

Federal Court



Cour fédérale

Date: 20230413

Docket: IMM-2373-22

Citation: 2023 FC 538

Ottawa, Ontario, April 13, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

**MCDONALD CHUKUNEDUM
ONYENWOSA**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, the Minister of Citizenship and Immigration, seeks judicial review of a decision of the Refugee Appeal Division (“RAD”) dated February 22, 2022, overturning the finding of the Refugee Protection Division (“RPD”) that the Respondent is excluded from refugee protection under Article 1F(b) of the *United Nations Convention Relating to the Status of*

Refugees, 189 U.N.T.S. 150 (the “*Refugee Convention*”), for having committed serious non-political crimes outside of Canada.

[2] The Applicant submits that the RAD’s finding that the Respondent’s crimes were not sufficiently serious is based on an unreasonable assessment of the evidentiary record, rendering the decision unreasonable.

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

II. Facts

A. The Respondent

[4] The Respondent, McDonald Chukunedum Onyenwosa, is a 32-year-old citizen of Nigeria. He is a bisexual man.

[5] On October 31, 2018, the Respondent left Nigeria and traveled to the United States (“US”) on a valid visitor’s visa. He claims that he fled Nigeria due to the threat to his life on the basis of his sexual orientation.

[6] Once in the US, the Respondent began working at Walmart using his friend’s Social Security Number (“SSN”). The Respondent then bought a fraudulent driver’s license from an agent, which bore his passport photo with another name. The Respondent claims that the agent

told him to test the license by attempting to collect a wire money transfer. When attempting to collect this money, he was arrested by the police for possessing a fake driver's license.

[7] The Respondent was charged with forgery and possessing a false identity of a government agency. He was incarcerated for two weeks.

[8] Upon being released, the Respondent traveled to Canada on May 19, 2019 and made a claim for refugee protection.

B. *RPD Decision*

[9] In a decision dated August 23, 2021, the RPD refused the Respondent's claim for refugee protection and found the claimant to be excluded from protection as per Article 1F(b) of the *Refugee Convention*, in accordance with section 98 of *IRPA*.

[10] At the outset, the RPD outlined the test for a finding under Article 1F(b) as follows: 1) there must be serious reasons for considering the claimant committed a crime outside Canada; 2) the crime must not be political in nature; and 3) the crime must be serious. The RPD also noted that formal conviction is not a prerequisite for a finding of exclusion under Article 1F(b).

[11] On the first prong of the test, the RPD considered the factual matrix surrounding the Respondent's use of his friend's SSN to obtain employment and the Respondent's purchase of a fake driver's licence. The RPD found, on a balance of probabilities, there are serious reasons for

considering that the Respondent has committed the offences of identity fraud and drawing a document without authority outside of Canada.

[12] On the second prong, the RPD concluded that there is no rational nexus between the Respondent's crimes and a political objective and they are therefore not political crimes.

[13] The third prong of the test, which requires an assessment of whether the crime in question is serious, involves the consideration of several factors. These include the elements of the crime, the mode of prosecution, the penalty prescribed, the facts, the mitigating and aggravating circumstances underlying the conviction, and sentencing range, as enumerated by the Federal Court of Appeal in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 and affirmed by the Supreme Court of Canada in *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68.

[14] The RPD found that the facts underlying the Respondent's crimes, the mode of prosecution, and the penalty prescribed for these crimes are all factors weighing in favour of finding that the crimes committed were serious in nature.

[15] Considering the elements of the Canadian equivalents of the offences under the *Criminal Code*, R.S.C., 1985, c. C-46 (the "*Code*"), the RPD found no evidence to suggest that the police were aware that the Respondent used a false identity to obtain work. The RPD's assessment therefore focused largely on the Respondent's charges of possessing false identification and forgery on January 23, 2019, following his arrest for using a fake driver's license. The RPD

found that the Respondent obtained a license in the name of another person with the intent to defraud the US government, and then intended to obtain a money order using this fake license. Finding that the elements of both the offences of false identification and forgery are made out on the facts, the RPD concluded that the elements weigh in favour of finding that the crimes committed are serious.

[16] Assessing the mitigating and aggravating circumstances, the RPD first found that the seriousness of the offences of false identification and forgery are mitigated by the lack of the limited period within which the Respondent used the false identity from January to February 2019, the Respondent's lack of prior criminal record, and the lack of violence involved in the commission of these offences.

[17] However, the RPD also found various aggravating factors that weigh in favour of the seriousness of the Respondent's crimes. These factors include the Respondent maintaining that he was not charged with any crimes in the US throughout the entire first sitting of the RPD's hearing, his lack of attempts to obtain documentary evidence from his lawyer in the US regarding his criminal charges, the lack of evidence about any bail conditions, and the Respondent's refusal "to accept any kind of responsibility to inquire into his charges in the United States, notwithstanding that this information is readily available." The RPD ultimately found that the mitigating factors applicable in the Respondent's circumstances are insufficient to outweigh the several aggravating factors weighing in favour of seriousness.

[18] Regarding the factor of sentencing range, the RPD noted the Respondent's submission that the circumstances relating to the offence of identity fraud would mandate a lower sentencing range and therefore weigh against the seriousness of the crimes committed. The RPD agreed that the offence of identity fraud attracts a wide sentencing range and considered two cases cited by the Respondent in support of the claim that the sentencing range for identity fraud would fall on the lower end of the range. However, the RPD found that both cases were distinguishable from the Respondent's case, in which he used two false identities for his own personal gain and was not under duress or fear for his life when doing so. The RPD therefore made no findings related to the factor of the Canadian sentencing range.

[19] Considering the factors cumulatively, the RPD ultimately found that the crimes committed by the Respondent are sufficiently serious and, in turn, there are serious reasons for considering that the Respondent committed serious non-political crimes outside Canada, such that he is excluded from protection as per Article 1F(b) of the *Refugee Convention*.

C. *Decision Under Review*

[20] In a decision dated February 22, 2022, the RAD allowed the Respondent's appeal of the RPD's decision and found that the Respondent is not excluded from refugee protection under Article 1F(b). The RAD concluded that the RPD erred in its Article 1F(b) exclusion analysis.

[21] On appeal, the Respondent submitted that the RPD was microscopic and over-vigilant in examining the evidence and his credible testimony surrounding his offences in the US. He submitted that the RPD ignored several mitigating circumstances that cumulatively weigh in

favour of a lesser penalty: he was a first-time offender, he was new to the US, it was his first time leaving Nigeria, first time trying to use the fake driver's license, the amount of money he tried to obtain was little, and he had limited education. The Respondent further submitted that the RPD erred in applying Canadian standards to his case by assuming he ought to have known the process for obtaining a US driver's license, and that the Canadian offence of drawing a document without authority as per section 374 of the *Code* is an overcharge because he did not intend to defraud with the fake license.

[22] The Respondent contended that the RPD in his case made the same errors found unreasonable by this Court in *Hasani v Canada (Citizenship and Immigration)*, 2020 FC 125 ("*Hasani*"), in which the RPD erroneously treated the claimant's absence of remorse and the failure to accept responsibility for her actions as aggravating factors rather than absence of mitigating factors (at para 69). The Respondent submitted that his offences were not serious and that he cannot be excluded from refugee protection on these grounds.

[23] The RAD agreed with the Respondent. The RAD first found that the RPD committed the same errors committed by the RPD panel and found unreasonable by this Court in *Hasani*. The RAD also found that the RPD erred by failing to consider several mitigating factors weighing in favour of the crimes being considered less serious, such that the Respondent should not be excluded from refugee protection under Article 1F(b). These factors include: it was the Respondent's first time outside of Nigeria, he was new to the US, he only attempted to use the fake license once, the amount of money he tried to obtain with the license was a small amount, and he demonstrated some lack of sophistication and naivety in being unaware of the difference

between licenses of different states. The RAD found that the mitigating factors in the Respondent's case weigh in favour of a lesser penalty.

[24] The RAD ultimately concluded that the Respondent's offences in the US were not serious enough to exclude him from refugee protection as per Article 1F(b) of the *Refugee Convention*, therefore allowing the appeal.

III. Issue and Standard of Review

[25] The sole issue is whether the RAD's decision is reasonable.

[26] The standard of review is not disputed. The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) (“*Vavilov*”). I agree.

[27] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[28] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a “minor misstep” (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

IV. Analysis

[29] The Applicant maintains that the RAD’s decision to overturn the RPD’s finding that the Respondent is excluded from refugee protection under Article 1F(b) of the *Refugee Convention* is unreasonable. The Applicant submits that the RPD reasonably considered the aggravating circumstances surrounding the Respondent’s offences in the US and the RAD’s reversal of the RPD’s decision on this point is based on an unreasonable assessment of the evidence.

[30] Regarding aggravating circumstances, the Applicant notes that the RAD unreasonably found that the RPD erred by drawing a negative inference from the Respondent’s lack of remorse, as per the decision in *Hasani*, because the RPD did not draw such a negative inference in the first place. The Applicant submits that the RAD unreasonably found that there are no aggravating factors weighing in favour of seriousness in the Respondent’s case.

[31] Considering mitigating circumstances, the Applicant submits that the RAD erred by impugning the RPD’s decision for finding that the Respondent ought to have known the

significant about being issued a license for Arizona while living in Georgia, and the process of obtaining a license in the US. The Applicant submits that the RPD reasonably found that, given the Respondent's profile as an educated person who resided in the US on a valid visa, it is unreasonable that he would not know what he was buying a fake driver's license.

[32] The Respondent maintains that the RAD's decision bears the hallmarks of reasonableness in that it is justified, transparent and intelligible (*Vavilov* at para 99). Specifically, the Respondent submits that the RAD reasonably assessed the circumstances surrounding his offences and found that the RPD committed the same errors found unreasonable by this Court in *Hasani*. The Respondent further submits that the RAD conducted a reasonable assessment of the aggravating and mitigating circumstances in his case, on the basis of the facts and evidence.

[33] In my view, the RAD's decision to allow the appeal and overturn the RPD's finding that the Respondent is excluded from refugee protection under Article 1F(b) is reasonable. I find that the Applicant failed to point to a reviewable error in the RAD's assessment of the Respondent's exclusion for his crimes committed in the US.

[34] The Applicant submits that the RAD erred in finding that the RPD committed the same errors as those found unreasonable in *Hasani*, specifically that the RPD did not find the Respondent's lack of remorse or sense of responsibility to be an aggravating factor. I disagree.

[35] While the RPD may have not used the same language used by the decision reviewed by this Court in *Hasani*, namely that the claimant's lack of remorse and responsibility for her

actions constituted an aggravating factor, the RPD in the case at hand still identified the Respondent's lack of awareness of and responsibility for his charges as an aggravating factor. The RPD considered it an aggravating factor weighing in favour of the seriousness of the Respondent's crimes that he "refused to acknowledge" his criminal charges, maintained that he was not charged with a crime in the US throughout the first sitting of the hearing, and "refused to accept any kind of responsibility to inquire into his charges." This analysis is sufficiently analogous to the RPD's reasoning in *Hasani*, which my colleague Justice Norris found to be unreasonable on the grounds that "treating the absence of remorse and the failure to accept responsibility as aggravating factors (as opposed to the absence of mitigating factors) is a fundamental error in principle" (at para 69).

[36] I further find that the RAD reasonably identified various mitigating factors weighing against the finding that the Respondent's crimes are sufficiently serious to warrant exclusion under Article 1F(b). The RAD reasonably assessed the factual matrix and specific circumstances of the Respondent, including that he only tried to use the fake driver's license once, the amount of money he tried to obtain was a low amount, and he demonstrated some naivety in being unaware of the differences between different states' licenses. These are reasonable bases upon which to find that the seriousness of the Respondent's crimes is mitigated.

V. Conclusion

[37] This application for judicial review is dismissed. The RAD's decision to allow the appeal of the RPD's decision and find that the Respondent is not excluded from refugee protection is reasonable. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-2373-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. There is no question to certify.

“Shirzad A.”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2373-22

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
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