

Federal Court



Cour fédérale

Date: 20150624

Docket: IMM-5921-14

Citation: 2015 FC 784

Ottawa, Ontario, June 24, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ABDUL BASIT FIDA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant's challenge to the decision of the Refugee Appeal Division [RAD], which confirmed the negative decision of the Refugee Protection Division [RPD], must be dismissed.

[2] Mr. Fida is from Pakistan and claimed protection in Canada on the basis of his sexual identity as a homosexual. The RPD did not believe him; it found that there was insufficient credible evidence to establish that he was a gay man or had suffered the experiences he claimed.

[3] Among other areas of concern, the RPD noted in its decision that the applicant had failed to provide any corroborative evidence of his sexual identity or the events relating to that alleged sexual identity which formed the basis of his fear:

The panel finds that it is not reasonable that he did not provide corroborating documents in the form of affidavits from these individuals considering he lives with his uncle and since Jawad Jamal and his wife were directly involved in the events alleged by the claimant. The panel draws a negative inference regarding his lack of efforts to corroborate central elements of his claim.

[4] Included in his appeal to the RAD were the precise three affidavits that the RPD complained had not been produced. The applicant asked the RAD to accept them as evidence in his appeal.

[5] The RAD noted the restriction on the acceptance of new evidence found in subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, which provides: “On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of the 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.”

[6] The RAD observes that “if the statutory requirements have been met, the panel must then consider the factors in *Raza* [2007 FCA 385]” [emphasis added]. There are many cases before this court addressing whether the RAD is to consider and apply the *Raza* test to new evidence; however, that issue does not arise in this case because the RAD explicitly finds that the

requirements of subsection 110(4) of the Act had not been met. The applicant urges that this was unreasonable.

[7] The applicant was asked at his RPD hearing why he did not have affidavits of the sort at issue to corroborate his evidence. He responded that he did not know that he could submit this kind of evidence. He submits that his lack of knowledge that such documents would be important is corroborated by the fact that he was now providing them in response to the decision of the RPD. The RAD did not accept that explanation.

With due respect, the RAD disagrees. The Appellant had the services of competent counsel at the time of the RPD hearing. Moreover, the BOC and kit provided to the Appellant explains the process which includes the instructions to submit corroborative evidence to support the allegations. The Appellant had the opportunity to do so at the time of the RPD hearing [held on June 3 and 20, 2013] and up until the time that the RPD rejected the claim on October 3, 2013. He failed to do so, and therefore all of the “new” documentation does not meet the statutory requirement, as these documents could reasonably have been available at the time of the RPD hearing. The RAD particularly notes the affidavit from the Appellant’s uncle in Canada, who could have come forward in person and testified as a witness at the RPD hearing.

[8] Decisions of the RAD are reviewed by this court on the standard of reasonableness, save for questions of law. I find that the RAD’s assessment that the “new” evidence did not meet the requirement of subsection 110(4) of the Act was reasonable; moreover, it is the very decision this court would have reached on these facts. The court takes particular note of the fact that there was no request made by either the applicant or his counsel at the RPD hearing to adjourn in order that the affidavits could be obtained, nor was there any request made to tender them following the hearing. Moreover, the decision of the RPD was rendered more than three months following the last hearing date, but the affidavits were produced only when the negative decision was

rendered and the RPD was functus. In short, there was no effort made to provide them until the decision was made rejecting the applicant's claim.

[9] It should not come as a surprise to a claimant or to his lawyer that proving sexual identity may well require more than simply the sworn testimony of the claimant: see for example *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067.

[10] There is a further submission made by the applicant that the RAD failed to apply the proper test when reviewing his credibility. The RAD examined the various findings of the RPD upon which it based the finding that the applicant was not credible. It is clear from the decision that it conducted its own independent analysis of that evidence. In fact, two of the bases upon which the RPD relied were found by the RAD not to have been a reasonable assessment of the evidence. Notwithstanding the omission of those exceptions, the RAD agreed with the RPD on the others and concluded that there was insufficient credible evidence upon which to make a positive determination that the applicant was a homosexual or had experienced the events in Pakistan that he claimed. That finding was reasonable based on the evidence that supported it.

[11] The applicant submitted in his written material that the RAD Member was biased. There is no evidence whatsoever offered by the applicant or found in the record to support even a suspicion of bias.

[12] Neither party proposed a question for certification, nor is there one on the facts before the court.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5921-14

STYLE OF CAUSE: ABDUL BASIT FIDA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 18, 2015

JUDGMENT AND REASONS: ZINN J.

DATED: JUNE 24, 2015

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