Federal Court  Cour fédérale

Date: 20160527

Docket: IMM-4702-15

Citation: 2016 FC 574

Ottawa, Ontario, May 27, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MACMILLAN NUYEBGA GABILA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a decision by the Refugee Appeal Division [the RAD] of the Immigration and Refugee Board confirming a decision by the Refugee Protection Division [the RPD] to reject the Applicant's claim for refugee protection. The RPD's decision [the Decision] is dated September 30, 2015.

II. Background

[2] The Applicant is a 31-year old citizen of Cameroon. He alleges a fear of persecution as a homosexual. Homosexuality is a crime in Cameroon and he states that if he returns his sexual orientation will be made public.

[3] The Applicant alleges that, from 2004 to 2008, he was in a secret relationship with a man named Ndipnu Edwin. The relationship ended when Ndipnu became engaged and subsequently married to a woman.

[4] As time passed, the Applicant came under increasing pressure from his family to find a wife himself. He alleges that rumours began to circulate that he was homosexual and that Ndipnu, worried about his own reputation, suggested the Applicant either get married or leave Cameroon. On September 2, 2014, the Applicant alleges that he was called to a family meeting on the subject and, eventually, he admitted to his sister that he was homosexual. His sister then told his uncle, who threatened to kill him and promised to report him to the local authorities.

[5] The Applicant alleges that he then fled to a different city and sought help from Ndipnu. The Applicant further alleges that, while he was not aware of it at the time, Ndipnu had already engaged an agent to prepare an exit for him, well before the incident with his sister. The documentary evidence suggests that an application to study at Centennial College in Toronto was submitted in May 2014, four months earlier.

[6] The Applicant, through Ndipnu, acquired a passport and a student visa from the agent. The Applicant alleges that he did not know what kind of visa it was, or for where, until he had it in his hands. That visa was issued on October 3, 2014. The Applicant alleges, however, that the agent refused to return the Applicant's passport to him until he received, as payment, the land his father had left him as an inheritance. The Applicant eventually transferred the land over, got the passport, the student visa, and a plane ticket, and was able to leave Cameroon on November 3, 2014.

[7] The Applicant arrived in Canada on November 5, 2014 at Toronto Pearson International Airport. At first, the Applicant attempted to enter Canada on the student visa. When a CBSA officer processing his entry expressed skepticism about his status as a student, the Applicant admitted that the student visa application was "full of lies" and made a claim for refugee status instead (Certified Tribunal Record at 50 [CTR]). In his Port of Entry [POE] examination, the Applicant did not disclose his sexual orientation, stating instead that he feared his uncle. The following line of questions on this point was included in the POE examination notes:

> Q: Why are you unable to return to Cameroon?
> A: My uncle will kill me.
> Q: Why will your uncle kill you?
> A: Because I sold my father's house and land.
> Q: How do you know your uncle will kill you?
> A: He will; with witchcraft.
> (CTR at 50)

[8] In his Basis of Claim [BOC] form, submitted almost a month later, however, the Applicant alleged that he was claiming protection from members of his family not because he sold his father's property but because of his homosexuality (CTR at 61).

[9] On April 8, 2015, after a hearing in which the Minister intervened, the RPD rejected his claim, finding that he was not a credible witness and that he had not established his identity as a homosexual. The Applicant appealed this decision to the RAD on May 12, 2015.

III. Decision

[10] The RAD first stated that, per *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 at paras 54-55 [*Huruglica FC*], it would conduct an independent assessment of whether the Applicant was a Convention refugee or a person in need of protection, deferring only where the RPD has an advantage in reaching its conclusions.

[11] The RAD noted that the Applicant had submitted new evidence, including school transcripts, a school ID card for Ndipnu, and a letter from the 519 Church Street Community Centre. The RAD accepted all of this evidence under subsection 110(4) of the Act, though it also concluded that this evidence was not so significant that an oral hearing under subsection 110(6) was necessary.

[12] The RAD then turned to each of the bases by which the RPD concluded had determined that the Applicant lacked credibility.

A. *Failure to declare sexual orientation at POE*

[13] The RPD drew an adverse credibility finding from the Applicant's failure to state his fear of persecution as a homosexual in his POE interview. The Applicant argued that this was an error. The RAD disagreed, offering the following reasons:

a. At his RPD hearing, the Applicant first stated that he did not disclose his sexuality to the CBSA officer at the POE interview because he was concerned about his privacy and was uncomfortable. Later, however, the Applicant contradicted himself and stated that he did not disclose his sexuality because the CBSA officer told him that he might be returned to Cameroon.

b. The Applicant could have had legal counsel for his POE interview, was offered it, and rejected it. Had he truly had privacy concerns, he would have sought counsel.

c. The Applicant also signed a declaration that his POE claim for refugee protection was truthful and he acknowledged during the interview that he had an obligation to provide honest answers.

d. The Applicant not only omitted information in the POE interview but intentionally deceived the CBSA officer – while the refugee claim was based on a fear of persecution as a homosexual, the Applicant alleged in the POE interview that he feared violence for having sold his father's property, a totally unrelated claim.

e. The Applicant did not mention his initial misrepresentation in his subsequent BOC, even though he used his BOC to address other potential concerns arising from his POE interview.

B. *Failure to provide corroborative evidence*

[14] The RPD found that there was insufficient evidence to corroborate that a letter from Ndipnu, submitted by the Applicant, was authentic. The Applicant argued that this was an error. The RAD, however, agreed with the RPD, finding that since the Applicant's relationship was central to his refugee claim, something more than just a non-notarized letter was required. Turning to the new evidence submitted by the Applicant, the RAD further concluded that none of it established that Ndipnu and the Applicant had actually been in a relationship.

C. *Concerns around visa application and timing*

[15] The RPD found that the Applicant's application for both a student visa and to attend Centennial College predated his problems in Cameroon (i.e. were submitted before the alleged incidents of September 2, 2014) and thus indicated that he had fabricated his narrative to strengthen his refugee claim. The Applicant argued that this finding contained numerous errors. In particular, the Applicant alleged that Ndipnu had been advising him to leave Cameroon since November 2013 and so it is reasonable to assume that either he or the agent began the applications without his knowledge. The RAD, however, concluded that the Applicant's testimony on this point was speculative and without corroborative evidence and therefore neither plausible nor credible. The RAD noted, for example, that there was no mention of this scheme in Ndipnu's letter, and that the Applicant had, by stating in his POE interview that the student visa was "full of lies", essentially acknowledged that he was aware of its contents.

[16] The RAD also drew an adverse inference based on the one-month delay between the issuance of the Applicant's student visa and his departure from Cameroon, as well as the fact that he could not explain why he had originally arranged his departure for October 31, 2014, two days before he allegedly relented and transferred his property to the agent.

D. *Activities in Canada*

[17] The RAD found that none of the evidence of activities in Canada proved his status as a homosexual and placed little weight on this evidence in light of the other credibility findings.

[18] The RAD ultimately found that the Applicant planned his departure from Cameroon prior to September 2, 2014, the date he alleged he became at risk of harm, that he was fully aware of

the contents of the college and visa applications, and that he had not established his identity as a homosexual.

IV. Issues and Analysis

[19] As a preliminary matter, the Federal Court of Appeal recently clarified that the standard of review the RAD should apply when reviewing RPD decisions is correctness, conducting "its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred" (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103 [*Huruglica FCA*]). The RAD's selection of a standard of review must then be reviewed by this Court on a reasonableness standard (*Huruglica FCA* at para 35).

[20] In the decision at issue, the RAD selected and applied the standard laid out in *Huruglica FC* at para 54, a standard that has since been supplanted by the approach offered in *Huruglica FCA*. Selecting the *Huruglica FC* standard does not mean that the RAD has committed a reviewable error: so long as the RAD conducted, in substance, a thorough, comprehensive, and independent review of the kind endorsed in *Huruglica FCA*, the RAD's selection of a standard of review was reasonable (*Ketchen v Canada (Citizenship and Immigration)*, 2016 FC 388 at para 29). I agree with the parties that the RAD did not err on this point: it had the full record before it, including a recording of the RPD hearing, and conducted an independent assessment throughout.

[21] As for the RAD's assessment of the evidence, it is reviewable on a reasonableness standard (*Vushaj v Canada (Citizenship and Immigration)*, 2016 FC 255 at para 10; *Cortes v Canada (Citizenship and Immigration)*, 2015 FC 1325 at para 13). As such, if the RAD's decision on these points is an acceptable and rational solution that is justifiable, transparent and

intelligible, it should not be disturbed (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[22] The Applicant contends that the RAD erred in (a) drawing an adverse inference from his failure to declare his homosexuality upon arrival and (b) finding his explanation for the timing of the student visa application to be implausible. The Applicant also alleges a number of additional errors that he asserts flow from these first two, arguing that if the two cannot stand, then the rest cannot either.

A. *Negative inference drawn from the Applicant's failure to disclose his sexual orientation*

[23] The Applicant argues that Federal Court jurisprudence is clear that refugee claimants often have good reason not to disclose their full narrative upon arrival and that their credibility should not be automatically impugned if they do not. As such, undue reliance should not be placed on statements made at the POE (*Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paras 11-13 [*Lubana*]; *Hamdar v Canada (Citizenship and Immigration)*, 2011 FC 382 at paras 46-50 [*Hamdar*]). This is especially true for a homosexual applicant fleeing a country where homosexuality is criminalized and stigmatized as harshly as it is in Cameroon.

[24] According to the Applicant, the RAD accepted this general principle but nonetheless made unreasonable findings for the following three reasons.

[25] First, the RAD drew a distinction between an individual who omits their sexual orientation and an individual who replaces that omission with a false story. The Applicant says

this distinction is unintelligible. A claimant needs to offer a narrative of some kind to base his claim at the POE; if he omits his sexual orientation but does not replace it with another ground of persecution, then the applicant has no ground of persecution at all. Furthermore, the Applicant's story was *not* a complete fabrication and thus it cannot be said that the Applicant "intentionally deceived" the CBSA officer. The Applicant did, in fact, sell his land to pay the agent and was threatened by his uncle. The original narrative correctly identified the source of persecution; it just did not fully describe the ground. As such, it is an error to distinguish and dismiss it as the officer did.

[26] Second, the Applicant denies that his testimony before the RPD on his decision not to disclose his homosexuality was contradictory. His stated concerns about disclosure all stem from a fundamental and reasonable anxiety about his safety and privacy. It was thus an error to draw an adverse inference from this non-existent inconsistency.

[27] Third, the Applicant contends that the RAD erred in drawing an adverse inference from the fact that he did not address, in his subsequent BOC form, the omission of his sexual orientation at the POE. The Applicant argues that this is an error because there is no legal requirement to make such a disclosure and there is no question on the BOC form that directs an applicant to address and explain any POE omissions.

[28] I agree with the Applicant on all of these points.

[29] On the Applicant's first point, the critical part of the RAD's decision reads as follows:

> The RAD finds it reasonable to expect that the Appellant traveled to Canada for a reason. The Appellant alleges that he was well aware of the jeopardy he faced in Cameroon due to his sexual orientation, and, as such, it is reasonable to expect he would not travel to a country where he would be faced with the same jeopardy. While it is true that a claimant may be initially reluctant to disclose his or her sexual orientation when making a refugee claim, the RAD finds that it does not excuse a claimant from providing false allegations of persecution to immigration authorities. (CTR at 9)

[30] As the Applicant observed, the RAD has put him in a catch-22 situation with this analysis: on the one hand, he does not have to disclose his sexuality. On the other, he cannot be excused for making any false allegation of persecution. How then can he base a claim for refugee protection?

[31] Simply put, it does not make sense to both recognize that refugee claimants may be reluctant to disclose their sexual orientation when they initially make their claim and then simultaneously draw an adverse inference from any partially untrue narrative that they provide in its stead. If one recognizes that a claimant may have legitimate reasons to provide insufficient disclosure at the POE, then one should forgive, within reason, the claimant's need to nonetheless ground the claim in some kind of fear.

[32] On the Applicant's second point, he explained to the RPD at his hearing that he was anxious and concerned about confidentiality, having come from a country where homosexuality was prosecuted. He would have noted the authority apparent in the CBSA officers. His anxiety and fear, given the context from which he came, was not surprising. There is nothing inconsistent in a general concern for privacy and a specific fear that CBSA might communicate his status to Cameroonian authorities.

[33] As for the Applicant's third point, I agree with the RAD that it would have been ideal had he explained the POE omissions in his BOC. However, I do not find that the Applicant is under an obligation to provide an explanation for any POE discrepancies in that document, which is to set out the constituent elements of the claim. The hearing provides the opportunity for the Board to question the Applicant about inconsistencies, which include any arising as between the BOC and the POE interview.

[34] The case law is clear that that there is a need for sensitivity in assessing statements made by refugee claimants made at a port of entry (*Lubana*, *Hamdar*). This direction is echoed in academic and international legal commentary (see, for example, James Hathaway and Michelle Foster, *The Law of Refugee Status*, 2d ed (Cambridge: Cambridge University Press, 2014) at 145; United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/12/09, October 23, 2012 at 14). The RAD's analysis in this case was out of step with this case law, and related guidance, and thus unreasonable.

B. *Implausibility finding based on the timing of the student applications*

[35] The Applicant takes issue with the RAD's conclusion that it was "neither plausible nor credible" that Ndipnu commenced the Applicant's college and visa applications unilaterally and without his knowledge. The Applicant argues that there is nothing inherently implausible about his version of events. Ndipnu, the Applicant's former lover, was concerned that he might be exposed as a homosexual, jeopardizing both his family life and his successful banking career.

Ndipnu had implored the Applicant to remove himself at a time when rumours were circulating but the Applicant refused to take any action. In short, Ndipnu had both the motive and the financial means to engage an agent to obtain a student visa for the Applicant.

[36] The Applicant argues that, per *Cortes v Canada (Citizenship and Immigration)*, 2014 FC 598 [*Cortes*], a finding of implausibility should not be made lightly:

> [19] Where the RPD finds a lack of credibility based on inferences, including inferences concerning the plausibility of the evidence, there must be a basis in the evidence supporting the inferences (*Abdul v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 260, [2003] FCJ No 352 at para 15 (TD)). Plausibility findings should only be made in the clearest of cases i.e. if the facts presented are outside the realm of what could reasonably be expected or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at paras 7, 17), and with a clear explanation for those findings (*Saeedi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 146 at para 30).

[37] This is particularly true since the only basis for the RAD's finding of implausibility is that Ndipnu's letter makes no mention of Ndipnu's participation in the Applicant's student visa application process. The Applicant submits that this violates a well-established principle that evidence cannot be used to "draw a negative inference based on what it does not say" (*Arslan v Canada (Citizenship and Immigr ation)*, 2013 FC 252 at para 88 [*Arslan*]; see also *Durrani v Canada (Citizenship and Immigration)*, 2014 FC 167 at para 7 [*Durrani*]).

[38] I agree that it was unreasonable to conclude that the events in question could not have happened in the manner asserted by the claimant. The timing of the Applicant's narrative is

unusual, and it was certainly open to the RAD to conclude that it was unlikely or that insufficient evidence was provided to corroborate it, but to say it *could not* have happened is something else entirely. The implausibility finding on this point was therefore unreasonable.

[39] I also agree that, per *Arslan* and *Durrani*, it is unfair to impugn the credibility of Ndipnu's letter because of what it does not say. This is because Ndipnu is not before the Board to be cross-examined as to why he did or did not mention that component of the story. An absence of evidence should not, in a refugee context, automatically be considered as evidence of absence: simply because Ndipnu's letter does not refer to his involvement in the Applicant's escape does not mean he was necessarily not involved.

[40] Furthermore, on these facts, there is a reasonable explanation for Ndipnu not to have admitted in a letter to the Canadian government that he had forged a student visa application: he would be admitting that he had engaged in a criminal activity. It is not implausible to think he would be reticent to disclose this fact, and thus his non-disclosure cannot reasonably ground a finding of implausibility.

[41] As noted above, the Applicant raised further errors and argued that the RAD's original plausibility and credibility findings tainted its analysis going forward. I am persuaded by the Applicant's submissions on this point. As such, the decision itself cannot stand.

V. Conclusion

[42] In light of the above, this application for judicial review is allowed. There are no questions for certification or costs ordered.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review is allowed;
2. There are no questions for certification;
3. There is no costs order.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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