

Federal Court



Cour fédérale

Date: 20200515

Docket: IMM-4442-19

Citation: 2020 FC 623

Ottawa, Ontario, May 15, 2020

PRESENT: Madam Justice Pallotta

BETWEEN:

HANNINGTON BALYOKWABWE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Hannington Balyokwabwe, brings an application for judicial review of the Refugee Protection Division's ("RPD") decision to deny his claim for refugee protection. The RPD determined that the Applicant's claim is manifestly unfounded pursuant to section 107.1 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 ("IRPA"). The Applicant

asserts that the manifestly unfounded determination was unreasonable. He seeks an order setting aside the RPD's decision and remitting his claim to a different RPD panel for determination.

[2] I am granting the order requested for the reasons below. The decision of the RPD is set aside and the Applicant's refugee claim shall be remitted to a different RPD panel for re-determination.

II. **Background**

[3] The Applicant is a citizen of Uganda. His claim to refugee protection is based on his assertions that he was a healthcare practitioner at a medical clinic in Uganda and that he was arrested and detained for providing medical services to marginalized groups, including members of the LGBTQ community. Prior to coming to Canada the Applicant unsuccessfully sought asylum in the United States on the same basis.

[4] The RPD determined that the Applicant is not a Convention refugee according to section 96 of the *IRPA* and that he is not a person in need of protection according to section 97 of the *IRPA*. Credibility was the determinative factor. The panel held that the Applicant did not establish, on a balance of probabilities, that he faced a serious possibility of persecution on a Convention ground or that he faced a risk to life, of torture, or of cruel and unusual punishment upon return to Uganda.

[5] The RPD then considered whether the Applicant's claim is manifestly unfounded and wrote:

[37] The panel has considered whether this claim is manifestly unfounded. The Act requires the panel to make a finding that the claimant's claim is manifestly unfounded if it is of the opinion that the claim is clearly fraudulent (*Act* s. 107.1) The panel finds that this claim is clearly fraudulent due to the credibility concerns relating to the basis of the claim. False allegations were made in material areas of the claim. The claimant submitted non-genuine documents to substantiate false allegations that he provided medical services and health counselling services to LGBTQ individuals. He also provided false police documents to support his false allegations that he was arrested and detained accused of promoting homosexuality.

[38] Having found that the claimant provided fraudulent information to support the material and substantive elements of his claim as outlined above, the panel finds, on a balance of probabilities, that his claim is manifestly unfounded.

III. **Issues**

[6] The main issue is whether the RPD's determination that the Applicant's claim is clearly fraudulent, and thus manifestly unfounded, was reasonable.

[7] The Respondent submits that there is a second issue, namely whether the RPD's negative credibility findings leading to the denial of the Applicant's claim were reasonable.

IV. **Parties' Submissions**

A. *Applicant's Written and Oral Submissions*

[8] The Applicant submits that there is one legal issue to be decided on review: whether the RPD unreasonably determined that the Applicant's claim is manifestly unfounded. The Applicant acknowledges that the RPD would have denied his claim based on its negative

credibility findings, even without making the determination that his claim is manifestly unfounded. Nevertheless, the Applicant argues that the RPD's findings that none of the evidence in support of his claim was worthy of any weight, and that his claim is clearly fraudulent, were unreasonable and this provides a sufficient basis to set aside the entire decision even if one or more negative credibility findings might be upheld on judicial review.

[9] Two serious legal consequences flow from the RPD's "manifestly unfounded" determination:

- i. the Applicant was denied an appeal to the Refugee Appeal Division ("RAD") that would have been available pursuant to subsection 110(2)(c) of the *IRPA*, an appeal which typically applies a correctness standard of review and in some circumstances admits new evidence; and
- ii. the Applicant's removal from Canada was not automatically stayed pending appeal and/or judicial review.

[10] The Applicant argues that these serious consequences should inform the interpretation of section 107.1 of the *IRPA*, and manifestly unfounded claims should be reserved for the most egregious circumstances.

[11] Section 107.1 equates manifestly unfounded with "clearly fraudulent". The dictionary meaning of "clearly" is "without equivocation or decidedly", implying a high degree of certainty.

In *Warsame v Canada (MCI)*, 2016 FC 596 [*Warsame*], the Court held:

[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. [Emphasis in original.]

[12] The Applicant submits that the RPD conflated lack of credibility and/or a lack of credible evidence with a clearly fraudulent claim. A negative credibility finding is not synonymous with submission of a fraudulent claim: *Nagornyak v Canada (Citizenship and Immigration)*, 2017 FC 215 [*Nagornyak*] at para. 14.

[13] There is a high threshold for determining that a claim is manifestly unfounded: *Yuan v Canada (Citizenship and Immigration)*, 2018 FC 755 at para. 45. The Applicant argues that his claim does not reasonably meet that threshold. Furthermore, the Applicant submits that the RPD applied the wrong standard of proof by finding that his claim is manifestly unfounded on a balance of probabilities. The Applicant states that this standard of proof is inconsistent with the high threshold required.

[14] The Applicant submits that the RPD's reasoning in support of the manifestly unfounded determination is not transparent, intelligible and justified, and amounts to a reviewable error. The manifestly unfounded determination stemmed from two main findings of the RPD: 1) the claimant submitted non-genuine documents to substantiate false allegations that he provided medical and health counselling services to LGBTQ individuals; and 2) he provided false police documents to support false allegations that he was arrested and detained, accused of promoting homosexuality. The Applicant submits that the bases for these findings, as set out below, do not reasonably rise to the level of "clearly fraudulent" and do not reasonably support the RPD's determination that his claim is manifestly unfounded. Other negative credibility findings made by the RPD are unreasonable extensions of these two main findings.

(1) Healthcare Professional and Health Clinic Documents

[15] The RPD concluded that three documents tendered to show that the Applicant was a licensed healthcare professional and licensed to operate a health clinic in Uganda are fraudulent. The RPD's conclusion was based on irregularities in the documents and statements in the National Documentation Package ("NDP") about the prevalence of fraudulent documents in Uganda.

[16] The Applicant argues that the RPD exaggerated the irregularities, stating in its reasons that "there were a number of concerns" with the documents and that "each document submitted had its share of irregularities on its face", irregularities that it characterized as "striking". In fact, two of the documents contain a single, minor spelling mistake (the misspelled word "calender" in one document and the misspelled word "registred" in another) and there are no irregularities in

the third document. The Applicant relies on *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 [*Oranye*] which cautioned against relying on spelling mistakes to support a finding of fraud, a serious accusation (at paras. 23-24). The Applicant also submits that the RPD unreasonably relied on statements in the NDP about the prevalence of fraudulent documents in Uganda because, according to *Cheema v Canada (Citizenship and Immigration)*, 2004 FC 224 at paragraph 7, this only opens a possibility that false documents could be available.

(2) Police Documents

[17] The Applicant tendered police documents in support of his assertion that he was arrested by the police and detained for providing health care services to members of the LGBTQ community. Based on “the flaws on the face of the Release on bond and the unexplained contradictions in the claimant’s account of how the arrest happened,” the RPD concluded that the arrest never occurred and that the police documents are fraudulent (Reasons and Decision, Immigration and Refugee Board of Canada, Refugee Protection Division (“*Reasons*”), para. 19).

[18] The Applicant argues that these findings were unreasonable because (i) the flaw identified in the Release on Bond document was that it refers to a different section of Uganda’s Criminal Procedure Code Act than the section that was “verified” as correct in the NDP (Reasons, para. 14), but the NDP does not verify the correct legislative section and expressly cautions that information was scarce among the sources consulted; and (ii) the “unexplained contradictions in the claimant’s account of how the arrest happened” was actually one, minor discrepancy in the dates of arrest and detention on Schedule 12 to the “port of entry” application, while an alleged contradiction in the location of the arrest was not a contradiction at all because

one description was general (at his clinic) while the other was specific (at a community gathering in a public area of the clinic).

[19] The Applicant argues that decision-makers should not make unreasonable inferences with respect to discrepancies as between a port of entry form and corroborative testimony and documentation, or be quick to characterize such discrepancies as inconsistencies: *Wu v Canada (Citizenship and Immigration)*, 2010 FC 1102 at para. 16 and *Cetinkaya v Canada (Citizenship and Immigration)*, 2012 FC 8 at para. 50. This is particularly so when those inferences form the basis for finding that a claim is clearly fraudulent and thus manifestly unfounded.

[20] Furthermore, the Applicant states that the panel unreasonably extended its findings regarding the lack of reliability of the Release on Bond document to other documents that discuss the same facts. The RPD found that two other police documents (a Summons and a report to police made by the claimant's relatives) are not genuine because they refer to the Release on Bond and/or "originate from the same facts that were found to be not credible" (*Reasons*, para. 20).

[21] The RPD found that affidavits and letters that the Applicant submitted "do not help in establishing elements of the claim because they discuss facts and incidents the claimant had a chance to testify about and was not able to establish" (*Reasons*, para. 32). The Applicant states that the RPD unreasonably extended certain credibility findings to almost all of the evidence, including sworn affidavits. In this regard, the Applicant argues that the panel failed to evaluate each piece of evidence independently: *N'kuly v Canada (Citizenship and Immigration)*, 2016 FC

112 at para. 41 (which refers to counsel's reliance on *Nkonka v Canada (Minister of Citizenship and Immigration)* (13 January 2016), Toronto IMM-2416-15 (FC)); *Li v Canada (Citizenship and Immigration)*, 2019 FC 307 at para. 18. The RPD also failed to accord sworn statements the benefit of the presumption of truthfulness: *Dirieh v Canada (Citizenship and Immigration)*, 2018 FC 939 at para. 28.

B. *Respondent's Written and Oral Submissions*

[22] The Respondent submits that there are two legal issues to be decided on review, not one: the reasonableness of the RPD's credibility findings and the reasonableness of the RPD's determination that the Applicant's claim is manifestly unfounded. While the Respondent states that the manifestly unfounded determination was reasonable, if this Court disagrees but finds the credibility findings were reasonable, this could result in an order that remits only the manifestly unfounded determination back to the RPD, thus opening the possibility of an appeal of this RPD panel's negative credibility findings to the RAD.

(1) Credibility findings were reasonable

[23] The Respondent submits that there was no reviewable error and this Court should not interfere with the RPD's assessment of credibility unless the Court is satisfied that the RPD based its conclusion on irrelevant considerations or ignored evidence. If the RPD's inferences and conclusions were reasonably open to it on the record, this Court should not interfere or re-weigh the evidence, even if it disagrees with those inferences and conclusions: *Canada*

(Citizenship and Immigration) v Khosa, 2009 SCC 12; *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381; *Houshan v Canada (Citizenship and Immigration)*, 2010 FC 650.

[24] The Respondent states that the RPD is entitled to reject even uncontradicted evidence if that evidence is not consistent with the probabilities affecting the case as a whole. The RPD is entitled to make an adverse finding of credibility based on the implausibility of the Applicant's story alone, and can make reasonable findings based on common sense and rationality: *Faryna v Chorny*, [1952] 2 DLR 354 (BC CA); *K.K. v Canada (Citizenship and Immigration)*, 2014 FC 78; *Pathmanapan v Canada (Citizenship and Immigration)*, 2013 FC 763).

[25] The Respondent submits that it was open to the RPD to make an overall finding that the Applicant's testimony was not credible because of the numerous, significant inconsistencies in his testimony, for which he gave no reasonable explanation, and which cast doubt upon the totality of his claim. The RPD found the Applicant to lack credibility based on the cumulative effect of the inconsistencies below:

- The Applicant was inconsistent about the dates of his arrest and release in Schedule 12, his Basis of Claim form, and his oral testimony. He was not able to provide a reasonable explanation for the inconsistencies.
- The Applicant was inconsistent about the location of his arrest in his claim for asylum in the US and his claim in Canada. He was not able to provide a reasonable explanation for the inconsistency.

- The Applicant provided a document entitled “Release on Bond”, which refers to the wrong section of the legislation. The RPD found that, more than likely, this document was not drawn up by the police and is fraudulent.
- The Summons provided by the Applicant was found to be non-genuine because it originates from the same facts regarding the Applicant’s arrest and release that were also found to be not credible.
- The report to police made by the Applicant’s relatives was found to be non-genuine because it is inconsistent with other evidence regarding an alleged beating of the Applicant’s father.
- The Applicant provided documents purporting to establish his employment as a medical clinical officer, which is at the root of his claim. The documents contain irregularities on their face including misspellings in their titles, and were found to be non-genuine.
- The NDP for Uganda states that fraudulent documents, such as licenses, are readily available.

[26] With respect to the alleged health professional employment documents, the Respondent submits that the RPD’s language suggesting multiple irregularities is not a reviewable error because (i) it is unclear whether there are, in fact, additional errors present in the documents, and (ii) even if there are only two errors, the RPD was clear about the errors. Two major and bold errors in the titles of the documents are more than sufficient to support a finding that the documents are not genuine: *Rahman v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1495. The Respondent states that finding all three documents to be fraudulent is not

unreasonable just because one of them contains no irregularities and is not fraudulent on its face. There was no error in taking into account the prevalence of fraudulent documents in Uganda generally, and the list of available fraudulent documents reported in the NDP is not exhaustive.

[27] The Respondent submits that the RPD did not commit a reviewable error when it gave no weight to affidavits and letters from friends, family and the Applicant's Ugandan lawyer because the affidavits and letters relate to facts that the Applicant was unable to establish through his testimony, and because the affiants/authors were not present to testify at the hearing.

[28] Regarding the police documents relating to the Applicant's arrest, the Respondent submits that the date discrepancies are not minor, and appear throughout the documents provided by the Applicant to support his claim. Further, the Release on Bond contains a very significant error in listing an incorrect provision of legislation. Finally, there is no error in the RPD's conclusion that the Applicant's two descriptions of the location of his arrest were inconsistent and that he did not provide a reasonable explanation for the inconsistency.

[29] According to the Respondent, the RPD focused on inconsistencies that go to the heart of the Applicant's claim. The RPD regularly makes and it is entitled to make such findings, as is supported by the bulk of the jurisprudence.

(2) Manifestly unfounded determination was reasonable

[30] The Respondent submits that the Applicant was so lacking in credibility as to render his entire claim manifestly unfounded. The consequences that flow from such a finding – no appeal

to the RAD and no stay of removal – reflect the intent of the provision. The intent is to maintain the integrity of the system and to avoid bogging down the system with cases that are so lacking in any basis that they are manifestly unfounded. In addition, denial of a stay of removal is of no consequence here because, in fact, the Applicant was not removed from Canada before the hearing of his application for judicial review.

[31] The Respondent argues that the RPD did not conflate “manifestly unfounded” with a lack of credibility. The RPD first found the Applicant to lack credibility, and then went on to find that his entire claim was completely lacking credibility to the point that it was manifestly unfounded.

[32] The Respondent submits that the RPD did not err in determining that the claim is manifestly unfounded on a balance of probabilities. The standard of proof for a determination pursuant to section 107.1 is the civil standard of balance of probabilities; however, the question that must be decided is whether the claim is “clearly fraudulent” in accordance with the test set out in *Warsame*. According to the Respondent, the RPD made no error in this regard. The Applicant’s deceptions and falsehoods go to the very heart of his claim for refugee protection. The assertion that he is a clinical officer who assisted LGBTQ people is at the very heart of his claim for protection, and was found to be entirely non-credible.

[33] A manifestly unfounded determination is not made lightly. The Respondent submits that there should be deference to the RPD both on the credibility findings, and on the determination that the Applicant’s claim is manifestly unfounded.

V. **Analysis**

A. *Standard of Review*

[34] The standard of review is reasonableness. The reasonableness standard applies to the RPD's negative credibility findings and to its determination that the Applicant's claim is manifestly unfounded: *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65, including at para. 25, among others [*Vavilov*]; *Nanyongo v Canada (Citizenship and Immigration)*, 2018 FC 105 at para. 8; *Nagornyak v Canada (Citizenship and Immigration)* 2017 FC 215 at para. 11.

[35] Reasonableness is a deferential standard. The reviewing court must consider only whether the decision made by the administrative decision-maker — including both the rationale for the decision and the outcome to which it led — was unreasonable: *Vavilov* at para. 83. A reasonable decision is based on an internally coherent and rational chain of analysis: *Vavilov* at paras. 85-86. It is also justified, by way of the reasons, in light of the facts and law that constrain the decision-maker: *Vavilov* at paras. 105-135.

[36] A party challenging a decision bears the burden of showing that it is unreasonable. That party must demonstrate that there are sufficiently serious and sufficiently significant shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency: *Vavilov* at para. 100.

B. *Standard of proof and the threshold for clearly fraudulent claims*

[37] As noted in the section above summarizing the parties' submissions, the Applicant argues that section 107.1 of the *IRPA* should be reserved for the most egregious circumstances. He argues that the RPD erred by conflating lack of credibility and/or a lack of credible evidence with a clearly fraudulent claim. The Applicant also submits that the RPD applied the wrong standard of proof, balance of probabilities, which is inconsistent with the high threshold for manifestly unfounded claims established by this Court's jurisprudence.

[38] The Respondent submits that there was no error. The RPD first found the Applicant to lack credibility and then went on to find that his entire claim is manifestly unfounded based on deceptions and falsehoods that go to the very heart of his claim for refugee protection. The assertion that he is a clinical officer who assisted LGBTQ people is at the very heart of his claim for protection and was found to be entirely non-credible. The standard of proof for a determination pursuant to section 107.1 is the civil standard of balance of probabilities; however, the question that must be decided is whether the claim is "clearly fraudulent" in accordance with the test set out in *Warsame*.

[39] Counsel did not point to any case that defines the standard of proof for section 107.1 of the *IRPA* specifically. However, the Supreme Court of Canada has made it clear that there is one civil standard of proof and that is proof on a balance of probabilities. A decision-maker should be mindful of the seriousness and consequences of allegations in a civil matter, but these

considerations do not change the standard of proof: *F.H. v McDougall*, 2008 SCC 53 [McDougall] at paras. 26 to 49.

[40] I agree with the Respondent that the civil standard of balance of probabilities applies, and the question is whether the claim is clearly fraudulent in accordance with the test set out in *Warsame*. The Applicant has not established that the RPD erred in applying the civil standard of proof. Further, it is not necessary to add “egregiousness” as a condition for the section 107.1 test. The high threshold espoused by this Court for determining whether a claim is manifestly unfounded is apparent from the language of section 107.1 itself.

[41] The Applicant has not established that the RPD erred in conflating lack of credibility with a manifestly unfounded claim. Based on statements in the RPD’s reasons it does appear, as the Respondent argues, that the RPD based its manifestly unfounded determination on deceptions and falsehoods that go to the very heart of his claim for refugee protection including the assertion that he is a clinical officer who assisted LGBTQ people. Therefore, I cannot conclude that the RPD failed to appreciate the high threshold required to make a determination that a claim is manifestly unfounded, and the Applicant has not established that the RPD erred in this regard.

[42] However, as I explain in the next section, the deceptions, falsehoods and findings of fraud set out in the RPD’s reasons, and relied on in the Respondent’s submissions, are not borne out by the evidentiary record. The RPD’s reasons include negative credibility findings that are based on exaggerations of the evidence or a misapprehension of the evidence. Relevant evidence was

unreasonably ignored or given no weight. Even taken cumulatively, these findings do not reasonably support the RPD's determination that the Applicant's claim is manifestly unfounded.

C. *Manifestly unfounded determination*

[43] Section 107.1 of the *IRPA* provides that the RPD shall state in its reasons that a claim is manifestly unfounded if it is of the opinion that the claim is clearly fraudulent. For the reasons below, I find that there are sufficient, significant shortcomings in the RPD's reasons supporting its manifestly unfounded determination to conclude that the determination is unreasonable.

[44] The RPD is entitled to make a general finding of lack of credibility based on the accumulation of inconsistencies and contradictions, and a general finding of lack of credibility can extend to other evidence: *Hohol v Canada (Citizenship and Immigration)*, 2017 FC 870 at para. 19 citing *Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558 at para. 22. However, the RPD must not be zealous in finding that a claimant is not credible: *Jamil v Canada (Citizenship and Immigration)*, 2006 FC 792 at paras. 24-25. Importantly here, the RPD made negative credibility findings and findings of fraud that were not grounded in the evidence. It also unreasonably extended those findings to other testimony and documents that were not otherwise impugned, and it failed to independently consider and/or give any weight to relevant evidence on this basis.

[45] In all cases, evidence must be scrutinized with care and it must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test: *McDougall* at paras. 45-46. Fraud is a serious finding that must be grounded in the evidence: *Oranye* at para. 24. Similarly, a

finding of “clearly fraudulent” must be grounded in the evidence. I find the RPD’s determination that the Applicant’s claim is clearly fraudulent and manifestly unfounded to be unreasonable because it is not justified in light of the facts and law that constrain the decision-maker, and therefore it does not meet the test for reasonableness set out in *Vavilov*.

(1) Healthcare Professional and Health Clinic Documents

[46] The first basis supporting the RPD’s manifestly unfounded determination is that the Applicant submitted non-genuine documents to substantiate false allegations that he provided medical services and health counselling services to LGBTQ individuals in Uganda, a material and substantive element of his claim (*Reasons*, paras. 37-38).

[47] The negative credibility findings relevant to the first basis are set out in the section of the reasons titled “The claimant was not credible in his alleged membership in a body that regulates the health profession as a Clinical Officer (assistant physician)”. In that section, the RPD states that it had concerns with the documents supporting the Applicant’s allegations that he is qualified as a medical clinical officer and that he was licensed to operate a private clinic.

[48] The RPD focused on three documents: a Certificate of Registration, a License to Operate a Private Health Unit and an Annual Practicing License for Registered [*sic*] Allied Health Professionals. The panel found that these three documents are fraudulent on the basis that each one has its share of striking irregularities on its face, and fraudulent documents are readily available in Uganda.

[49] In reviewing the documents, I agree with the Applicant that each document does not have multiple, striking irregularities. One document has the misspelled word “Registered” in its title, one has the misspelled word “calender” at the bottom of the page, and one has no irregularities. It was unreasonable for the RPD to rely on exaggerated irregularities in support of its finding of fraud.

[50] In addition, the Applicant provided other documents and testimony relevant to his qualifications as a clinical officer. It is not clear why they were not considered as a factor going to the truthfulness of the Applicant’s allegations and the genuineness of the certificates and licenses. The Applicant testified about the courses he completed in clinical medicine and community health in Uganda. The record includes academic transcripts, one being from the M’bale School of Clinical Officers that indicates the Applicant completed a three-year course conferring a Diploma in Clinical Medicine and Community Health. The Applicant testified that he did an internship and received a certificate of registration from the Allied Health Professionals Council. The RPD does not mention these documents and this testimony in the reasons.

(2) Police Documents

[51] The second basis supporting the RPD’s manifestly unfounded determination is that the Applicant provided false police documents to support false allegations that he was arrested and detained, accused of promoting homosexuality (*Reasons*, paras. 37-38).

[52] The negative credibility findings relevant to the second basis are set out in the sections of the reasons titled “The police documents submitted not genuine” and “Other problematic

documents.” Based on flaws on the face of one of the documents (the Release on Bond) and unexplained contradictions in the Applicant’s account of how the arrest happened, the panel found the Release on Bond to be fraudulent and concluded that the Applicant was not arrested and detained for providing medical services to LGBTQ individuals. The panel extended the lack of reliability of the Release on Bond to two other police documents (Summons and report) that originate from the same facts that were found to be not credible.

[53] Beginning with the flaws on the face of the Release on Bond, the RPD found that the Release on Bond is more than likely a non-genuine document because it refers to section 30 of Uganda’s *Criminal Procedure Code Act* when the correct section is section 17, as verified in the NDP (*Reasons* at para. 14). I agree with the Applicant that the NDP does not verify that the correct section is section 17, and in fact the NDP cautions that information was scarce among the sources consulted by the Research Directorate within the time constraints. The Release on Bond form attached to the NDP, which was found on the website of Uganda’s judiciary and refers to section 17, also contains flaws: the pronoun “I” is written “i” twice in the form despite being at the start of a sentence, and the word “as” is written “As” mid-sentence.

[54] To be clear, it was not unreasonable to consider the information in the NDP and it might have been reasonable for the RPD to find, in the context of all of the evidence as well as the information in the NDP, that the Release on Bond is more than likely not a genuine document. However, in my view the RPD overstated the reliability of the information in the NDP when it concluded that the Release on Bond is fraudulent because it refers to a different legislative section than the NDP. And as I will explain at paragraph 58, below, it then extended that finding

of fraud to both the Summons and the report to police, and relied on the provision of false police documents as a basis for determining that the Applicant's claim is clearly fraudulent and manifestly unfounded.

[55] Turning to the unexplained contradictions regarding the arrest, the Respondent argued that the RPD is entitled to rely on significant inconsistencies about the period of detention and the place of arrest. However, in my view the RPD's reasons overstate the inconsistencies.

[56] With respect to the date of arrest, in his basis of claim form and in his testimony before the panel the Applicant stated that he was arrested on August 28, 2017 and released on September 14, 2017. Schedule 12 to the port of entry application indicates the period of detention as August 29, 2017 to September 12, 2017, a minor difference that the Applicant explained was due to the fact that it was written by an officer, who made a mistake. The RPD rejected this explanation on the basis that the Applicant added his initials beside the dates, a point that was not put to him at the hearing. The RPD's implication, that the Applicant endorsed these dates specifically, is not accurate because the Applicant did not initial the dates but rather initialled the bottom of every page of the application (the dates were at the bottom one of the pages). The RPD's reasons also indicate that the Applicant provided a different date of arrest – September 2017 – in his US application for asylum (*Reasons*, para. 18). The reasons describe this as another inconsistency but that perceived inconsistency was never put to the Applicant at the RPD hearing, and I could not find where the Applicant provided a September 2017 date of arrest in the record from the US claim for asylum that was before the panel. The US application form does not seem to indicate the date of arrest at all (it only says that in September 2017 the

Applicant was imprisoned for two weeks after he was arrested) and the notice of intent to deny the US claim for asylum states that the Applicant was arrested on August 28, 2017, which is consistent with the Applicant's testimony in Canada.

[57] With respect to the location of the arrest, the RPD relied on what it perceived to be an inconsistency between the description in the US claim for asylum and the Applicant's testimony in Canada. The Applicant argues that the RPD overstated the inconsistency, which was not an inconsistency at all because both descriptions referred to his clinic, one description being specific while the other was general. I agree that the inconsistency about the location of the arrest is overstated, if there is an inconsistency at all. In the US record, the application form states that the Applicant was arrested at a community gathering where he was carrying out his duties, which included counselling on the importance of testing for HIV/AIDs, and the notice of intent to deny the US claim states that the Applicant was arrested at his clinic. Furthermore, the Applicant argues that the RPD rejected the Applicant's explanation about general versus specific location because "it does not account for the difference in arrest dates", and that reasoning is illogical. While that may be true, in addition the RPD did not confront the Applicant about the perceived difference in arrest dates, and the US record does not seem to have a different arrest date.

[58] The questionable findings about inconsistent evidence and fraudulent documents had a compounding effect. The RPD's reasons point out that the submission of fraudulent documents erodes a claimant's credibility and the allegation that the document purports to corroborate becomes doubtful (*Reasons*, para. 29). The RPD's reasons state that the "weighty credibility

concerns” in this case caused the panel to doubt the veracity of all of the Applicant’s evidence (*Reasons*, para. 35), which it did in the following ways:

- As noted above, the panel extended the lack of reliability of the Release on Bond to two other police documents, the Summons and the report, because “they all originate from the same facts that were found to be not credible” (*Reasons*, para. 20).
- The panel did not accept photographs and documents about an alleged beating and hospitalization of the Applicant’s father because the arrest and detention that would have caused the father to approach the authorities did not happen (*Reasons*, para. 31).
- The panel gave no weight to affidavits, letters and emails from family members and friends from Uganda because they discuss facts and incidents “the claimant had a chance to testify about and was not able to establish” (*Reasons*, para. 32).
- The panel gave no weight to letters from the Applicant’s Ugandan lawyer because he is the person who sent the police documents that were found to be non-genuine (*Reasons*, para. 33).

[59] Norris, J.’s summary of legal principles at paragraph 18 of *Li v Canada (Citizenship and Immigration)* 2019 FC 307 are applicable here:

...[A]dverse overall credibility findings alone are not sufficient grounds for rejecting potentially corroborative evidence. Such evidence must be examined independently of concerns about the claimant’s credibility before it can be rejected (*Yu v Canada (Citizenship and Immigration)*, 2015 FC 1138 at paras 31-37; *Lu v Canada (Citizenship and Immigration)*, 2016 FC 846 at paras 33-35; and *Ren* at para 27). Otherwise, the decision maker risks reasoning in a way that begs the very question at issue: the

corroborative evidence is not believed simply because the claimant is not believed (*Sterling v Canada (Citizenship and Immigration)*, 2016 FC 329 at para 12). Moreover, as Justice Rennie (as he then was) stated in *Chen*: “It is impermissible to reach a conclusion based on certain evidence and dismiss the remaining evidence as inconsistent with that conclusion” (at para 20).

[60] The Respondent argues that the onus was on the Applicant to prove his claim, and he could have submitted further proof after the hearing but did not. However, a number of the RPD’s concerns about inconsistencies described in the reasons were never put to the Applicant at the hearing, and when the RPD did put some of its concerns to him, there was no clear indication that the Applicant’s answers failed to address those concerns. Therefore, based on the transcript from the hearing, I do not agree that the Applicant should have anticipated the findings that the RPD made, and sought to file additional evidence or argument. In the circumstances, the RPD could have raised the concerns more clearly or sought additional submissions after the hearing.

[61] In conclusion, the RPD made negative credibility findings and findings of fraud that were based on inaccurate statements about the evidence or that were inconsistent with the evidence. It also unreasonably extended negative credibility findings to other testimony and documents that were not otherwise impugned, and it failed to independently consider and/or give any weight to relevant evidence on this basis. I find that the Applicant has established that the RPD’s negative credibility findings, even cumulatively, do not reasonably justify its determination that the Applicant’s claim is clearly fraudulent and thus manifestly unfounded.

D. *Order to set aside decision*

[62] The Applicant seeks an order setting aside the decision of the RPD in its entirety. He submits that the entire decision should be set aside even if one or more of the RPD's negative credibility findings might be upheld on judicial review. The Respondent submits that if the RPD's credibility findings are reasonable, this Court may make an order that remits only the manifestly unfounded determination back to the RPD, thus opening the possibility of an appeal of this RPD panel's negative credibility findings to the RAD.

[63] I have determined that an order setting aside the entire decision, and remitting the matter back to a differently constituted panel, is appropriate in this case.

[64] While it is generally impermissible to quash reasons for a decision while leaving the decision intact, a reviewing court may quash one aspect of a decision if that aspect is clearly excisable from the rest of the decision: *Agrium Vanscoy Potash Operations v United Steel Workers Local 7552*, 2014 SKCA 79 at paras. 18-28. The severed portions should not be so intertwined with the remaining portions that the administrative body would not have made the decision knowing that it could not include the offending portion: *Saskatchewan (Employment Standards) v North Park Enterprises Inc.*, 2019 SKCA 69 at paras. 43-49. See also Brown and Evans, *Judicial Review of Administrative Action in Canada*, (Carswell, 2019) at §5:2251.

[65] Strickland, J. considered this issue in light of the *Federal Courts Act* in *Nagornyak*, a judicial review application where the RPD determined that the applicant's claim was manifestly

unfounded. At the time of the *Nagornyak* decision, the question below from *Qiu v Canada (Citizenship and Immigration)*, 2016 FC 875 [*Qiu*] had been certified and was awaiting determination by the Federal Court of Appeal. *Qiu* was an application for judicial review of the RPD's determination that there was "no credible basis" for the applicant's claim, a determination that carries the same consequences as a manifestly unfounded determination.

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*?

[66] The Federal Court of Appeal did not answer the question posed above, finding instead that the Federal Court erred in law in certifying a question that was not dispositive of the appeal: *Canada (Citizenship and Immigration) v Qiu*, 2017 FCA 84. This was because the RPD's decision in that case was based on findings that: i) the testimony of the principal claimant was not credible; ii) there was no credible basis for the claim; and iii) even if the claims were found to be credible, the claimants had failed to establish a nexus between the peril claimed by them and a Convention ground. Since the claimants did not challenge the RPD's finding that they had failed to establish a nexus between the peril claimed and a Convention ground, their claims to status as Convention refugees were bound to fail.

[67] In this case, the RPD did not make a determination that is independent of the negative credibility findings to support its denial of the claim.

[68] In some cases it might be appropriate to remit back only a manifestly unfounded determination where the findings supporting the denial of a claim are not seriously questioned. That is not the situation here. The challenged credibility findings that underpin the manifestly unfounded determination also underpin the denial of the Applicant's claim. Thus, while the manifestly unfounded determination is excisable, the findings supporting it are so intertwined with the decision to deny the claim that the RPD may very well have come to a different conclusion if it had not exaggerated the irregularities or misunderstood some of the evidence, and if it had considered the evidence that was disregarded or afforded no weight.

[69] I agree with these words of Strickland J. in *Nagornyak* (paras. 33 and 34) and find them to be applicable to the matter before me:

...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... 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.

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.

[70] In the result, this application for judicial review is allowed. The decision of the RPD is set aside in its entirety and this matter shall be remitted to a different panel for re-determination.

E. *Certification*

[71] The parties were asked if there were any questions for certification and did not propose any. I agree that this application does not present a question for certification.

JUDGMENT in IMM-4442-19

THIS COURT'S JUDGMENT is that:

1. The application is granted and the Decision is set aside.
2. The matter is returned for redetermination by a different panel.
3. There is no serious question of general importance for certification.

"Christine Pallotta"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4442-19

STYLE OF CAUSE: HANNINGTON BALYOKWABWE v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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JUDGMENT AND REASONS: PALLOTTA, J.

DATED: MAY 15, 2020

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