Federal Court Cour fédérale

Date: 20231207

Docket: IMM-9042-22

Citation: 2023 FC 1627

Toronto, Ontario, December 7, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

MUSA TRAWALLY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Refugee Appeal Division and the Refugee Protection Division dismissed the applicant's claims for protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*) because he failed to prove his personal identity.

[2] In this application for judicial review, the applicant seeks to set aside the RAD's decision as unreasonable, applying the principles in *Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65,* [2019] 4 SCR 653.

[3] The applicant is a citizen of The Gambia. He claimed protection under the *IRPA* based on fear of persecution because of his race and political opinion.

[4] By decision dated February 23, 2022, the RPD denied his claim for *IRPA* protection.

[5] By decision dated August 29, 2022, the RAD dismissed his appeal.

[6] The applicant submitted that the RAD made reviewable errors on several issues, which I will address in turn.

I. **<u>Did the RAD make a reviewable error in declining to admit new evidence on appeal?</u>**

[7] The applicant submitted that the RAD erred by failing to admit new evidence on appeal. He did not provide a birth certificate to the RPD to show his identity but applied to file a birth certificate dated December 7, 2021, and an authentication of birth certificate dated December 28, 2021, as new evidence before the RAD.

[8] The applicant submitted that the RAD had discretion to admit these documents as proof of his identity (relying on *Denis v. Canada (Citizenship and Immigration),* 2018 FC 1182, at paras 63-65) and that it was unreasonable not to admit them.

[9] I see no reviewable error in the RAD's reasoning. The Court's decision in *Denis* did not suggest, as the applicant's position implied, that the RAD did not have to apply the statutory requirements in *IRPA* subsection 110(4) for admission of new evidence on appeal. Nor did the RAD have plenary discretion to admit new evidence. The reasons in *Denis* stated that the RAD was not "entirely without discretion" in considering new evidence for appeal "*within* the confines" of the three elements in subsection 110(4): *Denis,* at para 63 [original italics]. The Court observed that the first two requirements (newness and reasonable availability of the proposed new evidence before the RPD) appeared to be relatively objective and conferred little if any discretion on the RAD, but the third element (the applicant could not reasonably have been expected to have presented the new evidence to the RPD) was quite broad and entailed a certain degree of inherent discretion in its application: *Denis,* at para 63.

[10] In this case, the RAD held that the proposed documents did not meet the three statutory requirements in *IRPA* subsection 110(4). The RAD found that the documents predated the RPD's decision, were reasonably available at the time of that decision and the applicant did not provide sufficient information to justify why they were not filed with the RPD at the time. In addition, he did not advise how he received them and did not provide a copy of his email on December 29, 2021, to his counsel before the RPD decision (in which he allegedly tried to send the documents

to his lawyer but failed to attach them). The deadline for filing was extended from January 5 to January 12, 2022. The RPD's decision was made on February 22, 2022.

[11] In my view, these findings were open to the RAD on the record when it applied the statutory requirements for new evidence on appeal. The present application does not permit the Court to decide for itself how to apply the statutory criteria to the circumstances.

[12] The RAD also set out concerns about the source and circumstances in which the birth certificate and authentication came into existence. The applicant did not challenge these findings.

II. Did the RAD make a reviewable error in its reasoning related to the applicant's personal identity?

[13] Proof of identity is a fundamental component of every refugee protection claim. In *Yusuf Adan v. Canada (Citizenship and Immigration),* 2022 FC 1383, Justice Norris stated at paragraph 51 (citations removed):

> Identity is at the "very core of every refugee claim" […]. Proof of identity is therefore an essential requirement for a person claiming refugee protection. Without this, there can "be no sound basis for testing or verifying the claims of persecution or, indeed for determining the Applicant's true nationality" […]. A failure to prove identity will be fatal to a claim; absent proof of identity, there is no need to examine the evidence or the claim any further: […]. In short, a refugee claimant must establish that they are who they say they are. At a minimum, this encompasses their personal identity and their nationality (or lack of nationality, as the case may be). Should they fail to establish these things, their claim for protection must also fail.

A. ***Alleged Failure to understand the applicant's personal background***

[14] The applicant submitted that the RAD's analysis imposed its own "worldview" on the applicant and did not properly appreciate his background. He acknowledged that the RAD stated that it understood that he and his family came from an underclass in The Gambia that is akin to slave-status (known as Komo persons), had little education other than learning the Koran, and grew up simply in a small village. However, the applicant maintained that the RAD failed to implement that understanding when it assessed the evidence of personal identity, leading to the absence of justification and intelligibility in the RAD's decision as required by *Vavilov*. The applicant referred to *Valtchev v. Canada (Minister of Citizenship and Immigration),* 2001 FCT 776, at para 9.

[15] I have considered the applicant's submissions carefully, noting where the RAD's reasons accounted for this concern. It did so in several places, presumably because the applicant made substantially the same submissions in his appeal to the RAD as he did to the Court on this issue.

[16] In my view, the RAD's reasons displayed and implemented a satisfactory appreciation of the applicant's background and circumstances. As the applicant recognized, the RAD set out his concerns on this issue at the outset of its reasons (at paragraph 3). The RAD assessed the applicant's submissions about his background in its analysis of four of the five issues on appeal, and did so in sufficient depth to show that it understood the applicant's arguments. Although his appeal did not succeed overall, the RAD agreed with the applicant's arguments that the RPD made errors on two issues by failing to appreciate his background (at paragraphs 21, 28). The RAD disagreed on other issues; it concluded for example that the country condition evidence did

not support his position that Komo persons were unable to obtain identity documents (paragraphs 29, 42).

[17] Accordingly, I find no reviewable error in the RAD's reasons on this issue.

B. ***The applicant's Gambian passport***

[18] The applicant submitted that the RAD erroneously relied on one document in the National Documentation Package ("NDP") for The Gambia, but instead should have applied two others, to assess how he obtained his passport. The applicant argued that he obtained a machine-readable passport rather than a biometric passport. He submitted that the RAD erred by applying the requirements for obtaining a biometric passport, found in an NDP document published after he obtained it.

[19] The applicant's submissions cannot succeed. He testified that he provided his name, date of birth and an old photo to his father's friend, who obtained the passport. He signed it in December 2018. The RAD concluded that this process was inconsistent with country condition evidence on how to obtain a passport in The Gambia, including the supporting documents necessary to do so. In addition, the passport was issued in September 2018 with his signature electronically embedded. The RAD also found that he had not properly proved his identity to Gambian authorities before they issued the passport.

[20] The RPD concluded that the Gambian authorities began issuing biometric passports in 2014, a finding not challenged by the applicant on appeal to the RAD. Both the RPD and RAD

applied the requirements for a biometric passport. Although it appears that neither one made an express finding that it was biometric, the applicant's submissions on appeal to the RAD seemed to accept it. He only raised this factual issue in his application to this Court and did not point to any evidence to show that the RAD ignored or fundamentally misapprehended the evidence in the record: *Vavilov,* at para 126. In my view, the applicant has not shown that the RAD made a reviewable error by applying erroneous country evidence for obtaining a passport in The Gambia.

[21] Nor can I find that the RAD made a reviewable error in its assessment of the circumstances leading to the applicant obtaining his passport. The applicant has not shown that the RAD failed to respect the constraints arising from the evidence in the record. The Court cannot revisit the merits of the RAD's conclusions: *Vavilov,* at paras 83, 125-126.

[22] I observe that even on the applicant's position concerning the country evidence, the other NDP document advised that he would have had to submit proof of his parents' identities and a birth certificate or signed proof of his birthplace – neither of which he did, according to the RAD's findings based on the applicant's own testimony.

[23] Accordingly, the applicant has not shown a basis for this Court to interfere with the RAD's decision on these issues.

C. ***The RAD's reasoning related to the misspelling of the applicant's name***

[24] The RAD identified a reliability concern about the applicant's passport. The spelling of his first name in his passport ("Musa") was different from the spelling in the Canadian immigration documents he completed ("Mussa").

[25] The applicant submitted that the RAD's reasoning was unintelligible because it was internally inconsistent. The applicant argued that RAD found, contrary to the RPD, that given the applicant's limited education and background, it was unlikely that he would have known to provide his exact legal name on formal documents. Yet the RAD also agreed with the RPD that the applicant's explanations for misspelling his name made "little sense" – the explanation was that he used the spelling in his email address, but the documents did not ask for his email address and he did not testify that he did not know how to spell his own name correctly. The RAD concluded that he did not provide a sufficient explanation for having misspelled his name in all the Canadian forms, and noted that his amended narrative filed via his former counsel contained the same error.

[26] The respondent submitted that the RAD's assessment of the misspelling was reasonable, arguing that the RAD did not miss the point: "if one knows how to spell one's name, it is illogical to spell it differently without reason, regardless of implications".

[27] The respondent noted that there were many reasons why the RAD and the RPD found that the applicant's Gambian passport was not reliable, only one of which was the inconsistency between it and the various documents completed by the applicant after arrival in Canada. The

RAD had concerns about how the applicant obtained the passport. The respondent also noted that the RAD relied on the absence of other Gambian government-issued identity documents including a national identity card and a birth certificate.

[28] I agree substantially with the respondent. While the RAD's reasoning was arguably not perfect, it did not have to be, and any imperfection did not render the overall decision unintelligible: *Vavilov,* at paras 91, 102-104. The applicant did not challenge the RAD's point that he did not testify that he could not spell his own name. With all of the other reliability and identity issues identified by the RAD, I am unable to find that an imperfection in the RAD's reasoning on this issue was so fundamental as to vitiate the entire decision that he had not established his personal identity: *Vavilov,* at para 100. The Court cannot theorize, as the applicant invited, on whether personal identity would have been an issue if the applicant had not misspelled his name on the Canadian documents.

D. *The affidavits of the applicant's mother and his father's friend*

[29] The applicant submitted that the RAD failed to give effect to the evidence in his mother's and his father's friend's affidavit, which he argued were corroborative and supported his own evidence of his identity. The applicant argued that there was cumulative evidence about his identity.

[30] The applicant has not demonstrated a reviewable error in the RAD's assessment of this evidence. The RAD gave the evidence some effect, although not as much weight as the applicant wanted. The RAD found that the mother's affidavit corroborated that his name is "Musa" and the

name of his deceased father, but gave it less weight because it had not been properly authenticated by the commissioner of oaths – unlike his father's friend's affidavit, for which the friend's identity had been authenticated by the same commissioner of oaths. The RAD also gave the friend's affidavit some weight as it corroborated his name as "Musa Trawally" and that he lived in The Gambia. The RAD found that neither document corroborated his citizenship or his date of birth. The applicant's submissions did not persuade me that the RAD made a reviewable error in its treatment of this evidence.

E. ***Other issues raised in the applicant's written submissions***

[31] The applicant raised a number of other issues in his written memorandum. None of them established a reviewable error in the RAD's decision.

III. **Conclusion**

[32] This application must be dismissed, because the applicant has not shown that the RAD made a reviewable error in its decision.

[33] There is no question to certify for appeal.

<u>JUDGMENT IN IMM-9042-22</u>

1. The application is dismissed.

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

"Andrew D. Little"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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