Federal Court  Cour fédérale

Date: 20200408

Docket: IMM-4501-19

Citation: 2020 FC 502

Ottawa, Ontario, April 8, 2020

PRESENT: Madam Justice McDonald

BETWEEN:

MICHEAL MUWENDA

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a citizen of Uganda who claims fear of persecution because of his sexual orientation. On appeal, the Refugee Appeal Division (RAD) refused to allow the Applicant to file new medical evidence and found that his claim was not credible.

[2] For the reasons that follow, this judicial review is granted as the RAD's treatment of the medical evidence was unreasonable.

Background

[3] The Applicant claims that his father caught him having sex with his boyfriend in 2006 and that he received 40 lashes from the community as a result. In July 2010, he says that he and his boyfriend were attacked while walking and holding hands in public. When they reported the attack to the police, they were arrested. The Applicant says he was detained for 7 days, until his father bailed him out by bribing the police.

[4] The Applicant started living with his boyfriend in October 2012 and began studying computer science. In November 2015, the Applicant and his boyfriend were attacked at a nightclub and the Applicant had to be hospitalized for a day. In 2017, the Applicant was forced to resign from his job because his employer found out he had a boyfriend. In April 2017, the Applicant was attacked while eating dinner with his boyfriend at a restaurant. Although they escaped the attack, they did not return to their home. The Applicant stayed with his sister after the incident while his father arranged for him to get a student visa in Canada, which was issued in August 2017. The Applicant arrived in Canada in September 2017 and claimed refugee protection.

[5] The Refugee Protection Division (RPD) rejected his claim on June 28, 2018. The RAD rejected his appeal on June 26, 2019.

RAD Decision

[6] On appeal, the RAD refused to admit a new letter from the Applicant's doctor as evidence on the grounds that it was not "new" within the meaning of s. 110(4) of the *IRPA*. The RAD, relying upon C*anada (Citizenship and Immigration) v Singh*, 2016 FCA 96, stated that s. 110(4) is to be narrowly interpreted and that if the conditions are not met, the RAD has no discretion to accept the evidence. The RAD found that the evidence was not new because the new letter from the Applicant's doctor referenced his hospitalization on November 7, 2015 and the Applicant appeared before the RPD on June 28, 2018. The RAD found that the letter could have been presented before RPD issued its decision. The RAD found that the Applicant was trying to use s. 110(4) to complete a deficient record and that this was not permissible because of *Singh*.

[7] The RAD also made a series of credibility findings against the Applicant.

Issues

[8] Although the Applicant raises a number of issues, the dispositive issue on this judicial review is the RAD's refusal to admit new evidence under s. 110(4) of the *IRPA*.

Standard of Review

[9] There is a rebuttable presumption that the standard of reasonableness applies to substantive review of administrative decisions (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]). To determine whether a decision is

reasonable, a reviewing court must ask "whether the decision bears the hallmarks of reasonableness - justification, transparency and intelligibility - and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

Analysis

[10] The Applicant argues that the medical letter he sought to introduce was in direct response to the findings of the RPD that the medical evidence was not reliable because of spelling errors. The RPD found that the medical report from Dr. Kisaame was not genuine because he misspelled the words "assault" and "admit". The Applicant argues that it was unreasonable for the RAD not to allow him to file evidence with respect to documents found to be unreliable by the RPD.

[11] Subsection 110(4) of the *IRPA* states:

> (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[12] At the RAD, the Applicant tried to submit a new letter from Dr. Kisaame dated July 19, 2018, a certificate of Dr. Kisaame's registration of the Allied Health Professional's Council, and a copy of Dr. Kisaame's annual practicing license. The RAD found that even though the letter was written after the RPD decision, it referenced events in November 2015 and was therefore not new because the information could have been obtained prior to the RPD hearing. The RAD

found that the Applicant was trying to correct a deficient record by submitting the letter, which is not permitted by *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, at para 54.

[13] However, in *Ali v Canada (Citizenship and Immigration)*, 2015 FC 814, at para 31, Justice Zinn found that it was unreasonable for the RPD to focus on superficial errors in grammar or spelling to discredit a medical report. He noted that minor typographical errors "…whether found in a Pakistani medical report, a judgment of the Federal Court, or indeed reasons of a Member of the RPD, cannot be reasonably used to suggest that the document may be fraudulent" (*Ali* at para 31).

[14] In my view, like *Ali*, the RAD adopted an unreasonable approach to this evidence. The RAD did not consider that human error might explain the spelling errors. Further, the RAD did not consider whether the Applicant "could reasonably have expected" that the RPD would reject the medical report. In my view, the Applicant was not trying to correct a deficient record. Instead, he was responding to the RPD's concern about the genuineness of Dr. Kisaame's report, therefore the Applicant could not have reasonably been expected to know that he would need additional evidence to explain spelling errors. The RAD did not account for the fact that the Applicant was responding to RPD's concern and therefore did not consider the relevant factual constraints that bear on its decision. Instead, the RAD focused solely on the legal constraints imposed by s. 110(4) of the *IRPA* without applying them to the factual scenario. This is not in keeping with *Vavilov*.

[15] In my view, the RAD's approach with respect to new evidence the Applicant sought to introduce was unreasonable. This judicial review is granted and the matter is remitted to the RAD for reconsideration.

[16] There is no question for certification.

JUDGMENT IN IMM-4501-19

THIS COURT'S JUDGMENT is that this judicial review is granted and the matter is remitted RAD for redetermination. There is no question for certification.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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