Federal Court Cour fédérale

Date: 20150429

Docket: IMM-5246-14

Citation: 2015 FC 557

Ottawa, Ontario, April 29, 2015

PRESENT: The Honourable Mr. Justice S. Noël

BETWEEN:

HAMZE ELMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application by Hamze Elmi [the Applicant] for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Refugee Protection Division [RPD] dated May 9, 2014. The RPD held that the Applicant was neither a Convention Refugee nor a person in need of protection within the meaning of sections 96 and 97 of IRPA.

II. Alleged Facts

[2] The Applicant is a Djibouti national, born on February 8, 1984.

[3] He claimed to have been targeted by family members because of his homosexual orientation. The alleged persecution is said to be in the form of rape and physical humiliation in an attempt to cleanse him of his "sin". He claimed to have been arrested and detained after being reported by his father to the police in December 2003.

[4] The Applicant stated that following the December 2003 events, he hid at a friend's house in another area of the city and then moved, two months later, to stay with a friend's family in Dikhil, two hours away from the city of Djibouti. The Applicant claimed to have hid there for four and a half years before returning to the city of Djibouti to apply for a United States of America [USA] visa on June 5, 2009. He made an application to obtain a USA visa on July 6, 2009. The visa was issued on July 9, 2009. He returned to Dikhil on the same day.

[5] On July 16, 2009, the Applicant alleged to leaving Djibouti to go visit his mother in Somalia. He claimed to have stayed with her for one week before returning to Djibouti.

[6] He left Djibouti on October 15, 2009, for Egypt, where he remained until October 27, 2009. On that date, the Applicant went to the USA, where he stayed until February 10, 2010. He arrived in Canada on that date and claimed refugee protection.

[7] The RPD rejected the Applicant's claim in a decision rendered on May 9, 2014. This is the decision under review.

III. Impugned Decision

[8] The RPD identified numerous omissions and contradictions between the Applicant's narrative and his testimony, which undermined his credibility. First, the RPD noted discrepancies with respect to dates when he claimed to have been detained in December 2003, contradictions between what happened to him during his detention and his sister's affidavit and also with regards to his school attendance.

[9] The RPD also pointed out that no events were mentioned in his narrative until the Applicant's departure of Djibouti for Somalia on July 16, 2009. The RPD also wrote that the Applicant had not written in his narrative that he had returned to Djibouti after one week and stayed there until October 15, 2009, before leaving his country. The RPD therefore stated not to believe the Applicant's allegations and his alleged fears.

[10] The RPD also specified that it did not give any probative value to the copy of the notice to appear issued by the authorities in his country along with the Applicant's sister's affidavit. The RPD also did not give credence to the Applicant's brother's testimony.

[11] Finally, the RPD pointed out that the Applicant's conduct is inconsistent with his fear because before coming to Canada, he stayed in Egypt and in the USA, where he did not claim asylum.

[12] The RPD thus concluded that the Applicant was neither a Convention Refugee nor a person in need of protection within the meaning of sections 96 and 97 of IRPA.

IV. Parties' Submissions

[13] The Applicant first submits that there was no contradiction with regards to the period of his detention between the Applicant Personal Information Form [PIF], which specifies that he was detained between December 12 to 26, 2003, and his testimony before the RPD, where he stated that he was detained at the end of December 2003. The Applicant adds that the RPD also erred in its assessment of what happened to him while in detention. The Applicant further states that the RPD misconstrued the facts in the Applicant's sister's affidavit. He also submits that the contradiction regarding the dates he attended school was adequately explained to the RPD. The Applicant also argues that the RPD conclusion that his omission regarding his one week stay with his mother should not have impacted the assessment of his credibility. The Respondent however argues that the Applicant's attempts to undermine the RPD credibility findings and negative inferences are without merit, and that the RPD is owed considerable deference on credibility findings. He adds that it is not the role of this Court to reweigh the evidence.

[14] The Applicant further submits that the RPD's rejection of the notice to appear issued by the authorities of Djibouti, of his sister's affidavit and of his brother's testimony is unreasonable, because they corroborated the Applicant's story. The Respondent responds by saying that it was reasonable for the RPD to give little value to the affidavit of the Applicant's sister and to the Applicant's brother's testimony given its negative credibility determinations.

[15] As for the Applicant's stay in Egypt and in the USA, the Applicant argues that he only remained in Egypt for eleven days, where he went only to buy a cheaper plane ticket to travel to the USA, and that he did not claim asylum in the USA, because his goal was to join his brother in Canada. The Respondent replies by submitting that the RPD is entitled to decide adversely on an applicant's credibility based on the fact that he or she delayed in claiming refugee status. In its reply, the Applicant disagrees with the case law cited by the Respondent on this issue since the facts of the cases presented by the Respondent differ from the facts of the case at bar.

V. Issue

[16] I have reviewed the parties' submissions and respective records and I state the issue as follow:

1. Is the RPD's assessment of the Applicant's credibility reasonable?

VI. Standard of Review

[17] Whether the RPD's credibility assessment of the Applicant is reasonable is mainly a factual determination (*Salazar v Canada (Minister of Citizenship and Immigration)*, 2013 FC 466 at para 36; *Molano v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1253 at para 26; *Ruiz v Canada (Minister of Citizenship and Immigration)*, 2012 FC 258 at para 20). This Court shall only intervene if it concludes that the decision is unreasonable and falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 at para 47 [*Dunsmuir*]).

VII. Analysis

[18] Credibility determinations by the RPD are afforded deference (*Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at paras 27 and 31 [*Rahal*]). Indeed, credibility determinations are at the heart of the RPD's jurisdiction (*Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 7). This Court will only intervene if the RPD "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" (*Khakh v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 980, 116 FTR 310 at para 6; *Rahal*, above at para 35). The burden is on the Applicant to establish that the negative credibility findings were perverse, capricious or made without regard of the evidence (*Houshan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 650 at para 19 [*Houshan*]). In the case at bar, although not perfect, I found that the RPD decision to be reasonable.

[19] The Applicant first takes issue with the RPD's conclusion that there is a contradiction between the Applicant's testimony that he was detained at the end of December 2003 compared to what he had stated in his narrative, namely that he was detained between December 12 and December 26, 2003. I agree with the Applicant that this is not in itself a contradiction, given that the last day of detention, December 26, is very close to the end of the month. A contradiction in facts that are opposed to each other. In this case, the facts are not. Having said that, this does not render the whole decision unreasonable.

[20] The Applicant also takes issue with the RPD's determination that there was a contradiction between his statement that he was not subject to any suffering while in detention

and that of his sister's affidavit (Applicant's Record [AR] page 65), which seems to indicate that his brother was badly injured when he returned home. The Applicant's explanation and that of his counsel at the hearing before the RPD was that his sister was referring to the incident where the Applicant's family members tortured him under a tree, and that the affidavit should be read as a whole. However, based on the presentation of the content of the Applicant's sister's affidavit, it was reasonable for the RPD to conclude to a contradiction on this point.

[21] The Applicant also argues that the RPD's conclusion regarding the dates of his school attendance was unreasonable. On this matter, the Applicant wrote in his PIF that he attended school between September 2001 and July 2004. He however mentioned in his narrative that he "escaped to another neighbourhood in Djibouti City" (Applicant's Record of August 5, 2014, [AR], page 58 at lines 144 and following), where he stayed with a friend for two months after being tortured by his family members, which took place after his detention in December 2003, and did not attend school afterwards. When questioned on this contradiction before the RPD, the Applicant explained that he had simply written the end of the school year, July 2004, in his PIF because he was not asked for details at the border (Certified Tribunal Record [CTR], transcript of the RPD hearing, page 144). In essence, therefore, the Applicant did not go to school between January 2004 and July 2004, for a total of six months, which is not what he wrote in his PIF. It was reasonable for the RPD to conclude that the Applicant's record and his testimony contradicted themselves.

[22] The Applicant also disagrees with the RPD determination that the Applicant's omission of mentioning his return to Djibouti, after visiting his mother in Somalia for one week,

negatively affected his refugee claim. It was however open to the RPD to draw a negative conclusion on this omission. Moreover, the RPD noted that the Applicant remained in Djibouti for about two months before leaving for Egypt. Indeed, between June 5, 2009 and October 15, 2009, with the exception of the Applicant visiting his mother in Somalia, the Applicant was living in Djibouti. The Applicant explained that he spent this much time in Djibouti before leaving because of the procedure to obtain his Egyptian visa (CTR, transcript of the RPD hearing, page 160). During that time, however, the Applicant did not allege to have suffered any persecution. This again negatively affected his credibility as a person fearing persecution based on his sexual orientation.

[23] Although it was not discussed at the hearing before the RPD, but discussed at the hearing of this judicial review, I noted that the Applicant's passport contains a stamp for his exit of Djibouti, dated July 16, 2009, as well as a stamp regarding the Applicant's entry to Djibouti, dated October 2, 2009 (AR page 30). According to the Applicant's record and testimony before the RPD, the Applicant should have been in Djibouti before and on October 2, 2009. No answer was given to explain these exist and entry before this Court, but on its face, it contradicts the testimony of the Applicant when he said that he was in Djibouti during all of that time.

[24] I also noted that the Applicant testified before the RPD that he made the decision to come to Canada in 2004, while he was in Djibouti (CTR, transcript of the RPD hearing, page 132). The Applicant however waited until May 2009 to ask for a passport (CTR, transcript of the RPD hearing, page 129) and until July 2009 for a USA visa before finally arriving in Canada in February 2010. The Applicant's conduct and actions, since his decision to leave Djibouti for

Canada in 2004, are thus inconsistent with his alleged fear based on his sexual orientation. Moreover, no events took place in relation to the Applicant in Djibouti since his arrival in Canada, except for his claim that all of his "family knows by now" about his sexual orientation (CTR, transcript of the RPD hearing, pages 131-132). The simple statement, namely that all of his family now knows that he is homosexual is not enough to support the refugee claim.

[25] The RPD also discussed how the Applicant stayed in Egypt for eleven days in October 2009 and spent close to three months and a half in the USA before arriving in Canada without claiming refugee protection. The RPD was not satisfied with the Applicant's explanation as to why he did not claim refugee protection in either of those countries. This was a reasonable assessment by the RPD since it is not required to accept the Applicant's explanation (*Karakaya v Canada (Minister of Citizenship and Immigration)*, 2014 FC 777 at para 18; *Houshan*, above).

[26] The Applicant and the Respondent also disagrees as to the impact of the Applicant's decision not to claim refugee protection in the USA. A similar disagreement occurred between the parties in *Olaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 913 [*Oyala*], where Justice O'Keefe said the following at paragraphs 51 to 55:

> **51** The Board found that the applicants' failure to pursue immigration efforts or asylum claims in the U.S. prior to coming to Canada indicated a lack of subjective fear. Although this was not a determinative finding, the applicants criticized it for being made without regard to their specific circumstances. These circumstances included the fact that their stay in the U.S. was legal (they held valid visas) and brief (five days). They also never intended to stay there but rather always planned to come to Canada where one of their relatives lives.
>
> **52** In defending the Board's finding on this issue, the respondent submits that it is trite law that a failure to seek asylum

in a signatory country, through which an applicant travels before arriving in Canada, is a relevant consideration in rejecting a claim. This argument has judicial support (see *Gilgorri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 559, [2006] FCJ No 701 at paragraphs 24 to 27). One of the cases cited approvingly by Mr. Justice Michel Shore in *Gilgorri* is *Pissareva v Canada (Minister of Citizenship and Immigration)*, 11 Imm LR (3d) 233, [2000] FCJ No 2001. In *Pissareva* above, Chief Justice Edmond Blanchard explained (at paragraph 29):

> As regards the plaintiff's failure to claim refugee status in the U.S., where she lived for nearly a month before setting foot on Canadian soil, this Court has many times said that the Refugee Division must take claimants' behaviour into account. The fact of passing through a country which is a signatory of the Convention without claiming refugee status as quickly as possible may be one factor in assessing the subjective aspects of her claim. [emphasis added]

53 More recently, this Court has found that absent a satisfactory explanation for the delay, such delay can be fatal to an applicant's claim, even where that applicant's credibility has not otherwise been challenged (see *Velez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 923, [2010] FCJ No 1138 at paragraph 28).

54 In this case, it is notable that the applicants remained in the U.S. less than a week. However, as they held six-month U.S. visitor visas, there was no legal impediment to them staying longer and filing asylum claims there. Furthermore, the mere fact that the applicants have one relative living in Canada is not a sufficient basis to overcome the fact that they did not claim refugee status in the U.S. "as quickly as possible" (see *Pissareva* above, at paragraph 29).

55 As the Board did not ultimately render its decision on this issue, I find no fault in the negative inference that it drew from the applicants' failure to file claims in the U.S. Their failure to claim in the U.S. was a legitimate factor for the Board to consider in assessing the subjective aspects of their claims. The Board's finding on this issue was reasonably open to it based on the evidence before it (emphasis in original).

[27] In the case at bar, the Applicant spent more than three months in the USA, thus more than the five days as was the case in *Oyala*, above. Although it is not determinative, it is a factor that the RPD can take into consideration in the refugee protection claim of the Applicant. Justice O'Keefe also specified that having a relative in Canada is not sufficient to overcome the fact that the Applicant did not claim refugee protection as soon as possible. The same reasoning is applicable here as well. The RPD conclusion on this issue is thus reasonable.

[28] Lastly, the Applicant takes issue with the RPD's rejection of the Applicant's sister's affidavit, his notice to appear issued by the authorities of Djibouti and of his brother's testimony. The RPD pointed out, with respect to the notice to appear, that it was not dated, that it was not the original and also found it surprising that the Applicant did not know who had received it. With regards to the Applicant's sister's affidavit, the Applicant explained that he had requested the document from his sister in 2010, and only received it in February 2014, four years later (CTR, transcript of the RPD hearing, page 124). It was thus reasonable for the RPD to reject the Applicant's explanations with regards to those documents. Moreover, since the RPD determined that the Applicant was not credible, it was reasonable for it not to give probative value to this evidence and that of his brother's testimony (*Nijjer v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1259 at para 26; *Gebetas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1241 at para 29; *Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238, [1990] FCJ No 604 (CA) at para 9; *Karakaya v Canada (Minister of Citizenship and Immigration)*, 2014 FC 777 at para 18).

[29] For the reasons above, the decision is reasonable and falls within "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above).

VIII. Conclusion

[30] Despite an unreasonable conclusion with regards to the moment of detention of the Applicant in December 2003, the RPD decision, read as a whole, is reasonable. The RPD draw adequate negative credibility findings and the intervention of this Court is not warranted.

[31] The parties were invited to submit questions for certification, but none were proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to be certified

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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