Federal Court  Cour fédérale

Date: 20170222

Docket: IMM-3081-16

Citation: 2017 FC 215

Toronto, Ontario, February 22, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

TARAS NAGORNYAK

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada ("RPD"), dated June 17, 2016, finding that the Applicant is not a Convention refugee nor a person in need of protection pursuant to ss 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA") and that his claim is manifestly unfounded pursuant to s 107.1 of the IRPA.

Background

[2] The Applicant is a 21 year old citizen of Ukraine who claims that he fears persecution on the basis of his sexual orientation as a bisexual. In March 2014, he met Andriy Gritsenko ("Andriy") and they entered into an intimate relationship. In September 2014, the Applicant and Andriy were confronted by four neighbors outside Andriy's apartment, threatened and beaten. As a result, they both received medical assistance for minor injuries at a polyclinic. Following this incident, the Applicant's parents were informed of his same-sex relationship. They were shocked, his father was particularly upset. His family did not know what to do with him until his maternal aunt, who is Canadian, convinced his parents to send the Applicant to Canada to study. In January 2015 the Applicant came to Canada.

[3] The Applicant claims that in March 2015 he returned to Ukraine, without telling his parents, and moved in with Andriy. However, his aunt knew of his plan to return and informed his mother. In early June 2015, the Applicant's father came to Andriy's apartment and, at first, reasoned with him to return to Canada, but then became angry. His father's tirade was heard by the neighbors and triggered a further homophobic attack on the following day. Men attacked Andriy when he returned home and, when the Applicant ran out to help, he too was beaten. The Applicant called his mother and she drove them to a hospital where he was hospitalized for three days with a diagnosis of bodily injuries and a concussion.

[4] The Applicant returned to Canada at the end of June 2015 and filed his refugee claim in January 2016.

Decision Under Review

[5] The RPD accepted that the country condition documentation indicated that sexual minorities in Ukraine face more than a mere possibility of persecution. It stated that the determinative issue was credibility and found the Applicant's claim that he is bisexual not to be credible. The RPD also concluded, taking into account the Applicant's testimony and the documents presented, that the Applicant's claim was invented as a means to gain access to Canada and was manifestly unfounded pursuant to s 107.1 of the IRPA.

[6] The RPD structured its decision by addressing various pieces of evidence. It gave no weight to the Applicant's evidence concerning his involvement with the 519 Community Centre and found that it is more likely that this was primarily intended to create evidence to present in his claim. It gave little weight to the affidavit provided by the Applicant's aunt and stated that an inconsistency between the affidavit and other sources of evidence could have been explained by testimony from her, in person or by telephone, but that no such arrangements were made.

[7] As to a letter from the Applicant's mother, the RPD noted that this letter was brief, made a reference to the June beating and stated "what kind of orientation you have" and, therefore, added nothing to the credibility assessment. The RPD also drew an adverse inference from the Applicant's failure to recall details of the long conversation he had with his parents when his sexual orientation was discussed with them for the first time.

[8] As to the Applicant's relationship with Andriy, the RPD stated that given the inconsistency in the Applicant's evidence regarding the start of the relationship with Andriy; the limited information contained in, and therefore value to be ascribed to, an email from Andriy; and, the limited value of a Skype call log, the Applicant had failed to show that he was in a same-sex relationship with Andriy.

[9] As to the re-availment and June 2015 incident, the RPD stated that when asked why he returned to Ukraine in March 2015 after completing his English course in Canada, the Applicant answered that he missed Andriy. However, as the RPD found that the relationship between the Applicant and Andriy was not as alleged, this explanation was not reasonable. Further, the re-availment was not consistent with a fear of persecution.

[10] The RPD then noted counsel's argument that even if re-availment were not found to be reasonable, the June 2015 incident gave rise to a new basis of claim. However, the RPD disbelieved that the June 2015 incident occurred, finding that the 2015 medical extract ("Medical Extract") produced was fraudulent and fabricated for the purposes of the claim. This finding was based on the Applicant's testimony that the Medical Extract was sent to Canada after other supporting documentation. The RPD drew a negative inference from the unexplained delay. The RPD also drew a negative inference from the Applicant not having a similar medical extract for the September 2014 incident when the Applicant's evidence was that these documents are issued as a matter of course. The RPD drew a further adverse inference from the Applicant's Basis of Claim form ("BOC") amendment indicating that he had fallen unconscious after the June 2015 incident, a detail that was contained in the late arriving Medical Extract. The RPD did

not accept the Applicant's explanation that this was done on the advice of his counsel and found that it was most likely added to bring the narrative into line with the newly arrived medical document. The RPD stated that considering the lack of explanation of why the document arrived late; why it had been issued, which was inconsistent with the document presented to corroborate the previous year's incident; and, taking into account country condition documents which state that fraudulent documents are easily available in Ukraine, it found, on a balance of probabilities that the document was fraudulent and fabricated for the purpose of the claim and that the 2015 incident it was presented to corroborate did not occur.

Issues and Standard of Review

[11] Although the Applicant makes lengthy submissions on both procedural fairness and the reasonableness of the decision, in my view, the determinative issue is the RPD's finding that the claim is manifestly unfounded pursuant to s 107.1 of the IRPA. Reasonableness is the standard of review that applies to such findings (*Brindar v Canada (Citizenship and Immigration)*, 2016 FC 1216 at paras 7-8 ("*Brindar*"); *Warsame v Canada (Citizenship and Immigration)*, 2016 FC 596 at para 25 ("*Warsame*")).

Analysis

[12] Subsection 107.1 of the IRPA states:

107.1 If the Refugee Protection Division rejects a claim for refugee protection, it must state in its reasons for the decision that the claim is manifestly unfounded if it is of	107.1 La Section de la protection des réfugiés fait état dans sa décision du fait que la demande est manifestement infondée si elle estime que celle-ci est clairement

the opinion that the claim is clearly fraudulent.	frauduleuse.

[13] A finding that a claim is manifestly unfounded has serious consequences for a claimant because, pursuant to s 110(2)(c) of the IRPA, no appeal may be made to the Refugee Appeal Division ("RAD") when that finding has been made. Further, the claimant does not benefit from a stay of removal by operation of law if a challenge is made to the RPD's decision (*Immigration and Refugee Protection Regulations*, SOR/2002-227, s 231(1); IRPA, s 49(2)(c)).

[14] As stated by Justice Roy in *Warsame*:

> [27] Parliament chose to require that the claim be "clearly fraudulent" for particular consequences to flow. That would entail that it is the claim itself that is assessed as being fraudulent, and not the fact that the applicant would have used, for instance, fraudulent documents to get out of the country of origin or to gain access to Canada. However, once making a claim for refugee protection, the applicant would have to operate with clean hands and statements in support of the claim have to be accurate or they could be held against the claimant. In other words, the claimant would be attempting to gain refugee protection through falsehoods that may make the claim fraudulent. It is the claim that must be fraudulent.
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> …
>
> [30] For a claim to be fraudulent, it would be required that a situation be represented of being of a certain character when it is not. But not any misstatement or falsehood would make a refugee claim fraudulent. It must be that the dishonest representations, the deceit, the falsehood, go to an important part of the refugee claim for the claim to be fraudulent, such that the determination of the claim would be influenced in a material way. It seems to me that a claim cannot be fraudulent if the dishonesty is not material concerning the determination of the claim.
>
> [31] If the word "fraudulent" signals the need for a misrepresentation of the truth or a concealment of a material fact for the purpose of getting another party to act to its detriment, I

> would have thought that the word "clearly" would go to how firm the finding is. For instance, Black's Law Dictionary (West Group, 7th Ed) defines "clearly erroneous standard" as "a judgment is reversible if the appellate court is left with the *firm conviction* that an error has been committed." Similarly, clearly fraudulent would in my view signal the requirement that the decision maker has the firm conviction that refugee protection is sought through fraudulent means, such as falsehoods or dishonest conduct that go to the determination of whether or not refugee protection will be granted. Falsehoods that are merely marginal or are antecedent to the refugee claim would not qualify.
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> [emphasis in original]

[15] This Court has also held that a negative credibility finding is not synonymous with submission of a fraudulent claim (*Brindar* at para 11).

[16] In my view, in this matter there are at least three findings of the RPD that, taken together, bring into question the RPD's finding that the claim was manifestly unfounded by reasons of being "clearly fraudulent".

[17] The first of these is the RPD's treatment of the Skype call log. In its decision the RPD stated that while the Skype print out does confirm contact with Andriy:

> … every page of the log shows the same sequence of calls to the same persons, in the same order only on different dates. This only came to the Panel's attention after the hearing and, therefore, the claimant was not asked to comment on this fact. There may be a reasonable explanation. What is clear, however, is that, assuming this log is genuine, it shows that the claimant was having the same frequent contact with several people; therefore, the Panel can give little weight to this log as an indication that the relationship between the claimant and Andrii [*sic*] was as alleged.

[18] In his affidavit made in support of this application for judicial review the Applicant stated, if he had been asked to comment on the RPD's finding that every page of the log shows the same sequence of calls to the same persons, in the same order only on different dates, he would have explained that the names on the left hand side of the Skype call log show his Skype contacts and that he printed screenshots of all the calls with Andriy at one time, on April 17, 2016. Further, the "call ended" under Viktor Lupul's name is repeated on each page because the Applicant called him on the same day as he retrieved the Skype call log with Andriy.

[19] Thus, the Applicant submits that the RPD gave little weight to the Skype call log because it misapprehended this evidence as showing that the Applicant was having the same frequent contact with several people. The Applicant acknowledges that the fact that he was regularly calling Andriy may not alone demonstrate that they were in a same-sex relationship, however, submits that the RPD's conclusion that they were not in a relationship was cumulative and was based, in part, on this misapprehension of the evidence. Further, that he could not have anticipated that the RPD would draw this conclusion from the evidence. His counsel questioned him on the Skype call log and the RPD indicated that the questions asked had covered what the RPD wanted to know. Therefore, the RPD should have raised this issue with him, by seeking post-hearing submissions or otherwise, before making this finding.

[20] I would first note that it is clear that the RPD did rely on the Skype call log in reaching its conclusion that the Applicant did not meet his onus of showing that he was in a same-sex relationship with Andriy. The RPD stated:

> Considering the inconsistency in the claimant's evidence regarding the start of the relationship; the limited information contained in,

> and therefore the limited value to be ascribed to, the email from Andrii; **and limited value of the call log**, the Panels finds, on a balance of probabilities, that the claimant has not met his onus of showing that he was in a same sex relationship with Andrii as alleged in the claim.
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> [emphasis added]

[21] Further, it must be recalled that the RPD stated that the only issue being considered was the credibility of the Applicant's claim that he is bisexual. While in the passage above the RPD couches its finding concerning the Skype call log in terms of not meeting the evidentiary burden, viewed in context, the RPD was actually concluding that the evidence supporting the fact of the Applicant's sexual orientation. Fundamentally, the RPD did not believe the Applicant (*Warsame* at para 13). The RPD's conclusion in this regard was a cumulative one that included the adverse inference from the Skype call log (*Gomez Florez v Canada (Citizenship and Immigration),* 2016 FC 659 at paras 28 and 31). Thus, I do not accept the Respondent's argument that the RPD was not making a credibility finding based on this evidence.

[22] Further, at the hearing before the RPD the Applicant's counsel asked him about the Skype call log. Specifically, counsel asked the Applicant to identify "…who is it you're speaking to on Skype in all of these screen shots?" The Applicant replied that these were conversations that he had with Andriy. Counsel also asked him about the format of the Skype call log which the Applicant addressed including identifying a photo of Andriy appearing at the top of each page. The transcript indicates that counsel then asked the RPD if there was anything else that it wished to have addressed concerning the Skype call log and the RPD indicated that it was satisfied with the questioning by counsel.

[23] Accordingly, I also do not agree with the Respondent that the Applicant bore the onus of clarifying this evidence on the basis that it was not self-explanatory. The Applicant did explain the Skype call log and the RPD was asked if further clarification was needed and advised that it was not. Given that the Applicant's evidence was that all of the calls recorded on the Skype call log were with Andriy, it seems apparent that the RPD misapprehended this evidence and, as this misapprehension arose only after the hearing, it did not address this concern with the Applicant. The Skype call log could comprise credible evidence of the same-sex relationship with Andriy. Therefore, even if it alone may not have been conclusive, the RPD's misapprehension of this evidence is sufficient to render its finding that the claim was manifestly unfounded to be unreasonable.

[24] The RPD also took issue with the extract from Medical Card No. 7699 Medical Extract. This spoke to the assault in June 2015 and a resultant three day hospital admission. The RPD was concerned with the fact that the Medical Extract had not been sent with the package of documents originally submitted (but it had been received electronically by the RPD in advance of the hearing) and did not accept the Applicant's explanation that he did not know why his mother had sent him the Medical Extract later than another document, referred to as a medical note ("Medical Note") which the Applicant explained is a page out of his medical book which is an ongoing lifetime record of medical treatment. The RPD was also concerned with the Applicant's evidence that a medical extract would, as a matter of course, be issued after any injury or illness, but that one had not been issued for the September 2014 incident. Finally, the RPD was concerned that the Applicant had amended his BOC to add that he had been briefly unconscious as a result of the June 2015 attack. The RPD did not accept as reasonable the

Applicant's explanation that he had done so on the advice of his counsel. Given the lack of explanation for the late arrival of the Medical Extract, the inconsistency as to why it had been issued given that a similar document was not issued for the September 2014 assault and taking into account country condition documents which stated that fraudulent documents are easily available in Ukraine, the RPD concluded that the Medical Extract was fraudulent.

[25] However, the RPD made no finding as to the authenticity of the Medical Note. This is significant because the Medical Note also states that the Applicant was hospitalized from June 5 to June 8, 2015 with a diagnosis of a concussion and bodily injuries, which corroborates the information contained in the Medical Extract. Further, in my view, the RPD's finding in respect of the Applicant's explanation for the amendment to his BOC was not reasonable. It is clear from the transcript that the Applicant, who had just turned 21, explained that he had little experience in such matters and made the amendment because his counsel advised him to do so. His counsel told him that this was an important detail and that it was for that reason that he made the amendment. Applicants are entitled to amend their BOC's and, had he not done so, he might have faced a finding that he had omitted an important detail.

[26] In the result, the misapprehension of the Skype call log; the failure to address the Medical Note yet concluding that the Medical Extract was fraudulent; and, the unreasonable finding as to the Applicant's explanation for amending his BOC, taken together do not support the RPD's opinion that the claim is clearly fraudulent and renders its finding that the claim was, therefore, manifestly unfounded to be unreasonable.

[27] That said, there is some uncertainty as to the proper remedy in a circumstance such as this where the RPD's finding that the claim was manifestly unfounded is determined to be unreasonable.

[28] While there do not appear to have been many decisions in this regard concerning s 107.1, this Court has addressed circumstances where the RPD has made a finding of no credible basis pursuant to s 107(2) of the IRPA which has the similar consequence of precluding an appeal to the RAD pursuant to s 110(2)(c) of the IRPA.

[29] In *Mahdi v Canada (Citizenship and Immigration)*, 2016 FC 218, which concerned a finding of no credible basis, Justice Phelan ordered that the operation of the RPD's decision be suspended for 30 days to allow the applicant to commence an appeal to the RAD (also see reasons on reconsideration 2016 FC 422).

[30] In *Qui v Canada (Citizenship and Immigration)*, 2016 FC 740 Justice Hughes was satisfied that the decision under review before him had to be set aside at least so far as it made a finding that the claims "do not have a credible basis". This was because of a lack of attention to the documents which indicated that, had the documents been properly considered, there "could" have been something to support a positive finding in favour of the applicants. He stated that in the absence of a "no credible basis" finding, the decision under review could have been appealed to the RAD with benefits to the applicants of a statutory stay. He deliberately made no finding on the conclusions otherwise reached by the RPD that the claimants were not Convention refugees and were not persons in need of protection, preferring to leave that as an open issue for

the RAD to decide. He returned the matter to the RPD with directions that that portion of the decision declaring that there is no credible basis for the claim be set aside and that an amended decision to that effect be issued bearing the date of the amendment. On that basis, the RPD would not need to conduct any further hearing and an appeal to the RAD would be possible.

[31] Justice Hughes then certified the following in *Qiu v Canada (Citizenship and Immigration)*, 2016 FC 875:

> *Does the Federal Court have jurisdiction under paragraph 18.1(3)(b) of the Federal Courts Act to issue a direction requiring the Refugee Protection Division to remove from its decision a finding that there is no credible basis for a claim, thereby granting a right of appeal to the Refugee Appeal Division, which would otherwise be precluded by paragraph 110(2)(c) of the Immigration and Refugee Protection Act?*

[32] Recently, in *Omar v Canada (Citizenship and Immigration)*, 2017 FC 20, and again considering s 107(2) of the IRPA, Justice Fothergill held that, pending clarification by the Federal Court of Appeal, it was prudent to order the usual remedy when an application for judicial review is granted in part. He therefore remitted only the question of whether the applicant's refugee claim has no credible basis to a differently constituted panel of the RPD for re-determination.

[33] In my view, the considerations and questions of the appropriate remedy surrounding s 107(2) apply equally with respect to findings by the RPD that a matter is manifestly unfounded pursuant to s 107.1. In this matter, while it would perhaps be possible to only remit the question of whether the Applicant's claim is manifestly unfounded back to the RPD, because the findings pertaining to the Skype call log, the Medical Note, the Applicant's explanation for the

amendment of his BOC as well as other factual errors by the RPD, all also tie into the reasonableness of the overall decision, I have determined that it is appropriate to quash the decision in whole and refer it back to the RPD for re-determination by a different panel, taking into consideration the reasons contained in this decision.

[34] In any event, if this Court were to make a finding on the RPD's decision that the Applicant is not a Convention refugee or a person in need of protection and remit only the s 107.1 finding back to the RPD, and even if on re-determination the RPD found that the claim was not manifestly unfounded, entitling an appeal to the RAD, the RAD would then be faced with making a decision on appeal of the RPD's decision, knowing what this Court had already determined in that regard. In my view, that is a situation to be avoided, and for that reason, I have not made a finding in that regard.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of the RPD is set aside and the matter is remitted for re-determination by a differently constituted panel;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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