

Federal Court



Cour fédérale

Date: 20190904

Docket: IMM-4614-18

Citation: 2019 FC 1135

Ottawa, Ontario, September 4, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

LIVINGSTONE WASHINGTON OMABOE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] In June 2017, about two months after he arrived in Canada from South Africa, the applicant submitted a claim for refugee protection to the Immigration and Refugee Board of Canada [IRB]. In his Basis of Claim Form, the applicant identified himself as Livingstone Washington Omaboe, a citizen of Ghana who was born in that country on July 6, 1988. He

sought refugee protection on the basis that, as a bisexual man, he had a well-founded fear of persecution in Ghana.

[2] The applicant's claim was referred to the Refugee Protection Division [RPD] of the IRB for a hearing. The hearing took place on May 11, 2018, and August 16, 2018. For written reasons dated August 24, 2018, the RPD found that the applicant was neither a Convention refugee nor a person in need of protection because he had failed to establish his identity. The RPD also determined under section 107(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] that the claim had no credible basis.

[3] The applicant seeks judicial review of the RPD's decision under section 72(1) of the *IRPA*. He does not contest the conclusion that he failed to establish his identity. His challenge is limited to the RPD's determination that his claim had no credible basis, a conclusion which he contends is unreasonable.

[4] For the following reasons, I do not agree with the applicant. The application for judicial review will, therefore, be dismissed.

II. BACKGROUND

[5] According to the Basis of Claim Form he signed on June 7, 2017, the applicant was born in Ghana on July 6, 1988. He states that he fled to South Africa in April 2016, after he was discovered engaged in a sexual act with another man. At his refugee hearing, the applicant testified that he flew from Ghana to South Africa using his own Ghanaian passport. The

applicant claimed to have lost this passport while he was in South Africa. He never attempted to obtain a replacement.

[6] The applicant claimed that in February 2017 he had become fearful that he would be deported from South Africa back to Ghana. He therefore made arrangements with an agent (with his mother's assistance) to leave South Africa for Canada. According to information provided in documents filed in support of his refugee claim (also signed on June 7, 2017), the applicant arrived in Montreal on April 20, 2017, on a direct flight from South Africa. He stated that he had travelled on a non-genuine South African passport in the name of Modise Meshack which the agent had procured for him. This passport was no longer in his possession.

[7] On August 25, 2017, the Minister gave notice of his intent to intervene in the applicant's refugee hearing on credibility grounds. In connection with the intervention, the Minister filed information indicating that the U.S. Department of Homeland Security had reported a match between fingerprints taken from the applicant in the processing of his refugee claim in Canada and those of an individual who had entered the United States at the Chicago airport on April 22, 2017. This individual was identified as Meshack Makhubu, a South African national who was born on March 10, 1975. A photograph of this individual at the Chicago airport was also provided. This individual was travelling on a South African passport bearing number A04198161. Canadian records indicated that an individual travelling on this passport had then entered Canada at the Montreal airport later on April 22, 2017.

[8] Further investigation by Canadian officials determined that in February 2017, this same individual had obtained a visitor visa for Canada to attend a business conference in Montreal between April 28, 2017, and May 4, 2017. A copy of a South African passport in the name of Meshack Makhubu (DOB March 10, 1975) and bearing serial number A04198161 had been submitted in support of the visa application. A copy of this passport was filed with the RPD.

[9] At his refugee hearing, the applicant acknowledged that he had travelled to Montreal via Chicago on this South African passport. The passport had his photograph on it. He testified that when he originally filled out documents in connection with his refugee claim he made mistakes about his travel route to Canada and the name on the passport he had used because he was scared and his mind was “all over the place.” The RPD member rejected this explanation. The member found that the applicant had “knowingly provided false information as to all aspects of his travel to Canada.” The member found, further, that “this undermines the claimant’s overall credibility and calls into question his personal identity.”

[10] Despite the information provided by the Minister, the applicant maintained his claim that he was a Ghanaian national named Livingstone Washington Omaboe (DOB July 6, 1988). In support of this, the applicant provided what he claimed was his Ghanaian driver’s license and a photocopy of what he claimed was his birth certificate. (At the first RPD hearing date, the applicant said he would produce the original birth certificate but it was never received by the RPD.)

[11] The RPD member found that the driver's license "is not a valid one and was fraudulently obtained." The member also cited several reasons for finding that the birth certificate was not "a properly obtained document" and concluded that the copy the applicant tendered was "not reliable or trustworthy evidence to establish the claimant's identity." The applicant does not contest any of the member's findings with respect to these identity documents. (The applicant had also provided other documents in support of his claim but the RPD member found none of them were probative of his identity or nationality.)

III. THE GOVERNING LEGAL PRINCIPLES

[12] There is no dispute concerning the legal principles governing this application. The RPD's determinations of factual issues and issues of mixed fact and law are reviewed on a reasonableness standard. This includes the question of identity and the assessment of identity documents, fact-driven determinations at the core of the RPD's expertise (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 48; *Su v Canada (Citizenship and Immigration)*, 2012 FC 743 at para 5 [*Su*]; *Behary v Canada (Citizenship and Immigration)*, 2015 FC 794 at para 7 [*Behary*]). This standard also applies to the RPD's determination that a claim has no credible basis (*Hernandez v Canada (Citizenship and Immigration)*, 2016 FC 144 at para 3; *Mohamed v Canada (Citizenship and Immigration)*, 2017 FC 598 at para 22 [*Mohamed*]).

[13] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process"

and determines “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). These criteria are met if “the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes” (*Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). Thus, the reviewing court must look at both the reasons and the outcome (*Delta Airlines Inc v Lukács*, 2018 SCC 2 at para 27). On judicial review under the reasonableness standard, it is not the role of the court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

[14] Proof of identity is an essential requirement for a person claiming refugee protection. Without this, there can “be no sound basis for testing or verifying the claims of persecution or, indeed for determining the Applicant’s true nationality” (*Jin v Canada (Minister of Citizenship and Immigration)*, 2006 FC 126 at para 26; see also *Liu v Canada (Citizenship and Immigration)*, 2007 FC 831 at para 18 [*Liu*] and *Behary* at para 61). A failure to prove identity is fatal to a claim in and of itself. There is no need to examine the evidence or the claim any further: see *Elmi v Canada (Citizenship and Immigration)*, 2008 FC 773 at para 4; *Diallo v Canada (Citizenship and Immigration)*, 2014 FC 878 at para 3; *Liu* at para 18; *Ibnmogdad v Canada (Minister of Citizenship and Immigration)*, 2004 FC 321 at para 24; and *Behary* at para 61.

[15] The importance of establishing a claimant's identity is reflected in section 11 of the *Refugee Protection Division Rules*, SOR/2012-256 [*Rules*]:

<p>11 The claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.</p>	<p>11 Le demandeur d'asile transmet des documents acceptables qui permettent d'établir son identité et les autres éléments de sa demande d'asile. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour se procurer de tels documents.</p>
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[16] Section 106 of the *IRPA* draws an express link between this obligation to produce acceptable documentation establishing identity (or to explain why it has not been produced) and a claimant's credibility. It provides as follows:

<p>106 The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.</p>	<p>106 La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.</p>
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[17] What is "acceptable documentation establishing identity" is not defined in the *IRPA* or the *Rules*; it is for the RPD to determine in each case (subject, of course, to appeals to the Refugee Appeal Division [RAD] or judicial review). Together, section 11 of the *Rules* and section 106 of the *IRPA* place the onus on a claimant to provide acceptable documentation establishing his or her identity. If a claimant cannot obtain such documentation, he or she must

provide a reasonable explanation for why not or demonstrate that reasonable steps were taken to obtain it. This is a heavy burden (*Su* at para 4; *Malambu v Canada (Citizenship and Immigration)*, 2015 FC 763 at para 41; *Tesfagaber v Canada (Citizenship and Immigration)*, 2018 FC 988 at para 28). If a claimant fails to produce acceptable documentation establishing identity and fails to provide a reasonable explanation for the lack of documentation or demonstrate that reasonable steps were taken to obtain it, this could, at the very least, have an adverse impact on his or her credibility.

[18] Finally, section 107(2) of the *IRPA* provides that if the RPD “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.” Such a finding is significant because it precludes the usual right of appeal to the RAD as well as the statutory stay of removal pending that appeal and any subsequent application for leave for judicial review (see *IRPA*, s 110(2)(c) and *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 231(1)). Consequently, as the Federal Court of Appeal held with respect to the same phrase in previous legislation, the RPD “should not routinely state that a claim has ‘no credible basis’ whenever it concludes that the claimant is not a credible witness” (*Rahaman v Canada (Minister of Citizenship and Immigration)*, [2002] 3 FC 537, 2002 FCA 89 at para 51). The RPD may make this determination only if there is no credible or trustworthy evidence that could support recognition of the claim. If the RPD finds that there is any credible or trustworthy evidence that could support a positive determination, it “cannot find there is no credible basis for the claim, even if, ultimately, the Board finds that the claim has not been established on a balance of probabilities” (*Ramón Levario v Canada (Citizenship and*

Immigration), 2012 FC 314 at para 19). Thus, section 107(2) of the *IRPA* has been held to set a high threshold that must be met before it may be invoked (*Mahdi v Canada (Citizenship and Immigration)*, 2016 FC 218 at para 10).

IV. THE PRINCIPLES APPLIED

[19] In the present case, the RPD member reached two critical conclusions. First, the member found on a balance of probabilities that the applicant had “failed to provide sufficient credible evidence to establish his identity as a national of Ghana as required by section 106 of *IRPA* and rule 11 of the *Refugee Protection Division Rules*.” On this basis, the member concluded that the applicant was neither a Convention refugee nor a person in need of protection. Second, the member stated that the claim has no credible basis because “the panel has rejected the claimant’s credibility and further credible or trustworthy evidence has not been provided.”

[20] As noted above, the applicant takes issue with only the second of these conclusions. In my view, the member’s conclusion that the claim had no credible basis meets the *Dunsmuir* test for reasonableness. Crucially, the member did not simply find that the applicant had failed to discharge the burden placed on him to establish his identity and nationality on a balance of probabilities. The member also expressly “rejected the claimant’s credibility” and found that “further credible or trustworthy evidence had not been produced.” Read in the context of the reasons as a whole, it is clear that the latter statement is in reference to evidence of identity and nationality.

[21] While the member's reasons for finding that the claim had no credible basis are very brief and perhaps inelegantly worded, the reasons as a whole demonstrate that the applicant did not merely fail to provide sufficient credible and reliable evidence of his identity and nationality. In the member's view, there was no credible or reliable evidence that the applicant is the person he claimed to be. The member rejected the applicant's testimony and documentary evidence on this central point. He determined that the applicant had attempted to establish his identity using a driver's license which was "not a valid one and was fraudulently obtained" and a photocopy of a birth certificate for which there were several reasons to think it was not a "properly obtained document." These findings must also be considered in the context of the evidence presented by the Minister which suggested that the applicant was in fact a South African national named Meshack Makhubu (DOB March 10, 1975), evidence to which the applicant was unable to provide a credible rebuttal.

[22] Section 106 of the *IRPA* expressly directs the RPD to "take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation." Here, the applicant did not appear before the RPD without documentation purporting to establish his identity and therefore had to establish it in some other way. Nor did he appear with documentation which was found to be insufficient in weight. Rather, the applicant had attempted to establish his identity with documentation the RPD member found to have been "fraudulently obtained" or not "properly obtained." The member found this documentation to be deserving of no weight on the question of identity. The member also found that the applicant had knowingly

provided false information “as to all aspects of his travel to Canada,” which undermined the applicant’s “overall credibility and call[ed] into question his personal identity.” In short, the member rejected all of the applicant’s evidence of identity and nationality. This conclusion, which the applicant does not challenge in any event, was reasonably open to the member on the record before him.

[23] Had the member not found the applicant’s evidence of identity to be wholly lacking in credibility, or had he failed to explain sufficiently why he reached this conclusion, it may have been arguable that the no credible basis finding is unreasonable: see, for example, *Mohamed* at para 36; *Omar v Canada (Citizenship and Immigration)*, 2017 FC 20 at para 20, and *Hadi v Canada (Citizenship and Immigration)*, 2018 FC 590 at para 54). However, the member expressly found that there was no credible or reliable evidence that the applicant is who he said he was. This finding (which, to repeat, the applicant does not contest) “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* at para 47). The member’s reasons for so finding are justified, transparent and intelligible. Given this, it was not necessary for the member to analyze the claim or the supporting evidence further before the conclusion that the claim has no credible basis could reasonably be drawn (see the cases cited at paragraph 14, above).

[24] In summary, the member reasonably concluded that there was no credible or reliable evidence of identity. Having done so, the member could also reasonably conclude that the claim had no credible basis without examining the evidence that the applicant was bisexual or the

country condition evidence. This is because, in the complete absence of credible and reliable evidence of identity, there was no basis upon which a favourable decision could have been made.

V. CONCLUSION

[25] For these reasons, the application for judicial review is dismissed.

[26] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-4614-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. No question of general importance is stated.

“John Norris”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4614-18

STYLE OF CAUSE: LIVINGSTONE WASHINGTON OMABOE v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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DATED: SEPTEMBER 4, 2019

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