

Federal Court



Cour fédérale

Date: 20130527

Docket: IMM-5442-12

Citation: 2013 FC 553

Ottawa, Ontario, May 27, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

TUKONDJA MBIRIMUJO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Refugee Protection Division [RPD] rendered orally on May 28, 2012 and with written reasons dated July 5, 2012, denying the Applicant refugee protection.

I. Facts and decision under review

[2] The Applicant is a 32-year-old single citizen of Namibia. He fears society and authorities because he is Christian and homosexual as well as his uncle who is targeting him because he refused to marry his cousin.

[3] The RPD determined that the Applicant is not a Convention refugee or a person in need in of protection.

[4] First, the Applicant did not declare, at the interview at the point of entry that he is targeted because he is homosexual although at the hearing, this fact was a core allegation in his claim. The RPD rejected the Applicant's explanation that he was afraid of the officer in uniform because police in Namibia did not listen to him and that he thought the officer might reject him. The RPD noted that the Applicant is an articulate and confident person who received a high school education and that he stated that he chose to come to Canada and not stay in Germany, where he changed planes, because he heard from friends of a relative that Canada would be a good place for him. Therefore, the RPD considered that he should have mentioned the fact that he is targeted because of his sexual orientation at the port of entry.

[5] The RPD also determined that the Applicant's alleged fear due to his Christianity was not credible because when asked at the hearing why he was seeking protection he referred to his fear of being targeted because of his homosexuality and fear of being forced to marry his cousin. The RPD rejected the Applicant's explanation that the issue of his Christianity was already addressed earlier

in the hearing when he explained that his uncle mocked him because of his religion and homosexuality since the earlier questions asked by the member concerned his declaration at the port of entry in Canada. Therefore, the RPD concluded that had the Applicant's Christianity been the cause of his fear of persecution, he would have addressed it when asked specifically why he is targeted by his uncle. The RPD again noted that the Applicant showed to be a well-spoken person.

[6] The RPD further noted that the Applicant presented no evidence to establish his allegation that he had a same-sex relationship in Canada. His explanation that the relationship ended and that he tried to contact his former partner was rejected by the RPD as it considered that the person would have been present to provide testimony in support of the Applicant's highly important claim or alternatively, that the Applicant should have provided evidence that he made serious efforts to secure the former partner's testimony or evidence.

[7] The RPD made brief mention of the fact that the Applicant could have made a refugee claim in Frankfurt, Germany where he changed planes.

II. Applicant's submissions

[8] The Applicant first submits that the RPD's determination that the Applicant has not established on a balance of probabilities that he is homosexual is unreasonable. The RPD unreasonably excluded relevant documentary evidence such as a letter from the Applicant's former homosexual partner in Namibia, a letter from Rev. Brent Hawkes and a letter from his counsellor.

[9] The Applicant also argues that the RPD's assessment of the Applicant's explanation that he did not tell the officer at the point of entry that he was homosexual because of his prior experience with uniformed authorities in Namibia is unreasonable as it disregards the fact that he is a man who has spent his entire life in a homophobic country. Moreover, the RPD erred in focusing on his educational background.

III. Respondent's submissions

[10] The Respondent submits that in the RPD's oral decision, it is indicated that it did not accept the late filing of the evidence. Moreover, at the beginning of the hearing, the RPD provided the Applicant with the opportunity to specifically explain why the documentation was submitted late and no persuasive argument was given by the Applicant as to why he did not gather the documents earlier.

[11] The Respondent submits that in any event, the RPD considered the entirety of the evidence submitted by the Applicant including all the letters and concluded that it did not establish on a balance of probabilities that the Applicant is targeted because of his Christianity and homosexuality. Moreover, it is open to the RPD to find that opinion evidence is only as valid as the truth of the facts on which that opinion is based and the RPD is not required to defer to the opinion of the author of the report, especially on matters such as the claimant's credibility.

[12] Second, the RPD reasonably rejected the Applicant's explanation on why he did not tell the officer at the port of entry that he fears going back to Namibia because of his homosexuality as he specifically waited to come to Canada to make a refugee claim because he thought Canada was

receptive to a person who fears returning to his home country because of his homosexuality and Christianity. It was therefore unreasonable for the Applicant to think that he would not be allowed to make a refugee claim on this basis. Omission of pertinent evidence during the port of entry interview is a sufficient basis for making an adverse credibility finding.

[13] Third, the RPD reasonably found problematic the fact that his first response to why his uncle is targeting him is that he is homosexual but he failed to disclose this fact during the port of entry interview. Therefore, the RPD did not err by considering the educational background of the Applicant as it was pointing out why it did not accept his explanation for his failure to mention that he was targeted because he is homosexual.

[14] The Respondent also submits that questions of credibility and weight of evidence are within the jurisdiction of the RPD as the trier of fact in respect of refugee claims.

[15] In conclusion, the Respondent submits that the RPD provided clear reasons for denying the Applicant's refugee claim and that the decision falls within the range of acceptable outcomes and that the Applicant simply disagrees with the weight that was accorded to this evidence.

IV. Issues

1. Was the RPD's exclusion of evidence made in accordance with the law?
2. Are the RPD's credibility findings reasonable?

V. Standard of review

[16] The RPD's decision to exclude evidence raises an issue of procedural fairness (*Nagulesan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1382 at para 17, 44 Imm LR (3d) 99; *S.E.B. v Canada (Minister of Citizenship and Immigration)*, 2005 FC 791 at para 25, 2005 CarswellNat 1583), which is reviewable under the standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 111, [2009] 1 SCR 339). As for the second issue, findings of credibility are questions of fact and are therefore to be evaluated on a standard of review of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53, [2008] 1 SCR 190).

VI. Analysis

A. *Was the RPD's exclusion made in accordance with the law?*

[17] The RPD's determination as to the admissibility of the evidence that was filed late is incomplete as it did not properly apply the factors outlined in section 30 of the *Refugee Protection Division Rules*, SOR/2002-228 [RPD Rules].

[18] The RPD explained at the end of the hearing that it rejected all the evidence that was filed late as the explanation to the effect that he wanted to wait to have all the documents before he submitted them was not found satisfactory. Therefore, it did not consider the letter from Rev. Dr. Brent Hawkes, the letter from the Applicant's former sexual partner in Namibia and the letter from the counselor, although in the latter case, the RPD however considered the Applicant's testimony with regards to his meetings with a counselor.

[19] Under the prior version of section 29 of the RPD Rules, the Applicant was required to file a copy of the documents in support of his claim 20 days before the hearing. As the documents were filed late, in its decision, the RPD was under an obligation to consider the factors set out in section 30 which reads as follows:

*Refugee Protection Division
Rules, SOR/2002-228*

*Règles de la Section de la
protection des réfugiés,
DORS/2002-228*

30. A party who does not provide a document as required by rule 29 may not use the document at the hearing unless allowed by the Division. In deciding whether to allow its use, the Division must consider any relevant factors, including

30. La partie qui ne transmet pas un document selon la règle 29 ne peut utiliser celui-ci à l'audience, sauf autorisation de la Section. Pour décider si elle autorise l'utilisation du document à l'audience, la Section prend en considération tout élément pertinent. Elle examine notamment :

(a) the document's relevance and probative value;

a) la pertinence et la valeur probante du document;

(b) any new evidence it brings to the hearing; and

b) toute preuve nouvelle qu'il apporte;

(c) whether the party, with reasonable effort, could have provided the document as required by Rule 29.

c) si la partie aurait pu, en faisant des efforts raisonnables, le transmettre selon la règle 29.

[20] A reading of the transcript shows that there was an exchange between the RPD and the Applicant and his counsel on the late filing of the documents and their general purpose but at no time did the RPD conclude on the relevancy and probative value of each document. As noted above, there is an oral decision which makes a general comment on relevancy but without explanation. A

reader can only be left with no understanding as to the relevancy and probative value of each document. Such is not what Rule 30 requires in such a situation.

[21] The RPD took into consideration the fact that the Applicant was represented by an experienced counsel. The panel also assessed the explanation given for his failure to provide his documents, which he deemed unsatisfactory. He further noted that he considered that the Applicant started to gather documents only once he received notice of the hearing.

[22] However, in the RPD's decision, there is no determination as to the probative value placed on the documents filed late or as to their relevance if they had been adduced as part of the evidence, which are factors to be considered (*Mercado v Canada (Minister of Citizenship and Immigration)*, 2010 FC 289 at para 38, 192 ACWS (3d) 1319). Moreover, the RPD only considered in part whether the Applicant, with reasonable efforts, could have provided the document as required by Rule 29.

[23] Indeed, while the RPD acknowledges that there are other factors to consider besides the relevance of the document, it does not actually examine the relevance of the documents filed late or their probative value. The RPD's analysis is focused on the reasons why the documents were filed late and on the lack of diligence of the Applicant, which is one among other factors that needs to be considered. On this point, the RPD's examination of the last criteria is incomplete. Indeed, its analysis of whether the Applicant, with reasonable efforts could have provided the documents 20 days before the hearing held on May 28, 2012, the RPD ignored that a number of documents were not available on or before May 8, 2012, namely the letter by Rev. Dr. Brent Hawkes dated May 23,

2012, the letter by the Mental Health Counselor dated May 14, 2012 and the letter by the LGBT Settlement Coordinator dated May 17, 2012.

[24] Among the documents that were not considered by the RPD are the photographs of the Applicant with his former partner in Namibia as well as a letter by the latter confirming that he had a homosexual relationship with the Applicant. Such evidence may have been found admissible by the RPD despite the lateness of its filing, as they consist of relevant evidence that may have established the Applicant's sexual orientation, had they been admitted by the RPD. It was therefore incorrect to reject the documents filed late without doing a proper analysis by reviewing the factors put forward by the prior version of section 30 of the RPD Rules.

B. Are the RPD's credibility findings reasonable?

[25] In light of what is mentioned above and since the RPD may not have had all the documentary evidence as a result of its decision not to accept the late filing of certain documents, it is not necessary to decide the second question. As a new panel will be reviewing the case to be presented by the Applicant, it will then make a new decision in light of the evidence submitted and the testimony(ies).

JUDGMENT

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

“Simon Noël”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5442-12

STYLE OF CAUSE: TUKONDJA MBIRIMUJO
v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 23, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** NOËL J.

DATED: May 27, 2013

APPEARANCES:

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