Federal Court  Cour fédérale

Date: 20191209

Docket: IMM-981-19

Citation: 2019 FC 1570

Toronto, Ontario, December 9, 2019

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

HAFIZ OLAYINKA YAHAYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The fundamental issue in this case is whether the Applicant provided enough evidence of his fear of persecution due to his sexual orientation.

[2] The Applicant applies for judicial review of a Refugee Appeal Division [RAD] decision that concluded that the Applicant is neither a Convention refugee under section 96 of the

Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA], nor a person in need of protection under section 97 of the IRPA. The Applicant submits that the RAD was unreasonable in its credibility findings, and failed to give sufficient weight to evidence pertaining to his relationship with another man.

[3] For the reasons set out below, I allow the present application.

II. **Background**

[4] The Applicant is a citizen of Nigeria, who claims to have been persecuted on the basis of his bisexual identity. According to the Applicant, starting in 2006, he was in a long-term same-sex relationship with a man named Dapo Ogunrinde while he was living in Nigeria. On October 14, 2016, the Applicant married his wife, while continuing his relationship with Dapo.

[5] On December 20, 2016, the Applicant's neighbours made a police complaint regarding his same-sex relationship. The neighbours also provided the police with a photo of the Applicant and his male friend kissing in public. The Applicant claims that the police went to his house while he was absent. Soon after, a friend and neighbour of the Applicant told the Applicant that the police had come to his home looking for him, and had wanted to question him. In Nigeria, same-sex relationships are illegal and may result in imprisonment.

[6] Following the police visit, the Applicant moved from Lagos to his parents' home in Ilorin (Nigeria) for roughly two and a half months. After obtaining the appropriate visa from the United States Consulate General in Lagos, on March 10, 2017, the Applicant left Nigeria and fled to the

United States. On July 21, 2017, the Applicant fled the United States because of the current presidential administration's immigration policies, entered Canada and claimed refugee protection.

[7] On April 11, 2018, and April 24, 2018, the Refugee Protection Division [RPD] held hearings on the Applicant's refugee protection claim. During the hearing, the RPD asked inappropriate questions about the Applicant's sexual practices. For example, the RPD asked him if he preferred to have sex with men or women. On May 29, 2018, the RPD rejected the Applicant's claim on the basis that he was not credible, citing inconsistencies in his testimony and forms. The RPD further concluded that the Applicant had not established the facts underlying his claim. The Applicant appealed this decision to the RAD.

III. **The Decision Under Review**

[8] On January 15, 2019, the RAD dismissed the Applicant's appeal. The RAD determined—rightly, I might add—that the RPD's questioning regarding his sexual practices was inappropriate. Although the RAD found that the RPD erred on this point, it found no error in the RPD's central conclusions leading to the finding that the Applicant was not credible. In essence, the RAD found that the evidentiary lapses identified by the RPD were important and sufficiently serious enough to conclude that the Applicant was not at risk of persecution for his bisexuality. The RAD's decision was predicated on four considerations:

1. First, the RAD determined that the Applicant's inability to remember the date the police went to his home casts doubt as to whether the police even visited his home looking for him.

2. Second, the RAD concluded that the Applicant was not hiding at his parents' place because he failed to disclose that he once travelled to Lagos from his parents' home in Ilorin for a United States visa interview.

3. Third, the RAD concluded that the Applicant did not establish that he was in a sexual relationship with his boyfriend because he offered inconsistent testimony as to the length of their relationship.

4. Fourth, the RAD found that the affidavits of the Applicant's friend who had warned the Applicant about the police visit to his home should not be given any weight because they were brief and contradicted the Applicant's claims.

IV. **Issues**

[9] Before this Court, the Applicant challenges each one of these determinations. Accordingly, the principal question in this case is whether the RAD erred in determining that the Applicant provided insufficient evidence as to his same-sex relationship.

V. **Standard of Review**

[10] This case centres on the RAD's appreciation of the evidence and the reasons provided in support of its evidentiary determinations. These are issues that fall within the RAD's specialized area of expertise, and are therefore subject to the reasonableness standard of review (*Yan v Canada (Citizenship and Immigration)*, 2017 FC 146 at para 18 [*Yan*]; *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29). The standard of reasonableness requires that the decision be justified, transparent, and intelligible, and fall within the range of acceptable

outcomes defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

VI. **Analysis**

[11] The RAD and the RPD enjoy broad discretion in determining the weight to be assigned to the evidence it accepts (*Medarovik v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 61 at para 16; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 867 at para 68). Allowing for a broad discretion is appropriate because these tribunals have expertise in making factual findings and credibility determinations in connection with refugee claims (*Giron v Canada (Minister of Employment and Immigration)* (1992), 143 NR 238 (FCA); *Chen v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 805 at para 10; *Siad v Canada (Secretary of State)* (1996), [1997] 1 FC 608, 1996 CanLII 4099 (FCA) at para 24).

[12] In exercising its discretion, the tribunal may make credibility findings based on implausibility, common sense and rationality (*Yan* at para 18). If a decision turns on credibility, the tribunal must also provide reasons for its assessment given the importance of the issues at stake in a refugee claim (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 46; *Hilo v Canada (Minister of Employment and Immigration)* (1991), 15 Imm LR (2d) 199, [1991] FCJ No 228 (FCA) (QL)). The reasons must set out the basis for its credibility determination in clear and unmistakable terms (*Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 9 [*Lubana*]). If a claimant's testimony is rejected, the tribunal must still consider any objective evidence that is untainted by the negative credibility

finding (*Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238 at paras 7-8).

[13] This discretion should not be used to conduct a microscopic analysis of the evidence or seize on trivial or minute contradictions to reject a claim (*Haramicheal v Canada (Citizenship and Immigration)*, 2016 FC 1197 at para 15; *Lubana* at paras 10-11; *Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168, [1989] FCJ No 444 (QL) at para 9). Nor should a tribunal turn a refugee claim into a memory test (*Sheikh v Canada (Minister of Citizenship and Immigration)* (2000), 190 FTR 225, 2000 CanLII 15200 (FC) at para 28).

[14] While the applicant has the burden to show membership in the recognized "sexual orientation" social group (*Zamanibakhsh v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1137 at para 16; *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at p 739), tribunals should be attentive to evidence related to the social and legal realities of sexual minorities. As this Court affirmed in *Odetoyinbo v Canada (Citizenship and Immigration)*, 2009 FC 501 at paragraph 8, immigration and refugee tribunals must assess the applicant's fear of persecution or individualized risk in light of "what is generally known about conditions and the laws in the claimant's country of origin, as well as the experiences of similarly situated persons in that country." As a result, tribunals should be attuned to the realities of those in the sexual orientation group before making credibility assessments with respect to the applicant's sexual orientation.

[15] Moreover, the tribunal must be attentive to the personal and private nature of sexual orientation. As Mr. Justice Russell observed in *Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760 at paragraph 42, "the acts and behaviours which establish a claimant's homosexuality are inherently private." As a result, decision-makers should be mindful of the inherent difficulties in proving that a refugee claimant has expressed a particular sexual orientation (*Gergedava v Canada (Citizenship and Immigration)*, 2012 FC 957 at para 10). This type of attention is calibrated to the "deeply personal" nature of sexual orientation (*Egan v Canada*, [1995] 2 SCR 513, 1995 CanLII 98 (SCC) at page 528; *Vriend v Alberta*, [1998] 1 SCR 493, 1998 CanLII 816 (SCC) at para 90).

[16] That said, the applicant must still fulfill his or her burden to establish the existence of his or her same-sex relationship. Affidavits and other pieces of evidence can relate knowledge of the applicant's personal characteristics and the country conditions for certain sexual orientation groups (*Ojie v Canada (Citizenship and Immigration)*, 2018 FC 342 at para 40). However, calibrated factual determinations as to a person's sexual orientation need to conform to general principles of evidence relating to credibility, probative value, weight and sufficiency (see generally, *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 12-35).

[17] The issue before the RAD was whether the Applicant provided enough evidence of his same-sex relationship. In his Basis of Claim [BOC] and before the RPD, the Applicant maintained that his fear of persecution stemmed from the Nigerian police personally targeting him for his same-sex relationship with his boyfriend. Both the RPD and the RAD found that the Applicant did not provide sufficient evidence to establish that very relationship.

[18] The RPD found the Applicant's responses to questions about the existence of the relationship to be vague and evasive. The RAD also determined that there was little evidence to establish that he went to Ilorin to stay with his parents following the police visit. The RPD and the RAD also gave little weight to the affidavits by the Applicant's friend and neighbour, which seem to corroborate the Applicant's claim of a same-sex relationship.

[19] However, I need not make any finding as to this issue on account of how I view the RPD and RAD's assessment of the Applicant's evidence in respect of the police visit to his home.

[20] The determining factor in this case relates to the manner in which the RPD and RAD dealt with the incident of the police visit to the Applicant's home. In its decision, the RAD emphasized the apparent contradiction in the date on which the Nigerian police allegedly went to the Applicant's house.

[21] Both the RAD and the RPD read the Applicant's BOC as meaning that the Applicant's neighbours informed the police of his same-sex relationship on December 20, 2016, and that the police visited his home on December 21, 2016, and this despite affidavits indicating that the police visited the Applicant's home on December 20, 2016.

[22] When confronted with this discrepancy during his interview before the RPD, the Applicant became confused and reported that he mixed up the dates of the timeline. The Applicant then affirmed that the police visit occurred on December 21, 2016, only to then

reiterate that if the affidavits indicate that the date of the police visit was December 20, 2016, that must be the correct date.

[23] Because of these apparently contradictory reports about the date of the police visit, as well as the comportment of the Applicant in trying to explain the alleged discrepancy, both tribunals attached little credibility to the Applicant's account of that event, and the events that followed.

[24] I say "apparently contradictory" because a clear reading of the Applicant's BOC included in his refugee protection claim leads me to believe that the source of the confusion lies not in the evidence of the Applicant, but rather in the RPD's interpretation of the BOC.

[25] In his BOC, the Applicant wrote the following:

> My Life [*sic*] was threatened by my neigbors [*sic*] where I was staying at No 11, Ogunlesi Street Onipanu Lagos because they noticed I was bi sexual, [*sic*] that I had a boyfriend named Dapo Ogunrinde. They informed the police about it on the 20th of december [*sic*] 2016 and even showed picture evidence of me and him to the police. They told the police I'm a disgrace to the whole community and they wanted me prosecuted so the police came to my house on that day but fortunately for me I was not at home. My friend called me to tell me that they came looking for me on the 21st of december [*sic*] at about 4:00 pm in order to take me in for questioning. I was so scared when he told me and I could not return home immediately because I felt they might come back. I had to hang around until mid-night before sneaking in to pack some of my belongings then I travelled to Ilorin Kwara State in order to seek refuge in my parents [*sic*] house the next day and I was there for about two and [*sic*] half months before finally travelling to the United States of America.
>
> [Emphasis added.]

[26] It is clear that the tribunal misread the Applicant's BOC. The Applicant's statement in the BOC indicates that the police visit took place on December 20, 2016: the neighbours informed the police about their suspicions on December 20 and the police visited the Applicant's house on the same day. The date of December 21, 2016 does not relate to the police visit, but the date on which the friend telephoned the Applicant to advise him of the police visit.

[27] Additional evidence in the tribunal record supports this interpretation of the Applicant's BOC. Most notably, the affidavit from the Applicant's friend who called him to warn him about the police incident and the Applicant's testimony before the RPD both confirm that the police visited his home on December 20, 2016.

[28] It seems to me that the working premise of both tribunals as to the date of the police visit to the Applicant's home was wrong. I must admit that the wording in the BOC could have been clearer. In fact, the written submissions of both counsel for the Applicant and the Respondent, as well as their oral arguments, were also predicated on the same misapprehension of what the BOC actually stated.

[29] When I raised the fact that I did not see any inconsistency as to the date of the police visit, the Respondent's counsel indicated that only the Applicant knows for sure whether the police visit took place on the 20th or 21st of December.

[30] However, to accept the Applicant's statement in his BOC as indicating that the police visit took place on the 21st would mean that the police visited the Applicant's home twice: once

on the 20th ("on that day") and once on the 21st. However, counsel for both parties acknowledge their understanding, which I share from all the evidence in the file, that there was only one police visit to the Applicant's home.

[31] That being the case, the only reasonable interpretation of the Applicant's statement in his BOC is that the reference to the 21st is not to the date of the police visit to his home but rather the next day, when his friend informed him of the police visit.

[32] Why is this important?

[33] It is important because the RPD member's questioning on this issue added to the confusion, as it resulted from the initial misinterpretation of the Applicant's statement. At the hearing, the RPD member put a false premise to the Applicant, i.e., that the police visit took place on December 21, 2016, and then took note of how the Applicant reacted to what the Applicant had never understood as being a discrepancy.

[34] In effect, the Applicant was asked to explain away a discrepancy that never existed.

[35] It is, therefore, understandable how someone could become flustered and try to reconcile his own account of the facts with what the immigration officer was telling him was the truth but what was actually based upon a misinterpretation of the BOC. This is especially true when the testimony occurs in an inherently stressful situation (i.e., the RPD hearing), and the person

asking the questions has the authority to determine a matter of serious consequence to the applicant.

[36] I do not find that the RPD did so deliberately or that the RAD intentionally followed what it knew was a false working premise. As I mentioned, both counsel worked on the same premise going forward. All I am saying is that what transpired placed the Applicant in a compromising and unfair position.

[37] I considered whether putting a false premise to the Applicant, an unintentional yet clear breach of procedural fairness, was determinative of the outcome of the RPD and RAD decisions, especially given the other two considerations for the RPD's decision, *to wit*, that the Applicant did not establish that he was in a sexual relationship with his boyfriend and that his friend's affidavits should not be given any weight because they were brief and contradicted the Applicant's claims, amongst other things, with respect to the date of the police visit to his home.

[38] It was. In its decision, the RAD found the discrepancy as to the date of the police visit to be vital in the assessment of the credibility of the Applicant. The RAD stated the following at paragraphs 10 and 11 of its decision:

> [10] […] The Appellant's inability to remember when the police visited his house throws into question all of the other events that happened around this time. It is also even more unlikely that he simply forgot the date of the police visit, as he had three other events right around the same time to ground him in the timeline.
>
> [11] I also find the RPD's outline of the Appellant's evolving testimony about the date of this event to be of assistance in coming to my conclusion. The Appellant did not simply state at the beginning that he was unsure of the date which the police came to visit; he first asserted that Ola had made a mistake and insisted that

> it was December 21, 2018 [*sic*]. When confronted with the fact that earlier in the hearing he had said December 20, 2018 [*sic*], he said that Ola must have been correct. Finally, he said that he cannot remember. I agree with the RPD that this testimony is evolving and that he was trying to address contradictions as they came up rather than being upfront about what he can and cannot remember. I find that, given this inconsistency, the Appellant has not established that the police came to his house, as alleged.
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> [Emphasis added.]

[39] In reviewing the RPD and RAD decisions, it seems to me that the unintentional lapse in procedural fairness was clearly determinative of the outcome of the decisions.

[40] In response, counsel for the Respondent raised another, very astute point. The Respondent claimed that this was a new issue, not one raised before the RAD, and thus not one that could be raised before me.

[41] As a general rule, courts should be hesitant to consider on judicial review an issue that was not raised before the decision-maker (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at paras 23–26 [*Alberta Teachers*]). This rule exists in order to ensure that administrative tribunals are the first decision-makers on a given issue and that they are given an opportunity to make determinations (*Alberta Teachers* at paras 24-25; *Dunsmuir* at para 27). The rule also helps ensure that the court has access to an adequate record as well as submissions from the parties on the issue (*Alberta Teachers* at para 26).

[42] As an exception to this rule, courts have granted judicial review if the decision-maker had the opportunity to decide the issue, or if the issue is necessarily implied in a decision-maker's conclusions (*Alberta Teachers* at paras 28-29).

[43] In this case, the police date issue was central to the case. In his submissions to the RAD, the Applicant argued that his reaction when asked about the alleged discrepancy was the result of "confusion" on his part (Certified Tribunal Record at pp 39-40). This should have given the RAD the opportunity to review the issue. In the end, the RAD erroneously followed the RPD's interpretation, thus, making it necessarily implied in its final decision.

[44] What is most important here, however, is that the source of the confusion lies not in the evidence of the Applicant, but in the tribunals' interpretation of that evidence.

[45] In addition, it seems to me that this "new" interpretation of the facts is justified by the discretionary nature of judicial review. As the Supreme Court recognized in *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3, 1995 CanLII 145 (SCC) at paras 30-31, judicial review is ultimately a discretionary remedy (referring to section 18.1 of the *Federal Courts Act*). In accordance with this principle, the Court has exercised its discretion to correct a procedural defect on an issue that was central to the case.

[46] As such, the decision of the RAD must be set aside.

VII. **Conclusion**

[47] I would therefore grant the application for judicial review. There was a breach of procedural fairness which was determinative of this matter.

JUDGMENT in IMM-981-19

THIS COURT'S JUDGMENT is that this application for judicial review is granted. The matter is to be returned to the same panel of the Refugee Appeal Division for redetermination based upon the proper interpretation to be given to the Applicant's evidence.

The parties did not submit a certified question, and none arose.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-981-19
STYLE OF CAUSE:	HAFIZ OLAYINKA YAHAYA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 12, 2019
JUDGMENT AND REASONS:	PAMEL J.
DATED:	DECEMBER 9, 2019

APPEARANCES:

Me Jeffrey Platt	FOR THE APPLICANT
Me Erin Morgan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Me Jeffrey Platt Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT