Federal Court  Cour fédérale

Date: 20230330

Docket: IMM-9634-21

Citation: 2023 FC 451

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 30, 2023

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

SAIDOU ABOUBAKAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Saidou Aboubakar, is a citizen of Chad. He alleges that he fears persecution in Chad because of his homosexuality.

[2] The applicant is seeking judicial review of the decision of the Refugee Appeal Division [RAD] rendered on November 26, 2021, rejecting his claim for refugee protection and confirming the decision of the Refugee Protection Division [RPD] that the applicant is not a refugee within the meaning of the United Nations *Convention Relating to the Status of Refugees* or a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] For both the RAD and the RPD, the determinative issue was the applicant's credibility. The RAD member rejected photos submitted by the applicant on appeal on the ground that they "do not seek to establish facts that were unknown at the time of the RPD hearing and, as such, are not new".

[4] In this application, the applicant argues that the RAD's decision not to admit the new photos was unreasonable. In support of his argument, the applicant submits that, by requiring that, to be considered new, evidence must establish facts unknown at the time of the hearing, the RAD adds a new test that is not established either in the legislation or in the case law. He further argues that the RAD's credibility findings were also unreasonable. According to him, the RAD unreasonably relied on what it considered to be omissions and contradictions, when in fact these simply demonstrate the complexity and delicacy of the development of the applicant's sexual identity, and every individual's identity by extension.

[5] Having reviewed the record before the Court, including the written and oral submissions of the parties, and the applicable law, I allow the application for judicial review for the reasons that follow.

II. Standard of review

[6] The parties submit, and I agree, that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23, 48). The standard of reasonableness applies to RAD decisions regarding the admissibility of new evidence under subsection 110(4) of the IRPA. In applying that standard a reviewing court "asks 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).

III. Analysis

[7] The applicant argues that the RAD unreasonably rejected the new evidence he had submitted on the basis that it does not seek to establish facts that were unknown at the time of the RPD hearing. This new evidence included photos of the applicant at the pride parade as well as a BBQ organized by Montréal's LGBTQ+ community centre in August 2021. The events took place after the RPD's July 21, 2021 decision.

[8] In order for new evidence to be admissible on appeal to the RAD, it must first fall into one of the three categories described in subsection 110(4) of the IRPA, and contain evidence (i)

that arose after the RPD's rejection of the claim for refugee protection; (ii) that was not reasonably available at that time; or (iii) that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] at para 34).

[9] The RAD found that the photos did not demonstrate facts unknown at the time of the RPD hearing and, in that sense, they were not new. The RAD relied on the Court of Appeal decision in *Singh*. The RAD also noted that the Federal Court had stated that subsection 110(4) deals strictly with evidence that an applicant did not present to the RPD before it rejected the claim (*Idumonza v Canada (Citizenship and Immigration*), 2021 FC 80 at para 24). Furthermore, the RAD noted that, during the hearing before the RPD, the applicant filed documents relating to his involvement with the LGBTQ+ community in Montréal, as well as photos taken during a pride parade. This parade allegedly took place a year earlier.

[10] The applicant submits that the RAD misapplied the newness test by confusing the newness of the evidence filed and the newness of the fact that the applicant was seeking to corroborate. The applicant argues that by requiring that, to be considered new, evidence must establish facts unknown at the time of the hearing, the RAD added a new test that is not established either in the legislation or in the case law. The applicant submits that it is entirely possible for a refugee protection claimant to file evidence on appeal of the continuity of political involvement or religious practice in Canada. Why would the claimant in this case not be allowed to file evidence of his continued involvement with the LGBTQ+ community?

[11] The respondent submits that, even if the photos were taken subsequent to the RPD decision, they do not meet the newness test set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*]. In particular, the respondent argues that participation in LGBTQ+ events in Canada was not a new element. He adds that the RAD clearly understood the newness requirement as set out in *Raza* and *Singh*. Thus, the respondent submits that the RAD reasonably concluded that the photos were not intended to establish facts unknown at the time of the RPD hearing.

[12] The role of the Court is not to reassess whether the new evidence should have been accepted, but to determine the reasonableness of the RAD's conclusion that this new evidence did not meet the legislative and jurisprudential criteria for admissibility, specifically newness.

[13] I agree with the applicant and find that the RAD's treatment of his new evidence was unreasonable. In the circumstances of this case, I am not persuaded that the RAD's reasoning on newness attests to a logical, rational and justified chain of analysis based on the criteria set out in the IRPA and the jurisprudence as required by *Vavilov*.

[14] The evidence is, quite simply, new in that it post-dates the RPD's decision. While it is similar to other events in which the applicant allegedly participated in the past, this does not mean that the evidence is not in itself new or does not attest to new events. The evidence of the applicant's continued involvement with the LGBTQ+ community since the time of the RPD's decision in this case is a new event.

[15] *Singh* confirms the requirement for the RAD to consider the "newness" factor of the evidence in its decision whether to admit it under subsection 110(4). The "newness" factor is defined in *Raza* at paragraph 13:

> . . .
>
> 3. Newness: Is the evidence new in the sense that it is capable of:
>
> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
>
> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
>
> (c) contradicting a finding of fact by the RPD (including a credibility finding)?
>
> [Emphasis added.]

[16] The applicant is not required to meet the three criteria mentioned above, but only one of them. I find that the RAD's reasoning is not justified. Although it addressed the second criterion (b) above, it ignored the first criterion (a), an event that occurred or a circumstance that arose after the hearing in the RPD. Although written reasons given by an administrative body must not be assessed against a standard of perfection (*Vavilov* at para 91), they must, however, be justified in a manner that is transparent and intelligible (*Vavilov* at para 96).

[17] I find that, in this case, the RAD unreasonably applied the expanded *Raza* factors with respect to newness. This is sufficient to justify the intervention of this Court and to refer the matter back to the RAD for reconsideration.

IV. Conclusion

[18] For these reasons, the application for judicial review is allowed. The decision is set aside and the matter referred back to the RAD for reconsideration. No questions of general importance were proposed for certification, and I agree that none arise in this case.

JUDGMENT in 9634-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed;
2. The decision under review is set aside and the matter is referred back to the Refugee Appeal Division for reconsideration by another decision maker; and
3. No question of general importance is certified;

"Vanessa Rochester"
Judge

Certified true translation
Janna Balkwill

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9634-21
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