Federal Court Cour fédérale

Date: 20180726

Docket: IMM-4735-17

Citation: 2018 FC 784

Ottawa, Ontario, July 26, 2018

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

YEESON YOAO OLAYA YAUCE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Yeeson Yoao Olaya Yauce, claims to be a citizen of Peru and of Peruvian nationality. He entered Canada from Mexico in July 2017 and sought refugee protection. He alleges that he fears returning to Peru on the basis of his sexual orientation and the sexual abuse committed by a neighbour.

[2] On September 21, 2017, the Refugee Protection Division [RPD] rejected the Applicant's refugee claim on the basis that the Applicant failed to establish with credible and trustworthy evidence his identity as a citizen of Peru. The RPD also found, in accordance with subsection 107(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], that there was no credible basis to the Applicant's claim.

[3] The Applicant now seeks judicial review of the RPD's decision on the basis that the RPD erred in fact and in law in making its credibility findings, particularly in relation to the Applicant's Peruvian national identity document, his failure to produce his Peruvian passport, his omission to disclose a previous attempt to enter Mexico in 2016 in his Basis of Claim [BOC] form and the untimely production of his birth certificate. The Applicant also contends that the RPD erred in the assessment of the police and medical reports provided in evidence and that it unreasonably refused to hear from a witness, thereby breaching natural justice. Finally, the Applicant submits that the RPD erred in finding that the Applicant's claim had no credible basis.

II. Analysis

A. *Standard of Review*

[4] It is well-established that credibility findings, including the assessment of identity documents, are reviewable on a standard of reasonableness (*Mbula-Kolela v Canada (Citizenship and Immigration)*, 2017 FC 1018 at para 14; *Katsiashvili v Canada (Citizenship and Immigration)*, 2016 FC 622 at para 10; *Behary v Canada (Citizenship and Immigration)*, 2015 FC 794 at para 7).

[5] No credible basis findings are equally reviewable on a standard of reasonableness (*Mohamed v Canada (Citizenship and Immigration)*, 2017 FC 598 at para 22; *Iyombe v Canada (Citizenship and Immigration),* 2016 FC 565 at para 4; *Hernandez v Canada (Citizenship and Immigration)*, 2016 FC 144 at para 3).

[6] In assessing reasonableness, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision "falls within a range of possible, acceptable outcomes which are defensible in light of the facts and law" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[7] Regarding procedural fairness, it has long been established that issues of procedural fairness are to be reviewed against the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Khosa* at para 43). However, the Federal Court of Appeal has recently held that issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Instead, the role of this Court is to determine whether the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Dunsmuir* at para 79).

B. *National Identity Document*

[8] The Applicant submits that the RPD unreasonably determined that the person in the photograph on the Peruvian national identity document appeared markedly different from the

Applicant. The Applicant argues that this finding is unreasonable as the RPD is not an expert in the forensic analysis of photographs.

[9] The Applicant's argument is without merit. This Court has held that the RPD is empowered to make a finding that an applicant is – or is not – the person appearing in the photograph of an identity document and is not required to resort to expert testimony before making such a finding (*Liu v Canada (Citizenship and Immigration)*, 2012 FC 377 at paras 9-10; *Hernandez Santos v Canada (Citizenship and Immigration)*, 2007 FC 1119 at paras 21-22; *Kazadi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 292 at paras 11-12).

[10] The Applicant contends that the RPD erred in finding that the national identity document was not admissible as evidence as it was already part of the Canada Border Services Agency [CBSA] package of documents entered as an exhibit at the hearing.

[11] The Applicant is misconstruing the RPD's statement. The RPD was merely noting that the Applicant's failure to provide an English translation of the national identity document as required by section 32 of the *Refugee Protection Division Rules*, SOR/2012-256 [RPD Rules] affected the document's admissibility and reliability. It is obvious from the decision that the RPD considered the national identity document as it made a number of findings why the document was not reliable.

[12] The Applicant argues that the RPD erred in law in drawing a negative inference from his failure to provide the original of the national identity document at the hearing. The Applicant

argues that the onus was on the RPD to request the seized document from the CBSA. To support his argument, the Applicant referred to sections 9.7 and 11.5 of Chapter 12 of the Immigration Enforcement Manual and to paragraph 253(2)(*d*) of the *Immigration and Refugee Protection Regulations* SOR/2002-227 [IRPR]. Under the terms of paragraph 253(2)(*d*) of the IRPR, when a document or thing has been seized because an officer believes on reasonable grounds that the seizure is necessary to carry out the purposes of the IRPA, it shall be returned to its lawful owner when the seizure is no longer necessary to carry out the purposes of the IRPA.

[13] I agree with the Applicant that the RPD could have requested the original from the CBSA. However, the Applicant had the burden of establishing his identity. He was also notified in advance of the hearing that identity was an issue and that the presiding member requested that he provide identity documents at the hearing. In that context, and given the importance of the national identity document, it was not unreasonable for the RPD to expect that the Applicant request that the document be brought to the hearing for the RPD to review.

[14] The Applicant complains that the RPD unreasonably drew a negative inference because a copy of the national identity document was stamped “suspected fraudulent”. He argues that this finding is unreasonable because the notice of seizure states that the document is “genuine”. The Applicant is again misconstruing the RPD’s statements. The RPD reasonably found that the conflict between the two (2) documents reduced the reliability of the copied national identity document.

[15] The Applicant also takes issue with the RPD’s statement that because the Applicant was able to obtain a false Chilean passport, obtaining a Peruvian national identity document would not present an insurmountable barrier. The Applicant argues that this Court has held on a number of occasions that travel on a false document should not automatically lead to a negative inference of credibility.

[16] The RPD’s statement was made after it noted: (1) the differences between the Applicant and the person in the photograph; (2) the Applicant’s failure to produce both the original national identity document and an English translation of the document; and (3) the conflict between the document stamped “suspected fraudulent” and the notice of seizure. In that context, the RPD indicated that since the Applicant had been able to access fraudulent documentation – his Chilean passport – with sufficient security features to enable him to travel to Canada, it would not have presented an insurmountable barrier for the Applicant to obtain a fraudulent national identity document. The Applicant has failed to persuade me that the RPD’s statement was unreasonable in its overall assessment of the weight it should give to the national identity document.

[17] Finally, the Applicant argues that the RPD erred in failing to give weight to the Applicant’s accurate testimony concerning the identity number on his national identity document. The RPD found that while the Applicant gave consistent testimony regarding the number on his national identity document, the Applicant’s general credibility was so tarnished that it could not give this aspect of his testimony any evidentiary weight. The RPD’s finding is

reasonable and, in any event, it would not have been determinative in the RPD’s assessment of the national identity document.

C. *Failure to Produce the Peruvian Passport*

[18] The Applicant contends that it was unreasonable for the RPD to attach great significance to the Applicant’s failure to produce his Peruvian passport and to reject his explanation for not doing so. I disagree. The Applicant was forewarned that identity was an issue and that he should bring identity documents to the hearing. It was also open to the RPD to assess the Applicant’s explanation for not seeking a replacement of his passport and to reject it on the basis that it lacked credibility (*Okafor v Canada (Citizenship and Immigration)*, 2012 FC 99 at para 5; *Navaratnam v Canada (Citizenship and Immigration)*, 2011 FC 856 at para 20; *Toora v Canada (Citizenship and Immigration*), 2006 FC 828 at para 45).

D. *Travel to Mexico in 2016*

[19] The Applicant submits that the RPD made an unreasonable negative inference because the Applicant failed to state in his BOC narrative that he had travelled to Mexico in 2016 and could not remember what day or month the travel occurred. The Applicant argues that he disclosed this information in Question 4 of his IMM 5669 form. The Applicant further argues that the RPD should not draw adverse inferences where refugee claimants are merely adding details to what is already in their written statement.

[20] While I agree that the Applicant mentioned his 2016 travel to Mexico in his IMM 5669 form, he did so in response to the question of whether he had ever been refused admission to Canada or any other country. The Applicant did, however, omit this information in his BOC narrative. It was reasonable for the RPD to find that it was a significant omission considering that a prior attempt to flee Peru on the grounds of persecution went directly to the core of the Applicant's claim and identity. The RPD was entitled to rely on the Applicant's failure to mention this information in his BOC narrative in assessing the Applicant's overall credibility (*Liu v Canada (Citizenship and Immigration)*, 2012 FC 440 at para 14). I would also add that the RPD's negative inference was not based solely on the Applicant's failure to include the information in his BOC narrative. It was also based on the Applicant's failure to inform the RPD, when asked at the beginning of the hearing, whether he needed to make any changes to his BOC document.

E. *Birth Certificate*

[21] The Applicant asserts that the RPD unreasonably made a negative inference of the Applicant's credibility because he produced a copy of his birth certificate after the hearing began.

[22] The Applicant's assertion is unfounded. The RPD took issue with the birth certificate for a number of reasons: (1) the Applicant's failure to produce the document at least ten (10) days before the hearing in accordance with paragraph 34(3)(*a*) of the RPD Rules or when asked at the beginning of the hearing whether he had any additional documents to produce; (2) the Applicant's failure to provide the original birth certificate and an English translation as required

by the RPD Rules; and (3) the Applicant's failure to produce the email print out showing the email address and the communication that would have attached the scanned copy of his birth certificate.

F. *Witness*

[23] The Applicant submits that the RPD unreasonably refused to hear from the witness who attended the hearing to provide him moral support and, if required, to give evidence regarding the Applicant's identity and sexual orientation. Further, given that identity was the determinative issue in the claim and that the RPD had anticipated the possibility of hearing from the witness by excluding him from the hearing room at the commencement of the hearing, the RPD's refusal also constitutes a breach of natural justice.

[24] Upon review of the record, I am satisfied that the RPD reasonably exercised its discretion not to allow the testimony of the Applicant's witness and that there is no breach of natural justice in the circumstances of this case.

[25] Near the end of the hearing, the Applicant's counsel asked whether the RPD would like to hear from the Applicant's friend on the issue of identity. The RPD indicated that while such testimony would usually be allowed in cases of countries where there is a problem in getting documentation, Peru was not one of those countries. The RPD found that if the Applicant had wanted to prove his identity through alternative means, such as through the oral testimony of a witness, he should have disclosed the witness in advance and identified the nature of his relationship to such witness and the substance of his testimony.

[26] The RPD's determination is consistent with the requirements of section 44 of the RPD Rules. It provides that if a party wants to call a witness, the party must communicate to the RPD and the opposing party, no later than ten (10) days prior to the hearing, the contact information of the witness, a brief statement of the purpose and substance of the witness' testimony, the time needed for the testimony and the witness' relationship to the party. If the party fails to provide the witness information, the witness will not be allowed to testify unless authorized by the RPD. In deciding whether to allow testimony, the RPD considers any relevant factors, including the relevance and probative value of the proposed testimony and the reasons why the witness information was not provided.

[27] The Applicant concedes that he has not complied with the requirements of section 44 of the RPD Rules. There is also nothing in the record before the RPD regarding the substance of the proposed testimony. In the absence of any information regarding the relevance and the probative value of the proposed testimony, it was reasonably open to the RPD to refuse the testimony of the witness.

[28] Moreover, while new evidence may only be admitted on judicial review in very limited circumstances (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 25-27), I have no information on the substance of the proposed testimony or how it would have been persuasive in establishing the Applicant's identity.

[29] Finally, the RPD's comment regarding the admissibility of testimony in the case of countries where there is a problem getting documentation is supported by the case law. This

Court has held that, despite the requirement under section 106 of the IRPA that a claimant possess acceptable documentation establishing identity, alternative forms of evidence – affidavits and oral testimony – may be admissible where the country at issue is one which is recognized as presenting difficulties in proving national identity with the usual documentation (*Elmi v Canada (Citizenship and Immigration)*, 2008 FC 773 at paras 22-25; *Shafi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 714 at para 27). Given the RPD's expertise in such matters, it was within the RPD's purview to find that Peru was not one of those countries.

G. *Police and Medical Reports*

[30] The Applicant argues that the RPD erred in giving no weight to copies of a police and medical report simply because he had "access to sophisticated fraudulent travel document". Again, the Applicant's argument is unfounded. The RPD gave no weight to these documents because they failed to establish identity in the absence of a photograph and they were not original documents. This conclusion is reasonable. I would also add, upon review of both documents, that they do not have identical national identity document numbers.

H. *No Credible Basis Finding*

[31] The Applicant argues that the RPD erred in its assessment of the weight to be given to the Applicant's national identity card, the Applicant's sworn statements and corroborative documents. Contrary to the RPD's findings, there was credible evidence before it upon which the Applicant's refugee claim could have succeeded.

[32] Subsection 107(2) of the IRPA reads as follows:

No credible basis	**Preuve**
(2) If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim.	**(2)** Si elle estime, en cas de rejet, qu’il n’a été présenté aucun élément de preuve crédible ou digne de foi sur lequel elle aurait pu fonder une décision favorable, la section doit faire état dans sa décision de l’absence de minimum de fondement de la demande.

[33] It is trite law that the threshold for a finding that there is no credible basis is high (*Rahaman v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89 at paras 19, 27-30, 51-52; *Mahdi v Canada (Citizenship and Immigration)*, 2016 FC 218 at para 10; *Ramón Levario v Canada (Citizenship and Immigration)*, 2012 FC 314 at paras 18-19).

[34] After properly setting out the law on the matter and reiterating that it found the Applicant not credible, the RPD found that there was no credible and trustworthy evidence on which it could rely to find that the Applicant was a refugee or a person in need of protection. Upon review of the record, I am satisfied that the RPD’s determination in this regard is reasonable.

[35] In conclusion, the RPD’s decision must be reviewed as an organic whole and it must be kept in mind that judicial review is not a line-by-line treasure hunt for errors (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54). When viewed as a whole, I find that the RPD’s decision is reasonable as it falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and

the law (*Dunsmuir* at para 47). Moreover, I find that the Applicant is essentially asking this Court to reweigh the evidence before the RPD and to come to a different conclusion. That is not the role of the Court on judicial review (*Khosa* at para 61).

[36] Accordingly, the application for judicial review is dismissed. No questions were proposed for certification and I agree that none arise.

JUDGMENT in IMM-4735-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question of general importance is certified.

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4735-17
STYLE OF CAUSE:	YEESON YOAO OLAYA YAUCE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 18, 2018
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	JULY 26, 2018

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