

Federal Court



Cour fédérale

**Date: 20160706**

**Docket: IMM-5235-15**

**Citation: 2016 FC 752**

**Ottawa, Ontario, July 6, 2016**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**VICTOR KIPLANGAT KOECH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The applicant seeks judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the decision of the Refugee Appeal Division [RAD] dated November 3, 2015, which dismissed his appeal of the decision of the Refugee Protection Board [RPD] and confirmed that he is not a Convention refugee or person in need of protection.

[2] Based on its assessment of the evidence, the RAD agreed with the RPD that the applicant was not credible and found that the objective evidence did not support that he was at risk.

[3] For the reasons that follow, I find that the decision of the RAD is reasonable. The application for judicial review is dismissed.

#### I. Background

[4] The applicant, Mr. Koech, a citizen of Kenya, arrived in Canada on August 24, 2014 on a study permit. He made a refugee claim on February 11, 2015 based on his fear, as a Christian, of Al Shabaab in Kenya. He recounts two incidents: a grenade attack which killed his cousin in July 2014; and, the killing of dozens of people and burning of his family's property in Mpeketoni in November 2014. He claims that he has not heard from his family or siblings since they fled the area after the November 2014 attack. He also claims to fear Al Shabaab because of its killings and forced conversion of Christians to Islam.

#### *The RPD decision*

[5] The RPD found that Mr. Koech's testimony was vague, evasive and inconsistent with the information he provided in his Basis of Claim (BOC) form.

[6] The RPD noted that he testified that he was with his cousin for a social visit immediately before his cousin was killed in an attack. The police report and death certificate stated otherwise: that his cousin was in a security meeting before the attack. When confronted with the

inconsistency, he responded that security issues were also discussed during the social visit. The RPD rejected this explanation and found that he had adjusted his testimony to be consistent with the police report.

[7] In response to the RPD's inquiry why his cousin had been killed, the applicant stated that he did not understand the reason, but that most people attacked in Kenya are Christians and that only Christians were in the area at the time. The RPD confronted the applicant with his different account in his BOC form, which stated that his cousin was attacked for failing to recite the Quran and for refusing to join Al Shabaab. He then explained that this had happened to his cousin in the past, but the attackers fled, and that he does not believe it was the reason for the grenade attack that killed his cousin. The RPD rejected the explanation and again found that he had altered his testimony to be consistent with his BOC form.

[8] The RPD noted that the Minister had intervened and provided evidence to address the applicant's credibility. This included evidence of the applicant's Facebook page which demonstrated that Facebook accounts in his parents' names had "liked" photos of the applicant posted in December 2014, January 2015 and February 2015, after the November 2014 attack that the applicant had alleged was the last time he had heard from his parents.

[9] The applicant did not dispute that it was his Facebook page. He explained that he did not consider these "likes" to be communication. He speculated that his sister had set up the Facebook accounts. In response to why he did not use Facebook to determine the whereabouts of his parents, he responded that he did, but received no response.

[10] The RPD did not find it credible that the applicant's parents would be using Facebook if they were in a refugee camp, as the applicant stated he believed them to be. If his parents had access to the internet, the RPD found that they would likely communicate with the applicant. The RPD also found it unlikely that anyone except the applicant's parents or sister would have set up these Facebook accounts. Moreover, if the applicant's sister had set up their parents' accounts, as the applicant speculated, she would likely have also established her own account or responded to the applicant's inquiries about their parents' whereabouts. The RPD found that these inconsistencies undermined the applicant's credibility.

[11] The RPD also found that the applicant did not have a well-founded fear of persecution based on being a Christian. Kenya is over 80% Christian and that laws and policies generally protect religious freedom in Kenya. Although the documentation indicates that there is some discrimination against Christians, this occurs in historically Muslim areas where the applicant, who resides in Nairobi, has never lived.

[12] The RPD noted that if forced conversions and killings of Christians in Kenya were an ongoing problem, it would have been highlighted in the National Documentation Package [NDP]. There was insufficient evidence to support that violence directed at Christians in Kenya is so frequent, systematic or common that the applicant faces a serious possibility of persecution or a personalized risk of harm on a balance of probabilities.

II. The Decision under Review

[13] The RAD confirmed the decision of the RPD and found that the applicant is not a Convention refugee or a person in need of protection.

[14] The RAD noted that the applicant did not submit new evidence, request an oral hearing, or make submissions regarding his Facebook account or the NDP.

[15] With respect to the RPD's credibility finding related to the applicant's cousin's death, the RAD found, even with allowances made for his self-representation at the RPD hearing, that his responses to the RPD's questions did not address the RPD's concerns. Moreover, even if the RPD's finding was due to a misunderstanding, this finding would not be fatal to the overall determination in light of the RPD's other credibility findings.

[16] The RAD found that it was open to the RPD to find that the applicant's Facebook account and interaction contradicted his statements that he had no contact with his family and to find his explanation unreasonable. Based on its own assessment, the RAD found that, given that the applicant acknowledged that this was his Facebook account, on a balance of probabilities, the names identified as his parents were his parents.

[17] Based on its own review of the evidence, the RAD also agreed with the RPD's finding that the preponderance of the objective, documentary evidence does not corroborate the

applicant's testimony and that there was insufficient evidence to support that he was at risk as a Christian in Kenya.

### III. The Issues

[18] The applicant submits that the RAD did not conduct a sufficiently independent analysis, but rather deferred to the RPD, and, as a result, erred in its credibility findings and in its assessment of the documentary evidence.

### IV. The Standard of Review

[19] The RAD conducts an appeal of the RPD's decision. The Court conducts a judicial review of the RAD's decision.

[20] In *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103, [2016] FCJ No 313 (QL) [*Huruglica FCA*], Justice Gauthier clarified that the RAD should fulfill its appellate role and apply the standard of correctness when reviewing an RPD decision.

[21] Although the RAD decision preceded the decision in *Huruglica FCA*, the Court of Appeal confirmed the requirement for an independent assessment of the evidence that was established in the Federal Court's decision and which was applied by the RAD.

[22] The Court of Appeal also noted that the level of deference the RAD may owe to the RPD on credibility and other factual findings will vary depending on whether the RPD had an

advantage in making its findings, and other circumstances of the case, and that the jurisprudence will evolve.

[23] The Court's review of the RAD's determinations of factual issues, including credibility, and issues of mixed fact and law are reviewed on the reasonableness standard.

[24] The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]). The Court will not re-weigh the evidence or re-make the decision.

V. The RAD's decision is reasonable

[25] The applicant's principal argument is that the RAD showed inordinate deference to the findings of the RPD and did not conduct a sufficiently thorough and independent assessment of the evidence and, as a result, the RAD's decision is not transparent. The applicant focuses on the findings regarding his cousin's death, his Facebook account and the country condition evidence.

[26] The applicant argues that, although his initial responses to the RPD's questions about his cousin's death were not as detailed as described in his BOC or later responses, this should not have been found to be an attempt to alter his testimony. As a result of his lack of legal representation and sophistication, he argues that the credibility findings are unfair and unreasonable.

[27] The applicant submits that his responses regarding his cousin's death were not inconsistent. In his BOC he referred to the reason why his cousin was killed, due to his refusal to recite the Quran, and in his testimony he referred to how his cousin was killed. He argues that rather than assessing his evidence, the RAD simply deferred to the RPD.

[28] With respect to the Facebook interactions, the applicant submits that both the RPD and RAD failed to consider his explanation that he did not receive a response when he tried to communicate with his parents. He argues that a "like" on Facebook should not be considered communication and that anyone can set up a Facebook account in another person's name.

[29] The applicant also submits that the RAD erred by deferring to the RPD's finding that the preponderance of objective evidence does not support his allegations that he will be forced to convert to Islam or be killed. The applicant points to parts of the NDP that refer to the risk posed by Al Shabaab in Kenya, including the recruiting of youth, forcing children into prostitution and grenade attacks in Mombasa. He argues that if the NDP had been assessed by the RAD, it would not be such a leap to find that this evidence supports the risk he asserts.

*The RAD conducted an independent assessment of the evidence*

[30] I do not agree that the RAD simply deferred to the RPD's findings. The RAD conducted an independent assessment of the evidence based on the guidance in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, [2014] 4 FCR 811, which is consistent with the Court of Appeal's guidance in *Huruglica FCA*. The RAD clearly states where it agreed with the RPD and where it made its own findings based on its assessment of the entire record.



[31] Moreover, the RAD's deference to the credibility findings of the RPD was appropriate in the circumstances and reasonable. The RPD had an advantage in hearing the applicant's testimony and in observing his demeanor and his response to questions.

[32] The jurisprudence has established that the credibility findings of boards and tribunals that have heard the testimony and observed the demeanor of an applicant should be accorded significant deference (*Aguebor v Canada (Minister of Employment and Immigration)* , [1993] FCJ No 732 at para 4 (QL), 160 NR 315 (FCA); *Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052 at para 13, [2008] FCJ No 1329 (QL); *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at para 65, [2012] FCJ No 924 (QL)). I see no reason to take a different approach to credibility findings that are confirmed by the RAD following its independent assessment of the evidence on the record or where the RAD defers to the RPD based on its first-hand assessment.

[33] However, the RAD went beyond deference, conducted an independent assessment of the evidence and made its own credibility findings.

#### *The Cousin's Death*

[34] The RAD noted that it had taken the applicant's lack of legal representation before the RPD into account in its own review of the evidence. The RAD noted that the applicant did not address the concerns expressed by the RPD regarding his cousin's death. The RAD added that the applicant bears the onus to explain internal inconsistencies and contradictions in his evidence and had not done so.

[35] The applicant's lack of legal representation is not a reason to find the credibility findings unreasonable. The applicant argues that the findings of the RPD and RAD were "unfair", but does not suggest that there was a breach of procedural fairness. The record before the RAD, which includes the transcript of the RPD hearing, reveals that the RPD member explained the process to the applicant and the applicant understood that he was required to tell the truth and to respond to questions. The RPD member provided a copy of the applicant's BOC form to him. The lack of representation does not excuse inconsistencies, contradictions and other indicators of a lack of credibility.

[36] The applicant also offers additional explanations to the Court about how his testimony could be reconciled with his BOC. In my view, the new explanations also fail to do so. Regardless, the role of the Court is to determine if the findings of the RAD are reasonable, and it is clearly reasonable for the RAD to both defer to the RPD's credibility finding regarding the inconsistencies and to independently find that the inconsistencies were not explained.

#### *The Facebook Account*

[37] Whether a "like" on Facebook constitutes communication is not the issue. The issue is whether the applicant's contradictory testimony supports an adverse credibility finding. The applicant had claimed that he had no contact with his parents or siblings since they fled after the November 2014 attack. The RPD and RAD found this to be contradicted by the Facebook activity. Both the RPD and RAD considered the applicant's explanation that his sister may have set up the accounts. There is no merit in the applicant's argument that the RAD ignored his

explanation. The applicant appears to seek a re-weighing of evidence by the Court, which is not the Court's role on judicial review.

*The National Documentation Package*

[38] The applicant appears to concede that the NDP does not include reports that support that the applicant would be personally at risk of being killed by Al Shabaab as a Christian or forced to convert to Islam. Instead, the applicant argues that the NDP notes the range of Al Shabaab's activities and, by extrapolation, the RAD should have found that the applicant would be at risk as a Christian in Kenya.

[39] Both the RPD and RAD considered the NDP and both referred to the terrorist attack by Al Shabaab at the Westgate Mall in Nairobi and the attack at the university in Garissa. However, the RAD found that the NDP as a whole did not support that the violence is so frequent, systematic or common that it would support a serious possibility of persecution or personalized risk of harm to this applicant on a balance of probabilities.

[40] The applicant's fear that he would be forced to convert to Islam, based on his testimony that this had happened to friends several years ago, with whom he had lost contact, was reasonably found to be not supported by the objective evidence.

[41] As noted by the respondent, if the RAD were to extrapolate from the NDP, as the applicant argues the RAD should have done, then every Christian in Kenya would be found to be

at risk. The applicant bears the onus to establish that he is at risk on a Convention ground and the RAD reasonably found that he had not established such a risk.

*The RAD's decision is transparent*

[42] I do not agree with the applicant's submission that the RAD did not provide sufficient analysis or reasons in its decision to demonstrate that it conducted an assessment of the evidence.

[43] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, the Supreme Court of Canada elaborated on the requirements of the reasonableness standard articulated in *Dunsmuir*, noting at paras 14-16 that the decision maker is not required to set out every reason, argument or all the details in the reasons. The reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (at para 14). In addition, where necessary, courts may look to the record "for the purpose of assessing the reasonableness of the outcome" (at para 15). The key principle is summed up at para 16 that "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met."

[44] As noted above, it is apparent that the RAD reviewed the entire record and both deferred to the RPD and made independent findings. The record before the RAD supports the reasonable findings made.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

There is no question for certification.

"Catherine M. Kane"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-5235-15

**STYLE OF CAUSE:** VICTOR KIPLANGAT KOECH v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** CALGARY, ALBERTA

**DATE OF HEARING:** JUNE 15, 2016

**JUDGMENT AND REASONS** KANE J.

**DATED:** JULY 5, 2016

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