the RPD, and then the RAD, attributed to him a testimony he never gave, and particularly in regards to (1) the five-hour conversation with his family during the car ride back to the village; (2) statement that November 30 is the first day that he got back; (3) statement that it was a one-minute conversation as it was rather a question from the RPD, not his own testimony and constitutes evidence by the RPD, not by him.

[26] In particular, Mr. Ndiaye submits that the RAD improperly took the statements of the RPD about his testimony at face value, essentially ignoring what the actual testimony was and unreasonably conducted a microscopic examination of the evidence, a line-by-line treasure hunt. He adds that there exists explanation for the inconsistencies and contradictions and offers some explanations to the Court.

[27] First, the explanations for the inconsistencies and contradictions counsel now offers to the Court were not submitted to the RAD, and Mr. Ndiaye, having not file an affidavit, has not testified to them. I will therefore not consider these explanations.

[28] Second, and contrary to what Mr. Ndiaye asserts, the transcript of the RPD hearing confirms that the RAD's factual outline and conclusions correspond to Mr. Ndiaye's actual testimony. I found that (1) Mr. Ndiaye testified that a five-hour conversation with members of his family took place during the five-hour ride from Dakar to the village (CTR at 191); (2) the RAD did not confirm any findings on the date that he got back to his village, but in any event,

page 188 of the CTR confirms Mr. Ndiaye testified that he lived in Dakar from 2007 to 2015 and that in 2015, he left Dakar for Kébémér, particularly on November 30, 2015 (in his BOC, he stated having moved from Dakar to his village in January 2015); and (3) Mr. Ndiaye testified that the conversation was short at pages 172 and 173 of the CTR, he confirmed it was a one-minute conversation at page 173 of the CTR, and again, that it was a “very short” conversation at page 188 of the CTR.

[29] Second, Mr. Ndiaye’s argument that the information comes from a question from the RPD member and not from an answer cannot succeed. I agree with the Minister that the Applicant cannot now, before this Court, argue that he only agreed to part of the question of the RPD member when he did not testify to this nor raised it at the RAD level.

[30] Mr. Ndiaye’s argument that the RAD and the RPD should not do a microscopic analysis of the evidence that he provided has no merit. The RPD and the RAD precisely have to carefully examine the evidence before them. It seems here like Mr. Ndiaye simply disagrees with the weight given to the evidence and in fact, applies caution directed at the work of the Court on judicial review to the RPD and the RAD. However, “[i]t is trite law that disagreements with the weight assigned to evidence is not a basis on which the Court should intervene (*Ye v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 1233)” (*Omorogie v Canada (Citizenship and Immigration)*, 2015 FC 1255 at para 39).

IV. Conclusion

[31] The RAD decision is reasonable and the application for judicial review will consequently be dismissed.

JUDGMENT in IMM-5327-20

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed.
2. No question is certified.
3. No costs are awarded.

"Martine St-Louis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Me Philip Zayed FOR THE APPLICANT
Me David Matas

Me Brendan Friesen FOR THE RESPONDENT

SOLICITORS OF RECORD:

McIntosh Law & Technology FOR THE APPLICANT
Winnipeg, Manitoba

David Matas
Winnipeg, Manitoba

Attorney General of Canada FOR THE RESPONDENT
Winnipeg, Manitoba