Federal Court  Cour fédérale

Date: 20200901

Docket: IMM-6621-19

Citation: 2020 FC 875

Ottawa, Ontario, September 1, 2020

PRESENT: Madam Justice Pallotta

BETWEEN:

ISOKEN ZILLAH AMEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Isoken Zillah Ameh, is a citizen of Nigeria who sought refugee protection in Canada based on a fear of persecution due to her bisexuality. She brings this application for judicial review to challenge the decision of the Refugee Appeal Division ("RAD"), which confirmed the Refugee Protection Division's ("RPD") determination that she is neither a

Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] Before the RPD and the RAD, the applicant alleged that her bisexuality was exposed in March 2014 when she was discovered in a hotel room with her partner of 14 months, a woman named Joy. A mob attacked them and killed Joy. The applicant managed to escape with injuries. A newspaper article describing the attack, allegedly published about a week later, identified the applicant by name, revealed her bisexuality, and stated that she was wanted by the police.

[3] After this event, the applicant's mother forced her to marry a man. She was married in March 2015 and changed her surname. In February 2016, the police allegedly went to the applicant's house and told her husband—who was unaware that she was bisexual—that the applicant was wanted by the police and by anti-bisexuality groups. The applicant's husband helped her to hide in a remote village for several months. After learning that her sister was killed in September 2016 by the anti-bisexuality vigilante group looking for her, the applicant decided to flee Nigeria. She entered the United States on September 22, 2016, and eventually came to Canada on November 30, 2017, where she sought refugee protection.

[4] The RPD rejected the applicant's claim for refugee protection. Credibility was the determinative issue. The RPD found that the applicant did not have a relationship with Joy as she had alleged, was not bisexual, and had not been pursued by anti-bisexuality groups or by the police.

[5] The applicant appealed the RPD's decision to the RAD. The RAD dismissed the appeal. It made adverse credibility findings and determined that the applicant did not establish that she had a sexual relationship with a woman, that she was bisexual, or that her bisexuality was exposed. The RAD held that the applicant would not face a serious possibility of persecution on a Convention ground or be subject to a risk to life, to cruel and unusual punishment or to a danger of torture upon returning to Nigeria.

[6] While the applicant does not challenge the RAD's adverse credibility findings regarding her testimony, including that she failed to establish her bisexuality, she argues that the RAD's conclusion was unreasonable because the analysis focused on whether she is bisexual and failed to further consider whether she was perceived to be bisexual by the agents of persecution. In addition, she suggests there was independent evidence apart from her testimony that was relevant to her perceived sexual orientation, and the RAD improperly assessed that evidence.

[7] For the reasons below, I find the applicant has not established that the RAD's decision is unreasonable. I am dismissing the application for judicial review on the basis that the RAD did not commit a reviewable error by failing to consider the perception of the agents of persecution, or by failing to properly assess the evidence.

II. **Issues**

[8] Based on the written and oral submissions of both parties, the issues are as follows:

A. What is the appropriate standard of review?

B. Is the RAD's decision unreasonable because it failed to fully consider whether the applicant has a well-founded fear of persecution or is in need of protection due to her perceived sexuality?

C. Is the RAD's decision unreasonable because it failed to properly assess independent evidence of the applicant's perceived sexuality?

III. **Analysis**

A. *Standard of Review*

[9] Reasonableness is the presumptive standard on judicial review of an administrative decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23. The parties agree that the standard of review applicable to the RAD's decision is reasonableness but they disagree on its correct application. Specifically, they disagree on the degree of deference that this Court should apply to the RAD's credibility findings.

[10] The applicant takes issue with the respondent's position that a high degree of deference is owed when the impugned findings relate to the credibility of a claimant's story. Instead, the applicant submits that *Vavilov* requires the reviewing court to consider the applicable legal and factual constraints and ensure that the tribunal's decision is justified in light of those constraints. In some cases, a failure to justify the decision against any one relevant constraint may be sufficient to cause the reviewing court to lose confidence in the reasonableness of the decision: *Vavilov* at para 194.

[11] According to the applicant, the constraints applicable to this case result in a narrow range of acceptable credibility determinations. Those constraints include the need to: ensure conformity with the *Convention Relating to the Status of Refugees*, 22 April 1954, 189 UNTS 150 (the "*Refugee Convention*"); recognize that an adverse decision denies rights (such as protection against removal to a country where a claimant would face risk); and understand the

consequences to refugee claimants of a harsh approach to credibility. The applicant argues that it is an objective of the *IRPA* to protect refugees and cites the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* ("*UNHCR Handbook*") at para 196:

> [W]hile the burden of proof in principle rests with the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

Also, the applicant points to Canadian and international guidelines about refugee cases based on sexual orientation, which identify difficulties with proof in such cases.

[12] I agree with the applicant that *Vavilov* requires a reviewing court to be satisfied that an administrative decision is justified in light of the legal and factual constraints that bear on the decision. The legal and factual constraints define the limits of the space in which the decision maker may act and the types of solutions it may adopt: *Vavilov* at para 90. However, the applicant proposes an approach to judicial review that starts by identifying constraints relating to refugee claims generally (or at least to refugee claims based on persecution due to sexual orientation) and presupposes based on those constraints that "the range of acceptable credibility determination outcomes that [would allow] a decision to be described as reasonable is narrow." This is contrary to the "reasons first" approach mandated by *Vavilov*, which requires a reviewing court to start with how the decision maker arrived at their decision, and determine whether it was defensible in light of applicable constraints: *Vavilov* at paras 82-87; *Canada Post Corp. v*

Canadian Union of Postal Workers, 2019 SCC 67 at paras 26 and 41. Furthermore, reasonableness is a single standard that accounts for context: *Vavilov* at para 89. In my view, the applicant's approach—that would afford more or less deference to an administrative decision based on a preliminary determination of the constraints applicable to the type of proceeding—is inconsistent with a single reasonableness standard.

[13] Finally, credibility determinations are findings of fact. A reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker and, absent exceptional circumstances, will not interfere with its factual findings (*Vavilov* at para 125; *Garcia v Canada (Citizenship and Immigration)*, 2020 FC 16 at paras 16-17). As the majority of the Supreme Court wrote in *Vavilov* at paras 125 and 126:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker". Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review.
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> [126] That being said, a reasonable decision is one that is justified in light of the facts. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it…
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> [Citations omitted.]

[14] In summary, a reviewing court's approach should start with the reasons, and be concerned with the existence of justification, transparency and intelligibility within the decision-making process and whether the decision is justified in relation to the relevant factual and legal constraints: *Vavilov* at para 99. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

B. *Is the RAD's decision unreasonable because it failed to fully consider whether the applicant has a well-founded fear of persecution or is in need of protection due to her perceived sexuality?*

[15] The applicant argues the RAD erred by failing to address her perceived or imputed sexual orientation from the perspective of the agents of persecution. She relies on *Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC), [1993] 2 SCR 689 [*Ward*], where the Supreme Court stated that "the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs," and that "[s]imilar considerations would seem to apply to other bases of persecution," (*Ward* at 747). The applicant also relies on the *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression*, which indicates, "Individuals may be subjected to persecution by reason of their perceived or imputed SOGIE [sexual orientation, gender identity and expression]." The applicant submits that it is "certainly possible for a claimant to support a refugee claim based on imputed membership in a particular social group when he or she is not actually a member of that group," (*Amaya Jerez v Canada (Citizenship and Immigration)*, 2012 FC 209 at para 24).

[16] Although the applicant acknowledges that her basis of claim did not advance the issue of perceived bisexuality, she submits it is incumbent on the administrative decision-maker, not the

claimant, to relate the facts to the relevant criteria of the 1951 Refugee Convention (*UNHCR Handbook* at s. 205(b)(iii)). According to the applicant, both the RPD and the RAD considered only whether the evidence established her bisexuality. The record included crucial evidence—two affidavits and the report of a complaint made to the Nigerian police—relevant to whether the feared agents of persecution would perceive her to be bisexual. The applicant submits that both divisions were required to address her perceived bisexuality, and erred by applying an incorrect analytic framework.

[17] During the hearing, the applicant was asked whether she raised the RPD's failure to consider perceived bisexuality as an issue on appeal to the RAD. The applicant responded that the issue was raised in substance. Before the RAD, she had argued that the RPD erred by giving little weight to a police complaint made by her cousin in 2018, which recounted the cousin's personal experience of visiting the family home in 2016 and being informed by neighbours that the applicant's sister was killed by an anti-bisexuality group pursuing the applicant. According to the applicant, the RAD overlooked the fact that this report was independent evidence about her perceived sexual orientation.

[18] I am not persuaded that the applicant raised the RPD's failure to consider perceived bisexuality as an issue on appeal. The RAD addressed the errors that she had raised regarding the police report and, as I discuss below, reasonably concluded that the police report should be afforded no weight (See *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103; *Refugee Appeal Division Rules*, SOR/2012-257, s. 3(3)(g)). As this Court explained in *Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 at para 23, the RAD's decision must be assessed in the context of how the applicant framed the appeal:

> [T]he RAD's decision must be assessed in the context of how the applicants framed their appeal. The applicants did not raise any alleged error in relation to the RPD's assessment of the police or medical reports. It is well-established that the RAD is not required to consider potential errors that an appellant did not raise: see *Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 at paras 18-20; *Ilias v Canada (Citizenship and Immigration)*, 2018 FC 661 at para 39; *Broni v Canada (Citizenship and Immigration)*, 2019 FC 365 at para 15; and *Canada (Citizenship and Immigration) v Chamanpreet Kaur Kaler*, 2019 FC 883 at paras 11-13 (IMM-57-19).

[19] Moreover, as the respondent correctly notes, the perception of the agents of persecution was premised solely on the applicant's relationship with a woman that was exposed through the March 2014 hotel attack. The record presented no other reason for the applicant to be perceived as bisexual. However, she failed to establish that she had a relationship with a woman or that the March 2014 attack had occurred. The newspaper article describing the attack was found to be fraudulent, and the RAD held that it was not distributed in Nigeria. Furthermore, the applicant could not explain how her husband was unaware of her sexuality or how she was able to live safely for years after her bisexuality had allegedly been exposed. The RAD reasonably found that the applicant was not being pursued by an anti-bisexuality group or by the police, that her sexuality was not exposed, and that she did not flee Nigeria because her sexuality was exposed. In my view, the RAD's findings addressed not only the applicant's alleged bisexuality, but also the agents' perception of her sexuality.

[20] Thus, the applicant has not established that the RAD's decision was unreasonable because it failed to consider whether she had a well-founded fear of persecution or was in need of protection on the basis of her perceived sexuality.

C. *Is the RAD's decision unreasonable because it failed to properly assess independent evidence that was relevant to the applicant's perceived sexuality?*

[21] The applicant argues that the RAD's assessment of the two affidavits and the police report was unreasonable. She argues that these were independent pieces of evidence relevant to whether the agents of persecution perceived her as bisexual.

[22] First, the applicant argues that the RPD and RAD were inconsistent in their treatment of the affidavits and the police report. The RPD afforded "some" weight to the affidavits and "little" weight to the police report even though they contained similar information, and the RAD did not mention the affidavits at all. However, I note that in her appeal to the RAD, the applicant did not raise any errors regarding the RPD's treatment of the affidavits. In the circumstances, the RAD was not required to address any alleged inconsistencies in the RPD's treatment of the affidavits and the police report. As noted above, the RAD's role is to consider the alleged errors that are raised on appeal and it is not required to consider potential errors that an appellant did not raise: *Kanawati* at para 23.

[23] Second, the applicant argues that the RAD improperly assessed the police report. According to the applicant, the RAD incorrectly described the report as a reiteration of her allegations when it was actually the cousin's personal account. Also, the applicant submits the RAD unfairly criticized her inability to explain why the police report did not mention prior reports of the events in question (without any evidence that prior reports are customarily referenced), and improperly used the failed explanation to "take a negative inference" and undermine the credibility of the police report.

[24] In my view, the RAD's finding that the police report was a reiteration of the applicant's allegations does not demonstrate a misunderstanding of the contents of the report. The cousin reported that he attended the applicant's family home and found it to be deserted. His report of the reason why it was deserted—that the applicant's sister had been murdered by the anti-bisexuality group pursuing the applicant as a result of the 2014 hotel attack—was not based on his own observations. Rather, the report allegedly relays information from unidentified neighbours and family friends, and without disclosing the source of their information. In fact, the source of their information could have been the applicant herself. The applicant's testimony was the only first-hand evidence about the hotel attack in the record, and was found not to be credible. It was not unreasonable for the RAD to assign no weight to the police report describing the same event based on information from an unidentified source.

[25] I agree with the applicant that the RAD did not provide a clear basis for drawing a negative inference about the police report from her inability to explain why it did not mention previous reports about the 2014 hotel attack and/or the 2016 attack at the family home. However, this was not the only support for the RAD's decision to assign no weight to the police report, and I am not persuaded that the shortcoming was sufficiently central or significant so as to render the decision unreasonable: *Vavilov* at para 100. As the RAD correctly noted, the police report summarized information provided to an officer in 2018, at least two years after the alleged events occurred, and it did not record observations of the police or of any witnesses to the attacks. Overall, the RAD provided sufficient reasons to justify its finding that the police report should be accorded no weight.

[26] Third, the applicant argues that the RAD failed to consider the independent evidence from the perspective of the agents of persecution. I have already addressed this above. The RAD did not approach the evidence from an incorrect perspective and the RAD's findings addressed not only the applicant's alleged bisexuality, but also the agents' perception of her sexuality.

[27] In summary, I find that the RAD's assessment of the evidence, including the weight assigned to it, was reasonable.

IV. **Conclusion**

[28] In light of the above, this application for judicial review is dismissed.

[29] Neither party raised a question for certification, and none arises.

JUDGMENT in IMM-6621-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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