

Federal Court



Cour fédérale

**Date: 20211022**

**Docket: IMM-3731-20**

**Citation: 2021 FC 1128**

**Ottawa, Ontario, October 22, 2021**

**PRESENT: The Honourable Mr. Justice Favel**

**BETWEEN:**

**ANTHONY AHMED ADAMS**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Defendant**

**JUDGMENT AND REASONS**

I. Nature of the Matter

[1] This is an Application for judicial review of an August 5, 2020 decision [Decision] of the Refugee Appeal Division [RAD] pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RAD dismissed Mr. Adam's [Applicant] appeal of a decision of the Refugee Protection Division [RPD] refusing his claim for refugee protection under sections 96 and 97 of the *IRPA*.

[2] The Applicant submits that the RAD erred by overlooking a risk from a group called the Land Guards and in its assessment of a perceived risk of harm resulting in an unreasonable decision. The Applicant requests that the Court set aside the Decision and remit it to a different panel for redetermination.

[3] The application for judicial review is dismissed.

## II. Background

[4] The Applicant is a citizen of Ghana who claims to be bisexual. In his basis of claim form, he claims that his relationship with his partner was discovered in July 2010 and that the couple was summoned by an Imam to answer questions about their sexuality. Due to the discovery of their relationship, in August 2010, the Applicant and his partner were beaten. That same month he and his male partner were attacked after leaving a nightclub, resulting in his partner's death. In September 2010, the Applicant moved to another part of Ghana where he became a target of the Land Guards. The Applicant states that the Land Guards wanted to take possession of his land. He claims he is at risk due to the Land Guards and because of his sexual orientation.

[5] In November of 2010, the Applicant fled Ghana to Central America. He travelled north and crossed the United States [US] border in June of 2011. At the US border, the Applicant asked for asylum. US border officials immediately detained him and he remained detained for nearly a year and a half.

[6] The US refused the Applicant's asylum claim in February 2012. The US released him under an Order of Supervision in December 2012 with an impending removal order to Ghana.

[7] In March 2018, the Applicant crossed the border into Canada and made a refugee claim. On July 24, 2019, the RPD refused the Applicant's claim for lack of credibility based on inconsistencies, contradictions, and omissions in his evidence.

[8] The Applicant appealed the RPD's decision to the RAD. On August 5, 2020, the RAD refused the appeal.

### III. The Decision

[9] At the RAD hearing, the Applicant argued that the RPD erred in its determination that the Applicant had not established a serious possibility of persecution on a Convention ground, that he did not face a personal risk to his life, or cruel and unusual treatment or punishment if returned to Ghana. He also argued that the RPD erred in finding that the Applicant was neither a Convention refugee pursuant to section 96 nor a person in need of protection pursuant to section 97(1) of *IRPA*.

[10] Specifically, the Applicant submitted that the RPD erred in the following ways:

- By giving little weight to his participation in the gay community in Canada as evidence of his sexuality;
- By finding the Applicant's description of his sexuality lacking. There is no definitive way to identify someone as being gay or bisexual;

- By finding that his evidence about his same-sex relationship was contradictory. The fact that he did not have same-sex relations with someone until he was 25 does not contradict his evidence that he was attracted to men since childhood;
- By impugning his credibility on the basis that he had not been in a same-sex relationship since arriving in Canada; and
- By finding that the panel's credibility findings were sufficient to overcome the presumption of truthfulness.

[11] As noted by the RAD, the Applicant did not argue that the RDP erred in its assessment of his subjective fear or the risk he may face from the Land Guards. Therefore, the RAD focused on the errors the Applicant did plead.

[12] The RAD confirmed the decision of the RPD that the Applicant is neither a Convention refugee nor a person in need of protection. The determinative factor was a lack of credibility based on the inconsistencies in the Applicant's evidence concerning his sexuality and previous relationships, and a lack of supporting evidence.

#### IV. Parties' Positions

##### (1) Applicant's Position

[13] The Applicant states that the RAD failed to address the issue of whether he would be perceived as being bisexual or gay in the eyes of his persecutors. Furthermore, the RAD should have assessed the issue of the Land Guards.

##### (2) Respondent's Position

[14] The Respondent submits that the Decision is reasonable and that the Applicant challenges the Decision by raising arguments that he did not bring before the RAD.

V. Issue and Standard of Review

[15] The issue for consideration is:

A. *Is the Decision unreasonable because it failed to consider the Applicant's perceived sexuality and the threat posed by the Land Guards?*

[16] The parties agree that the merits of the Decision are to be assessed using the reasonableness standard. I agree (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 23 [*Vavilov*]). The exceptions to reasonableness review as stated in *Vavilov* are not present here.

[17] Under the reasonableness standard, the Court must focus on the Decision, including the reasoning process and the outcome (*Vavilov* at para 83). This does not include a redetermination of the matter but rather a consideration of whether the 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 that constrain the decision maker” (*Vavilov* at para 85). In doing so, the decision-maker’s written reasons must be interpreted holistically and contextually (*Vavilov* at para 97).

VI. Analysis

A. *Is the Decision unreasonable because it failed to consider the Applicant's perceived sexuality and the threat posed by the Land Guards?*

[18] The Respondent submits that the Applicant may not raise issues that were not advanced before the RAD. The issues being raised for the first time before this Court are: (1) the RAD erred by not explicitly considering whether the Applicant would be perceived as gay or bisexual; and (2) the RAD erred by not considering the risks posed by the Land Guards.

(1) Did the RAD err in not assessing the Applicant's perceived sexuality?

[19] Consideration of this ground requires an examination of what the Applicant plead before the RAD. Before the RAD, the Applicant raised the following issues for determination:

1. It is the position and submission of the appellant that the RPD-panel erred in its determination that the appellant had not satisfied the burden of establishing a serious possibility of persecution on a Convention ground or that on a balance of probabilities he faces a personal risk to his life or cruel and unusual treatment or punishment if he returns to Ghana.
2. The RPD-panel also erred in finding that the appellant is neither a Convention refugee pursuant to section 96 nor a person in need of protection pursuant to Section 97(1) of the IRPA.

[20] The Applicant's submissions related to the RPD's errors were summarized above in paragraph 10. In the Applicant's Reply Memorandum on judicial review (at paragraph 43), the Applicant states that his submissions to the RAD related to the following:

The reference to a serious possibility of persecution on a Convention ground refers to the component of the claim based on perceived sexuality. The reference to a personal risk to life or cruel

and unusual treatment or punishment refers to the property dispute and the risk from the Land Guards. There is no other possible referent for this statement. The respondent suggests none.

[21] The Applicant states that the RAD went through an elaborate and prolonged inquiry into his actual sexual orientation. Instead, the RAD should have considered whether his agents of persecution perceived him as bisexual or gay (*Canada (AG) v Ward*, [1993] 2 SCR 689 [*Ward*]). *Ward* concerned a claimant's fear of persecution on the basis of political belief. The Applicant submits that the holding in *Ward* should apply to other bases of persecution, including sexual orientation (*Ward* at para 92).

[22] The Respondent acknowledges that the perspective of the persecutor is the lens through which persecution must to be examined. A claimant's credibility will ultimately determine whether they belong to a persecuted group or whether an agent of persecution views them as part of that group. The RAD's finding that the Applicant did not credibly establish that he was either bisexual or gay or perceived as such, was reasonable.

[23] After reviewing the record, I find that the Applicant's submissions before the RAD did not explicitly raise the issue of the Applicant's perceived sexuality (*Chekroun v Canada (Minister of Citizenship and Immigration)*, 2013 FC 737 at paras 55-57 [*Chekroun*]). If the Applicant wished to rely on arguments related to his perceived sexuality, then he should have made those submissions to the RAD with clarity. The Applicant asks this Court to make a leap and assume what his submissions intended to convey rather than rely on his literal submissions. The Applicant must bear the consequences of his submissions.

[24] *Ameh v Canada (Minister of Citizenship and Immigration)*, 2020 FC 875 [*Ameh*] also provides guidance in the present matter. At paragraph 18 of *Ameh*, Justice Pallotta stated:

...As this Court explained in *Soultani Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 at para 4, 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 applicant 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).

[25] The Applicant failed to identify errors in the RPD's decision in his submissions before the RAD. As a result, this Court cannot consider those issues now (*Dahal v Canada (Citizenship & Immigration)*, 2017 FC 1102 [*Dahal*]). The RAD did not err with respect to the Applicant's perceived sexuality because the Applicant did not raise it as a ground of appeal.

[26] In *Dahal*, the Honourable Chief Justice Crampton states at paragraph 37:

By simply satisfying itself that no such additional errors were made, the RAD's decision should not become vulnerable to being set aside on judicial review, based solely on its general concurrence with findings made by the RPD in respect of matters that were not raised on appeal by the Applicants. In my view, this would largely vitiate the purpose of Rule 3(3)(g) of the [*Refugee Appeal Division Rules*, SOR/2012-257], which requires an appellant to identify (i) the errors that are the grounds of the



appeal, and (ii) where those errors are located in the RPD's decision, or in the transcript recording of its hearing.

[27] In *ATA v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 [ATA], the Supreme Court of Canada stated "...raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue" (ATA at para 26).

[28] I am also guided by *Adams v Canada (Minister of Citizenship & Immigration)*, 2018 FC 524 [Adams] where the Court found that the specific issue counsel raised on judicial review was being raised for the first time (Adams at para 27). At paragraphs 28-29, Justice Lafrenière states:

[28] Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257, requires an appellant to submit a record containing a memorandum that includes full and detailed submissions regarding: (i) the errors that are the grounds of the appeal, and (ii) where those errors are located in the RPD's decision, or in the transcript recording of its hearing. The RAD cannot be faulted for failing to consider arguments that were never raised.

[29] As was stated by Mr. Justice Patrick Gleeson in *Ghuri v Canada (Citizenship and Immigration)*, 2016 FC 548 (CanLII) at para 34: "appellants before the RAD that fail to specify where and how the RPD erred do so at their own peril". If the Court on judicial review were prepared to condone such practice, it would effectively allow an appellant to circumvent and neuter the appeal route provided by statute while gutting the deference owed to the tribunal (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 (CanLII) at para 54).

[Emphasis added.]

[29] The Applicant's arguments concerning his perceived sexuality were not raised before the RAD. Therefore, based on all of the above, this Court will not consider those submissions.

(2) Did the RAD err in not assessing the risk posed by the Land Guards?

[30] In the Applicant's RAD submissions under the section "Proof of the Appellant's fear for his life", there was no mention of the Land Guards, a land dispute, or any fear of persecution based on the Land Guards. Nowhere in his RAD submissions did the Applicant mention that the RPD erred in its assessment on this ground of persecution.

[31] I find that the issue of the Land Guards is raised for the first time on judicial review. The RAD noted that there were no submissions concerning the Land Guards in paragraph 4 of its Decision. In light of the above jurisprudence and the *Refugee Appeal Division Rules*, SOR/2012-257 it was reasonable that the RAD did not consider the alleged risk posed by the Land Guards. The RAD could not consider this because the Applicant did not raise it.

B. *Summary*

[32] The Decision indicates that while the Applicant's testimony is subject to a presumption of truth, inconsistencies can rebut this presumption. The RAD had concerns over inconsistencies in the Applicant's evidence about his sexuality and previous relationships, as well as the Applicant's failure to provide any personalized evidence about his sexuality. This led to a strong negative inference regarding the Applicant's credibility. The RAD also pointed out examples of inconsistencies in the evidence before the RPD at paragraphs 11 to 14 of the Decision.

[33] As pointed out above, the Applicant's submissions before the RAD did not include submissions about his perceived sexuality or the Land Guards. The RAD did not err by not considering these issues and the Applicant cannot raise them on judicial review.

[34] The Applicant has not established that the RAD's decision was unreasonable. The Decision, viewed holistically and contextually, is internally coherent and sets out a rational chain of analysis that is justified in relation to the facts and the law.

## VII. Conclusion

[35] The application for judicial review is dismissed.

[36] The Applicant did not propose a certified question but invited the Court to consider one on its own. The Respondent submitted that there is no question for certification and the Applicant has not submitted a question in writing and in advance. I find that there is no question for certification.

**JUDGMENT in IMM-3731-20**

**THIS COURT'S JUDGMENT is that:**

1. The Application for judicial review is dismissed.
2. There is no question of general importance for certification.
3. There is no order for costs.

"Paul Favel"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3731-20

**STYLE OF CAUSE:** ANTHONY AHMED ADAMS v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCING

**DATE OF HEARING:** APRIL 19, 2021

**JUDGMENT AND REASONS:** FAVEL J.

**DATED:** OCTOBER 22, 2021

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