Date:20240611

Docket: IMM-1076-23

Citation: 2024 FC 888

Ottawa, Ontario, June 11, 2024

PRESENT: Madam Justice Azmudeh

BETWEEN:

REBECCA ACHIENG ACHOLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I.   Overview

[1]   Under section 72(1) of the Immigration and Refugee Protection Act [IRPA], the

Applicant, Rebecca Achieng Achola [the "Applicant"], is seeking a Judicial Review of the

rejection of his refugee protection appeal by the Refugee Appeal Division ["RAD"] of the

Immigration and Refugee Board of Canada ["IRB"]. The Judicial Review is dismissed for the

following reasons.

[2]   The Applicant is a citizen of Kenya. She alleges to possess information about the death of a Kenyan woman (AB) who had an affair with a Kenyan governor. She claims that the Sangwenya gang seeks to persecute and harm her because of what she knows about AB's death.

[3]   As an HIV positive person, the Applicant also fears persecution and a personal risk of harm in Kenya.

[4]   The RPD rejected the case on credibility. After conducting its own independent assessment of the evidence, the RAD upheld the RPD decision on December 20, 2022. The Applicant then applied to this Court to judicially review the RAD's decision.

II.   Decision

[5]   I dismiss the Applicant's judicial review application because I find the decision made by the RAD to be reasonable and reached in a procedurally fair manner.

III.   Standard of Review and Issues

[6]   The Applicant raises two issues: a) whether the RAD breached its duty of procedural fairness and, b) whether the RAD decision is reasonable.

[7]   Reasonableness review is a deferential standard, and requires an evaluation of the administrative decision to determine if the decision is transparent, intelligible, and justified (*Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 (CanLII), [2019] 4 SCR 653 [*Vavilov*] at paras 12-15 and 95). The starting point for a reasonableness review is the reasons for decision. Pursuant to the *Vavilov* framework, a reasonable decision is "one that is

based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law" (*Vavilov* at para 85).

[8]   The onus is on the party challenging the decision to prove that it is unreasonable. Flaws must be more than superficial for the reviewing court to overturn an administrative decision. The court must be satisfied that there are "sufficiently serious shortcomings" (*Vavilov* at para 100).

[9]   With respect to issues of procedural fairness, the standard of review is not deferential. It is for the reviewing court to ask, "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*], at para 54). Consequently, when an application for judicial review concerns procedural fairness and a breach of the principles of fundamental justice, the question that must be answered is not necessarily whether the decision was "correct". Rather, the reviewing court must determine whether, given the particular context and circumstances of the case, the process followed by the administrative decision maker was fair and gave the parties concerned the right to be heard, as well as a full and fair opportunity to be informed of the evidence to be rebutted and to have their case heard (*CPR* at para 56). Reviewing courts are not required to show deference to administrative decision makers on matters of procedural fairness (*Vargas Cervantes v Canada (Citizenship and Immigration)*, 2024 FC 791 at para 16).

IV.   Analysis

A.   *Did the RAD reach its decision fairly?*

Allegations against former counsel

[10]   The Applicant submits that she had raised a breach of procedural fairness argument at the RAD with respect to the incompetence of her counsel at the RPD. The Applicant argues that the RAD's dismissal of that issue amounts to a breach of procedural fairness.

[11]   I disagree with the Applicant's characterization that the manner by which the RAD resolved this issue was either procedurally unfair or resulted in an unreasonable decision.

[12]   The Applicant had submitted to the RAD that her previous counsel at the RPD was in possession of certain documents that she had not disclosed prior to the hearing. As a result, the RPD reached a negative decision on credibility. Counsel at the judicial review confirmed that the Applicant had not applied to the RAD under s. 110(4) of IRPA to admit those documents.

[13]   The Applicant had complied with the necessary rules and had put the previous counsel on notice. The previous counsel had replied and in a letter dated September 2, 2022, explained the history of the file and her role in it. In particular, she stated the following:

> Particularly at our meetings, I repeatedly advised Ms. Achola of the evidence that I suggested she obtain in order to support her claim. Although she sent me documents, many of them were duplicates or not relevant or not appropriate to provide to the RPD due to their form or content.
>
> Following the hearing, at which Ms. Achola made statements which the RPD found inconsistent with the evidence and her

previous statements, I maintained contact with Ms. Achola to the best of my ability. I continued to be ill, which delayed my provision of submissions to the RPD, but they were provided to and considered by the RPD, and I did advise Ms. Achola of that circumstance. Further documents were provided to me, but none that would advance her case. I adduced all of the relevant evidence that the client provided to me. I exercised my professional judgment to ensure that the most probative and credible information was available to the decision maker. I do not agree with any allegation that relevant information provided to me was not put forward.

[14]   The RAD record also contained exchanges of text messages between the Applicant and former counsel on gathering corroborating evidence.

[15]   The Applicant does not allege that the RAD did not take her documents or arguments against former counsel into account. However, without relying on any authority, she argues that former counsel needed to spell out what documents she decided not to provide the RPD, to elaborate on what she meant by her professional judgment, and why she thought they would not advance the Applicant's case. She argues that not holding former counsel to this standard, the RAD reached a procedurally unfair decision. The Applicant does not rely on any legal authorities to advance this argument.

[16]   I do not find the Applicant's unsupported argument persuasive. First, the RAD member accepted all the new documents submitted to advance the allegations against former counsel into evidence under s. 110(4) of IRPA. He set out the correct test to establish a breach of procedural fairness, and took the evidence into account and applied it to the legal test. There is a clear and logical chain of reasoning as to how the member reached his decision. There is nothing before me to suggest that the member failed to consider the totality of the evidence.

[17]   I cannot equate the Applicant's desire to weigh the evidence differently with a breach of

procedural fairness. The RAD member allowed the Applicant's new evidence on the issue,

engaged with her submissions and considered all the evidence relevant to counsel competence.

He reached the decision in a procedurally fair manner. (Ibrahim v Canada (Citizenship and

Immigration), 2020 FC 1148 at para 30; Kaur v Canada (Citizenship and Immigration), 2023 FC

1064 at para 12; Kohl v Canada (Attorney General), 2024 FC 45 at para 69)

> Was the RAD analysis in finding that the Applicant did not face a
> serious possibility of persecution on a Convention Ground under
> section 96 IRPA or on a balance of probabilities a personal risk of
> harm under section 97(1) IRPA reasonable?

[18]   Since the chain of reason is clear from the member's analysis, I also find that the analysis

of the allegations against former counsel to be reasonable.

B.   *Credibility findings*

[19]   At the hearing, the Applicant heavily relied on her written arguments to argue that RAD

member's assessment of credibility was unreasonable.

[20]   I find that the RAD member relied on material discrepancies, contradictions or omissions

to impugn the Applicant's credibility and clearly articulated the chain of reasoning. The

Applicant finds that those discrepancies were minor because they had to do with the names of

key individuals, or that the omission was just about a violent incident.

[21]   The RAD analysis clearly explains why the credibility of material facts were rejected on

material inconsistencies. The RAD's reasons do not suggest that corroboration was a pre-

requisite. Rather, in light of material discrepancy, the lack of corroboration left the RAD with

insufficient credible evidence to find that the Applicant was either a Convention Refugee or a

person in need of protection. This is a reasonable approach where the chain of reasoning is clear.

[22]   I find that the Applicant is not happy with how the RAD has weighed the evidence. This

Court has repeatedly stated that this is not a ground for intervention on judicial review. (Gega v

Canada (Citizenship and Immigration), 2021 FC 1468 at para 23; Boughus v Canada

(Citizenship and Immigration), 2010 FC 210 at paras 56-57; Solopova v Canada (Citizenship and

Immigration), 2016 FC 690 at para 33)

C.   *The assessment of prospective risk in light of the Applicant's positive HIV status*

[23]   The Applicant argued that the RAD member was unreasonable to conclude that she did

not face a serious possibility of persecution or a personal risk of harm in Kenya because of her

HIV status. To advance this argument, the Applicant relied on para. 57 of the RAD decision to

argue that it was unreasonable not to include Applicant in the group of persecuted HIV positive

individuals. In particular, counsel argued that the member unreasonably excluded the Applicant

because of the way that the documentary evidence "especially" treated the "illiterate poor

women":

> [57] There were some women in Kenya who faced obstacles in accessing healthcare, **especially** "illiterate poor women", who relied on men for decision-making when seeking medical care (my emphasis). There were also concerns about healthcare access for women with disabilities, women in sex work, and rural women. Certain other groups faced difficulties accessing HIV services, such as men who have sex with men, transgender and intersex individuals, and drug users. In my view, these groups of people face a much more precarious situation, as compared to the Appellant, who is not similarly situated. Though the Appellant is

> married, she testified that she is only officially married, and that she has been living independently from her husband for many years. The Appellant testified that her husband was working for the United Nations and that he had been living in South Africa since 2018. Prior to that, he was working in Myanmar and East Timor. The Appellant had not lived with him since 2012, and she did not keep track of when he was visiting Kenya from abroad. The Appellant has a post-secondary diploma from a technical college in Kenya. She was a successful entrepreneur who ran a coaching and training company, as well as a design company in Nairobi. There is no indication that her gender, educational background, or marital status would prevent her from accessing medical care on her own.

[24]   The RAD's analysis is not limited to this paragraph. This paragraph is continued by showing that how the Applicant's circumstances differ from those who face challenges (at para. 58). The RAD member assessed whether the Applicant would face a serious possibility of discrimination amounting to persecution in the context of her specific profile, and the country documents. He noted that Kenya is dealing with a large number of people affected by HIV, about 1.5 million, and that the authorities are making genuine efforts to address discrimination, which includes not only studies but also changes to employment laws and establishing a specialized tribunal, as well as free and available care for certain illnesses including HIV/AIDS.

[25]   The RAD's analysis was thoughtful and logical in explaining a clear chain of reasoning. I therefore reject the Applicant's argument that it was unreasonable.

V.   Conclusion

[26]   For the foregoing reasons, the RAD decision was reached in a procedurally fair manner and it is intelligible, justifiable and transparent. It is therefore reasonable.

[27]   The Application for Judicial Review is dismissed.

[28]   There is no question to be certified.

JUDGMENT IN IMM-1076-23

THIS COURT'S JUDGMENT is that

1.   The application for Judicial Review is dismissed.

2.   There is no question for certification.

                                                          "Negar Azmudeh"
                                            ————————————————————
                                                              Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1076-23

STYLE OF CAUSE: REBECCA ACHIENG ACHOLA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: ZOOM CONFERENCE

DATE OF HEARING: MAY 28, 2024

REASONS FOR JUDGMENT AND JUDGMENT: AZMUDEH J.

DATED: JUNE 11, 2024

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