Federal Court  Cour fédérale

Date: 20230620

Docket: IMM-9025-21

Citation: 2023 FC 867

Toronto, Ontario, June 20, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

DENNIS MUSAJJAWAZA KABUNGA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant applied for judicial review of a decision of the Refugee Appeal Division (the "RAD") dated November 12, 2021. The RAD confirmed the conclusion of the Refugee Protection Division ("RPD") that he was not a Convention refugee or a person in need of protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act* (the "*IRPA*").

[2] The determinative issue at the RPD and the RAD was the credibility of certain evidence to prove the sole incident that grounded the applicant's claim for protection.

[3] The applicant submitted that the RAD denied him procedural fairness by making credibility determinations about that evidence, without giving him an opportunity to make additional submissions. The applicant also argued that the RAD made errors in its assessment of the evidence that rendered its decision unreasonable, applying the principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.

[4] For the following reasons, the application will be dismissed. The applicant has not shown that the RAD deprived him of procedural fairness or made a reviewable error in its assessment of the evidence.

I. Background and Events leading to this Application

[5] The applicant is a 45-year old citizen of Uganda. His spouse and three children still live in Uganda.

[6] The applicant based his claim for *IRPA* protection on an alleged fear of persecution at the hands of the Ugandan government and its security forces because of his political opinion, specifically, his support for the People Power Movement ("PPM") opposition in Uganda.

[7] The applicant holds a Bachelor's degree in business management from Nkumba University in Entebbe. From January 2016, the applicant worked as a business development

manager at Davema Travel Solutions Limited (“Davema”) in Kampala. His role at the company included leasing company vehicles to clients.

[8] In March 2018, two members of the PPM leased vehicles from Davema to be used in their campaigns. The applicant was involved in leasing the vehicles, although his name did not appear on the documentation.

[9] In August 2018, the authorities arrested several leaders of PPM, and imprisoned them. Other individuals were killed in subsequent weeks, including the driver of one of the leased vehicles.

[10] In September 2018, the applicant travelled to Vancouver to represent Davema at the Vancouver International Travel Expo.

[11] On October 3, 2018, the applicant boarded his flight back to Uganda in Vancouver, with a layover in Toronto. He arrived in Toronto around 2:00 AM local time on October 4, 2018.

[12] At Pearson airport on October 4, 2018, the applicant read an email from his supervisor at Davema. The email advised him that two “military men” had arrived at the Davema office, looking for him. In the email, the applicant’s supervisor advised the applicant not to return to Uganda and to seek assistance from the Canadian authorities.

[13] The applicant decided not to board his onward flight to Uganda and filed a claim for *IRPA* protection later that day.

[14] The applicant's claims for protection were made *sur place* in Canada, supported only by the single event on October 4, 2018, that occurred in Uganda.

II. The RPD and RAD Decisions

[15] The RPD found that the applicant testified that he did not personally experience any threats or violence while in Uganda. His evidence also did not mention any threats or violence against his wife or children in Uganda.

[16] The RPD concluded that the applicant had not established the basis for a subjective fear of returning to Uganda. The RPD had credibility concerns with the "precipitating event" that gave rise to the applicant's subjective fear and his *sur place* claim. That event was the alleged arrival of two men at the applicant's workplace in Uganda, looking for him, while he was in Canada. That event, which allegedly occurred on October 4, 2018, was the only reason the applicant feared persecution in Uganda.

[17] Over several pages in its analysis, the RPD considered three possible reasons offered by the applicant to explain why the men came to his workplace in October 2018 to look for him. The RPD found that each one was speculative.

[18] The RPD assessed the supervisor's email and her later sworn statement. Her email and statement were the only evidence that the two men came to the applicant's workplace looking for the applicant on October 4, 2018. The RPD had credibility concerns with the sworn statement. Although the supervisor was also the head of human resources for Davema, her statement stated that the applicant's employment at the company ended on September 27, 2018, before he represented the company at the Vancouver Expo. The RPD found that her October 4, 2018, email alone did not overcome the credibility concerns with the sworn statement.

[19] Accordingly, the supervisor's sworn statement and the supervisor's email to him on October 4, 2018, and the applicant's speculation about the reasons for the two military men's visit, were not sufficient to establish that the claimant was sought by the military men at work on account of his political opinion. The applicant therefore did not establish the basis for his subjective fear arising from the incident described in the supervisor's October 4, 2018 email.

[20] The applicant appealed to the RAD, which dismissed his appeal. At the outset of its reasons, the RAD summarized its decision as follows:

> The appeal is dismissed. An email which the [applicant]'s supervisor sent to him at the point when he was about to leave Canada was likely an orchestrated attempt to create a paper trail which would then be used to justify an asylum claim. A subsequent statement from the same supervisor which contains somewhat different information than that which has been mentioned in the email message is not credible either. An important consideration is the absence of evidence of continued efforts by Ugandan authorities to pursue the [applicant] or question members of his family living in Uganda. The limited scope of the [applicant]'s political implication [i.e., involvement] while in Canada makes it improbable that this implication came to the attention of the Ugandan authorities.

[21] The RAD concluded that the supervisor's email dated October 4, 2018, did not contain an accurate description of the events that transpired. Instead, it was fabricated by the applicant and his supervisor to create a false impression that he faced the risk of arrest by the Ugandan authorities upon returning to his company.

[22] To reach its conclusion, the RAD examined the applicant's evidence about when and how he received the email, its contents, and how those contents were different from information from the supervisor in her sworn statement. The RAD found that it was obvious from the way the message was formulated that it was a contrived communication, lacking any semblance of authenticity. The RAD found that:

a) the supervisor's email message did not indicate when the two military men attended at the workplace; it was only in her sworn statement, made a year later, that the supervisor explained that the visit occurred the same day;
b) the email characterized the men as "military men", whereas the sworn statement called them "security operatives"; and
c) the email message did not contain any explanation about why the men's visit may be linked to the leasing of vehicles to the PPM five months earlier. The supervisor's sworn statement made that link but only repeated what the applicant has stated in his Basis of Claim form. (Reviewing the two documents in the record, their wording was strikingly similar.)

[23] In addition:

a) the RAD could not understand how the applicant learned of the two men's statement when leaving the workplace that connected their inquiry to the PPM. That statement was not in the supervisor's email but appeared in the applicant's Basis of Claim prepared shortly afterwards;
b) the RAD questioned the applicant's testimony about reading the email shortly after his arrival at Pearson airport from Vancouver at approximately 2 AM, compared with the arrival of the email nearly an hour later at 2:52 AM;
c) the RAD found it peculiar that the supervisor indicated in the email that she first tried to telephone him, although she appeared to be quite familiar with his travel schedule and would have known that he was in the air until shortly before the message was sent; and
d) the RAD found that there was no evidence that the applicant responded to the email message, in one form or another.

III. Standards of Review

[24] If a procedural fairness question arises on an application for judicial review, the Court determines whether the procedure used by the decision maker was fair, having regard to all of the circumstances including the nature of the substantive rights involved and the consequences for the individual(s) affected. While technically no standard of review applies, the Court's review exercise is akin to correctness: *Hussey v Bell Mobility Inc,* 2022 FCA 95, at para 24; *Gordillo v Canada (Attorney General),* 2022 FCA 23, at para 63; *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship),* 2020 FCA 196, [2021] 1

FCR 271, at para 35; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121, at paras 54-55.

[25] The standard of review for the RAD's substantive decision is reasonableness. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov*, esp. at paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33, 61.

IV. Analysis

A. *Procedural Fairness*

[26] The applicant raised two points relating to procedural fairness. The first concerned a possible reasonable apprehension of bias. The applicant claimed that the RAD made a seemingly negative finding about a previous application for a visa, without questioning him on the previous application. However, as the respondent observed, the applicant testified before the RPD specifically about the previous application. The RAD's single sentence about the previous visa application was open to it on the evidence. There is no basis to find any suggestion of an apprehension of bias.

[27] The applicant's second procedural fairness argument was that in its analysis of the email dated October 4, 2018, the RAD raised a new or unrelated ground on the appeal, and relied on new credibility concerns about that email (including a prior visa refusal), without granting him an opportunity to respond. The applicant relied on *Ojarikre v Minister of Citizenship and Immigration,* 2015 FC 896 and *Husian v Canada (Citizenship and Immigration),* 2015 FC 684.

[28] The respondent disagreed. The respondent maintained that the RAD was tasked to conduct its own review of the evidence. In doing so, the RAD could make additional or different credibility findings respect to a document without triggering a requirement to notify the applicant and provide him with an opportunity to respond (citing *Zreihaymanot v Canada (Citizenship and Immigration*), 2022 FC 610, at para 45; *Gadafi v Canada (Citizenship and Immigration*), 2021 FC 1011, at para 24; *Tan v Canada (Citizenship and Immigration*), 2016 FC 876, at para 40).

[29] The respondent also submitted that the RAD was entitled to make independent findings of credibility because credibility was at issue before the RPD, its credibility findings were contested on appeal, the RAD's credibility concerns were linked to the applicant's appeal submissions, and the RAD's conclusions arose from the evidentiary record (citing *Han v Canada (Citizenship and Immigration),* 2021 FC 1390, at paras 31-32; *Gedara v Canada (Citizenship and Immigration*), 2021 FC 1023, at para 32; *Farah v Canada (Citizenship and Immigration),* 2021 FC 116, at para 16; *Nurridinova v Canada (Citizenship and Immigration),* 2019 FC 1093, at paras 44-48; *Bebri v Canada (Citizenship and Immigration),* 2018 FC 726, at para 16).

[30] I agree with the applicant that before considering a question that was not raised before the RPD or by any of the parties to the appeal, the RAD must first notify the party and provide an opportunity to respond: see e.g., *Shoyebo v. Canada (Citizenship and Immigration)*, 2022 FC 1264, at para 30; *Corvil v Canada (Citizenship and Immigration),* 2019 FC 300, at para 13; *He v Canada (Citizenship and Immigration*), 2019 FC 1316, at para 79; *Kwakwa v Canada (Citizenship and Immigration),* 2016 FC 600, at paras 25, 30; *Ching v Canada (Minister of Citizenship and Immigration),* 2015 FC 725, at para 71.

[31] However, if there is no new issue analyzed by the RAD – one that was not before the RPD or raised by the parties in the appeal to the RAD – the RAD is not required in law to provide an opportunity to respond to ensure procedural fairness: *Zreihaymanot*, at para 45; *Gadafi*, at para 24; *Al-Hafidhi v Canada (Citizenship and Immigration)*, 2018 FC 315, at para 37*; Tan*, at para 40; *Bakare v Canada (Citizenship and Immigration),* 2017 FC 267, at paras 18-19; *Ibrahim v Canada (Citizenship and Immigration),* 2016 FC 380, at paras 24-30. On credibility issues before the RAD and the RPD, see, for example, *Oluwatusin v Canada (Citizenship and Immigration),* 2023 FC 378, at para 31; *Li v Canada (Citizenship and Immigration),* 2022 FC 1407 at paras 34-38; *Corvil*, at para 13.

[32] Applying these principles to this case, I agree with the respondent's position.

[33] In my view, there was only one substantive issue before the RPD and the RAD: whether the evidence about the incident on October 4, 2018, was credible and demonstrated that the

events in fact occurred. That incident occurred in Uganda while the applicant was in Canada. It was described, soon after it purportedly occurred, in the supervisor's email on October 4, 2018.

[34] The central issue at the RPD was the credibility of the evidence related to the alleged incident on October 4, 2018. The RPD called it the "precipitating event" for the applicant's subjective fear and *sur place* claim and found that applicant's narrative and testimony stated that the sole basis for his subjective fear was that email on October 4, 2018. In substance, the RPD's concern was whether that incident occurred, as the email and his sworn statement claimed.

[35] For present purposes, the applicant made two important arguments to the RAD on appeal, which challenged the RPD's critical reasoning. First, he challenged the paragraph in which the RPD found it had credibility concerns about the precipitating event that gave rise to his subjective fear and *sur place* claims. The applicant argued to the RAD that the RPD displayed an unreasonable and incorrect doubt about the evidence that the authorities came after the applicant because of the services that he rendered to the PPM and its representatives. He claimed that the uncontradicted evidence only led to the conclusion that Ugandan authorities were seeking the applicant because of his dealings with the PPM and that the RPD's conclusion conflicted with simple logic given the evidence on the record.

[36] Second, the applicant's submissions to the RAD specifically raised the email sent on October 4, 2018, arguing that the RPD:

> … panel's treatment of and/or conclusion to give no meaningful value to the crucial email from the [applicant]'s former supervisor was inexcusably flawed and convenient given the email's

> centrality to the developments that caused the [applicant]'s to seek for protection in the first place.

[37] In my view, the RAD's analysis did not raise a new issue, or a new credibility issue. The RPD's analysis analyzed the credibility of the evidence tendered by the applicant to support the existence of the precipitating incident. The applicant's appeal submissions to the RAD challenged the RPD's reasoning and squarely raised the "crucial" email, inviting the RAD to analyze its contents and rely on it to support the applicant's claim for protection. Procedural fairness as established in the applicable case law did not require the RAD to advise the applicant that it proposed to analyze the email to determine whether its contents contained accurate information, or to provide the applicant another opportunity to make submissions on the truth of its contents or the circumstances when he read it at Pearson airport.

[38] Accordingly, the applicant's procedural fairness argument does not succeed.

B. *Should the RAD's decision be set aside as substantively unreasonable?*

[39] The applicant submitted that the RAD's decision should be set aside as unreasonable because the RAD was not reasonable in its assessment of the evidence in reaching its conclusions. The applicant relied on his submissions on the appeal to the RAD. He also noted that his evidence to the RPD was uncontradicted.

[40] The applicant did not demonstrate that the RAD's assessment of the evidence, or its conclusions on credibility issues, were unreasonable as failing to exhibit the hallmarks of intelligibility, transparency and justification, or specifically that the RAD fundamentally

misapprehended the evidence or ignored any material evidence: *Vavilov*, at paras 15 and 126. The Court is not permitted to come to its own view on the evidence or reassess or reweigh that evidence in place of the RAD: *Vavilov*, at paras 83, 125.

[41] The RAD made no reviewable error in its analysis of the timing of the applicant's arrival at Pearson airport at approximately 2:00 AM and the arrival of the supervisor's email at 2:52 AM. The RAD essentially found that his testimony about reading the email, and the time of the email's arrival, did not match up: the applicant's testimony implied that he arrived at the airport and read the email before it was sent (based on the timestamp on the email). That observation was open to the RAD on the evidence and its reasoning on this point was intelligible.

[42] There is no basis for the Court to intervene based on the applicant's position that the RAD's reasoning contained contradictory findings or an internal inconsistency. The applicant noted the RAD's statement that he came to Canada "under the guise of a business trip" but in the next sentence, the RAD indicated there was a legitimate purpose to that trip. These statements must be read with the rest of the paragraph and the associated testimony before the RPD. Doing so clarifies their meaning: the RAD concluded that the applicant was using the legitimate business trip as an opportunity to try to remain in Canada. The applicant has not shown that the evidence constrained the RAD from making that finding.

[43] The applicant has provided no persuasive basis for this Court to intervene with respect to the RAD's credibility or other findings. Its conclusions were reasonably open to it on the evidence.

V. Conclusion

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

[45] Neither party proposed a question to certify for appeal, and none will be stated.

JUDGMENT in IMM-9025-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Kingsley Jesuorobo	FOR THE APPLICANT
Nomanthika Kaneira	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kingsley Jesuorobo Barrister & Solicitor North York, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT