

Federal Court



Cour fédérale

Date: 20140915

Docket: IMM-1458-14

Citation: 2014 FC 879

Ottawa, Ontario, September 15, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

VAHID GHANNADI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of Refugee Appeal Division [RAD] member Douglas Fortney's decision to uphold a Refugee Protection Division [RPD] decision rejecting the Applicant's claim for refugee protection in Canada. The rejection was based on a finding that the Applicant was neither a Convention Refugee nor a person in need of protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

I. Issues

[2] The issues in the present application are as follows:

- A. Did the RAD breach procedural fairness in not accepting the new evidence presented before it?
- B. Did the RAD err in finding that the RPD had not breached procedural fairness in not asking the Applicant about why he had not disclosed his sexual orientation at Port of Entry into Canada?
- C. Was the RAD acting reasonably in accepting the RPD's findings against credibility and plausibility?

II. Background

[3] The Applicant is a 22 year old citizen of Iran.

[4] He arrived in Canada on or about January 11, 2013, and claimed refugee protection status upon his arrival.

[5] His Port of Entry [POE] interview based his claim on political persecution. He later recanted this reason and amended his Basis of Claim [BOC] dated January 28, 2013, to base his claim on his sexual orientation as a gay man.

[6] Since the Applicant's arrival in Canada he has resided with the Jamali family in Port Moody, and then moved into Vancouver and shared an apartment with Cerrah Hosseinian (Ms.

Jamali's daughter). The Applicant spent most of his time at home. The Applicant has discussed his sexual orientation openly with the Jamali family, and has shared his sexual orientation with his mother in Iran, since arriving in Canada.

[7] On August 4, 2013, Ms. Husseinian took the Applicant to the gay pride parade in Vancouver.

[8] The Applicant moved from Port Moody to Vancouver in November 2013. Since this move he has made contact with the Rainbow Refugee community group at least once.

[9] The RPD rejected the Applicant's claim orally on October 8, 2013. Written reasons were provided with a notice of decision dated October 28, 2013.

[10] Credibility was a significant issue for the RPD panel member, who found:

- a. The Claimant lied about political activities being the reason why he was fleeing Iran, then later changed his BOC to state it was because of his homosexuality;
- b. His mother made a statement under oath by phone that the Applicant had never been with a girl or had a girlfriend (after the Applicant had stated that his mother knew about his relationship with his ex-girlfriend Sarah);
- c. The mother changed her statements a few times on the phone interview and noises seemed to suggest she was referring to paperwork for answers;
- d. The mother testified differently than the Applicant about his profession and work experience;

- e. The Applicant and his mother further contradicted each other in describing the Applicant's most recent boyfriend Behnam;
- f. The mother testified that the Applicant is at risk of being arrested and tortured by the Basiji but her testimony was found not-credible and only speculative at best;
- g. There was no proof of the existence of the initial boyfriend and no evidence of attempts to contact the newest boyfriend;
- h. The Claimant did not present evidence that he is a homosexual in Canada and further has not sufficiently proven he is a homosexual in Iran;
- i. The only evidence is the Claimant's testimony that he went to a Gay pride parade with Ms. Husseinian in Vancouver. Any efforts to contact or be involved with the gay community in Vancouver was through Ms. Husseinian and the Applicant never followed up;
- ii. There was no evidence of trying to contact anyone in the worldwide gay community online, or by phone.

[11] Prior to the Appeal, the Applicant submitted two new pieces of evidence for the RAD to consider in his case: first, a letter from a Rainbow Refugee coordinator obtained after his first visit to the community group (after the RPD decision); second, the UNHCR Guidelines for refugee claims, based on sexual orientation, dated October 23, 2012.

[12] The Applicant appealed the RPD decision to the RAD. The RAD affirmed the RPD decision and rejected the Applicant's claim on February 18, 2014.

III. Standard of Review

[13] The standard of review is correctness regarding the issues of natural justice of procedural fairness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 43-44). The standard of review for alleged errors of fact dealing with credibility and implausibility is reasonableness.

IV. Analysis

A. *Did the RAD breach procedural fairness in not accepting the new evidence presented before it?*

[14] The Applicant provided information as to why he could not have reasonably been expected to present the letter prior to the RPD decision in his written statement; referencing his state of mind, the distance between where he was living (Port Moody) and the community group, as well as language barriers. It is also argued that the RPD and RAD did not consider the factors in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] sufficiently, in assessing the evidence.

[15] Further, since the RAD admitted that the RPD relied heavily on the Applicant's lack of efforts to participate in the Vancouver gay community in its credibility assessment, the Applicant states that the new evidence is demonstrably relevant and material. The RAD also acknowledged the credibility of the letter's source.

[16] The Applicant concedes he should have submitted the UNHRC evidence prior to the RPD decision, but his counsel at the time did not bring it to his attention. However, the Applicant argues that the decision not to admit the UNHCR guidelines was not supported by adequate analysis. It was only an unsupported statement by the RPD and monitored by the RAD that it does not meet the test for relevance and materiality, and there was no discussion of the source's credibility.

[17] When considering whether new evidence should be admitted, the following factors should be considered: credibility, relevance, newness, and materiality, in addition to any express statutory provisions (*Raza* at para 14).

[18] While the letter is arguably a new piece of evidence, it is reasonable to have expected similar evidence be presented at the RPD hearing. The credibility of the author is not in question, but the truth of the Applicant's self-identification as a gay Iranian refugee is. Since the *Raza* factors are merely considerations to take into account, that the letter was material and relevant is not necessarily determinative of its admissibility. On the evidence before the RAD, it was reasonable for the RAD to maintain the refusal of the letter as evidence.

[19] Despite alleged issues with his previous counsel the UNHCR guidelines could have been presented before the RPD hearing, therefore it was reasonable for the RAD to refuse their admissibility. While the lack of admissibility of these pieces of evidence lead the RAD to decide not to approve an oral hearing, their decisions on the matters do not constitute a breach of procedural fairness.

- B. *Did the RAD err in finding that the RPD had not breached procedural fairness in not asking the Applicant about why he had not disclosed his sexual orientation at Port of Entry into Canada?*

[20] The Applicant submits that the RPD panel member conducting the interview made her credibility determination early in the interview when the Applicant's dishonesty at the POE interview was disclosed, and that this coloured the rest of her line of questioning and any other findings of credibility stemmed analytically from this initial finding. It is argued that the RPD member was required to put this concern to the Applicant at the hearing, since her findings of credibility were largely based on this issue. However, when the RAD reviewed the decision, they acknowledged that the RPD panel member had not questioned the Applicant directly on this issue, but found that the BOC adequately answered the issue.

[21] Further, the Applicant submits that the aggressive questioning in the hearing was inappropriate and showed the RPD panel member was relying on unfair stereotypes to determine how the Applicant should have behaved if he were truly gay, and the RAD failed to adequately address this issue (*Kornienko v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1419; *Essa v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1493; *Menaj v Canada (Minister of Citizenship and Immigration)*, 2008 FC 611).

[22] The Applicant's BOC is to be treated as sworn testimony. It did address the discrepancy between his POE interview and his current reason for claiming refugee status. If the Applicant was concerned about the RPD panel member's reaction to the discrepancy, he and his counsel

could have addressed the issue at the hearing. The RAD correctly acknowledged the explanation in the BOC and found no breach of procedural fairness.

[23] While the Applicant's dishonesty at the POE interview was certainly a factor the RPD panel member considered in her negative assessment of his credibility, it was not the only one. Her finding was based on a number of contradictions in the Applicant's testimony as well as that of his mother and roommate Ms. Husseinian, and the RAD's considerations and finding that there was no breach of procedural fairness is supported by the evidence and record before the RAD.

C. *Was the RAD acting reasonably in accepting the RPD's findings against credibility and plausibility?*

[24] The Applicant argues that the RAD committed reviewable errors by not considering certain established principles when reviewing the RPD's findings of fact and plausibility. For example:

- a. When a witness swears to the truth of certain allegations, a presumption is created that they are true unless there are reasons to doubt them (*Maldonado v Canada (Min of Employment & Immigration)*, [1980] 2 FC 302 [*Maldonado*]);
- b. A decision-maker is presumed to have reviewed all the evidence before them unless probative evidence directly contradicting the decision-maker's conclusions is not mentioned (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35); and

- c. A tribunal decision-maker ought not to replace and substantiate its own version of events without evidence to support its conclusions for that of the claimant (*Vodics v Canada (Minister of Citizenship and Immigration)*, 2005 FC 783).

[25] The Applicant points specifically to the RPD's suggestion that the Applicant's mother was cheating during her testimony, and that the RAD does not address the RPD's finding at all in their reasons, contrary to *Maldonado*.

[26] Further, the Applicant argues that the RPD also failed to consider Facebook print outs that the Applicant provided as proof of his intimate relationship with Benham. The RAD went beyond its purview by adding to the RPD's finding of fact regarding the evidence and suggested it was not verifiable and therefore reasonably disregarded. However, verification of the evidence was not put to the Applicant as an issue at his hearing.

[27] Finally, the Applicant states that implausibility findings should only be made in the clearest of cases, where facts presented portray unreasonable expectations, or there is contradictory documentary evidence. The RPD merely makes a blanket statement that "much of this claim is implausible or improbable", without supporting that finding. The RAD's failure to address the strength of the RPD's implausibility findings (as distinct from credibility findings) constitutes reviewable error and warrants intervention (*Giron v Canada (Minister of Citizenship and Immigration)*, 2013 FC 7 [*Giron*]; *Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937; *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 [*Valtchev*]).

[28] The RPD panel member found that the Applicant was not credible on a number of fronts:

- Initial lie at port of entry;
- Contradictory evidence about relationship with Sarah (the Applicant's alleged ex-girlfriend);
- Contradictory evidence about occupation;
- Contradictory evidence about Applicant's (alleged) ex boyfriend Benham;
- Mother's claim to have told Basiji relative about Applicant's homosexuality not credible, or speculative at best;
- Implausibility and improbabilities
 - It did not make sense that Benham would be locked up after the Applicant had been out of Iran for 16 months or more, and there were no charges;
 - No evidence that any people the panel member would expect to be questioned in relation to rape allegations by Amir (the Applicant's former partner) were in fact questioned;
 - Improbable Amir would tell police of a rape one and a half years before Benham was arrested in 2013;
 - Made no sense that the Applicant had not made more effort to contact Benham;
- Applicant claimed it was impossible since he barely used a computer but Cerra Husseinian said he used her computer daily;
- Material omission and contradiction on efforts to contact Benham

[29] The RAD was correct in identifying the RPD as a body deserving of deference in their findings of fact and credibility. While the Applicant submits the RAD ignored established principles in evaluating the reasonableness of the RPD's findings, I do not agree.

[30] The RAD's finding with respect to the Applicant's mother's credibility was supported by evidence and impressions of the RPD panel member, who was present at the interview and in a better position to judge credibility. The presumption that a witness' testimony is true can be rebutted when there is evidence to suggest a lack of credibility. In the present case, the RPD panel member reasonably made a determination based on the lack of continuity in the witness' answers. The RAD's agreement in finding against the mother's credibility was reasonable.

[31] With respect to the Facebook printouts included in the Applicant's record, the RPD panel member's reasons clearly show that she considered them in her decision-making; she did not, however, give them the weight the Applicant says is appropriate. The Facebook evidence was considered in conjunction with Ms. Husseinian's and the Applicant's testimony, which conflicted significantly with regard to the Applicant's usage of computers. The RAD was reasonable in accepting the RPD findings of fact as being reasonable.

[32] Lastly, I agree that findings of implausibility should be treated differently than those of credibility; the findings of implausibility here were not reasonably made. While the panel member was able to question the credibility of the Applicant's testimony, and emphasize the lack of evidence before her to substantiate the narrative of Benham's arrest, this was not a "clear case" of implausibility (*Giron*, above at paras 17 and 24).

[33] Care must be taken when making plausibility findings not to impose cultural ideals on the situation at hand. As *Valtchev*, above at para 7, established “refugees come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant’s milieu.” The plausibility findings of the panel member in this case fail to meet that standard.

[34] However, the panel member’s overall findings with respect to lack of credibility are reasonable and while she may have erred in using the term ‘implausible’ to question certain elements of the Applicant’s story, the credibility issues, as referred to above, not implausibility issues, provide the foundation for much of her analysis and findings and for the RAD’s decision on this issue.

[35] The panel member based her findings on many contradictions within the Applicant’s own testimony as well as that of his mother and roommate. There was very little evidence supplied to her to support credibility. The RAD was well within the limits of reasonability in deciding to reject the Applicant’s claim.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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