

Federal Court



Cour fédérale

Date: 20220317

Docket: IMM-896-21

Citation: 2022 FC 361

Ottawa, Ontario, March 17, 2022

PRESENT: The Hon. Mr. Justice Henry S. Brown

BETWEEN:

ABDUL KARIM SIITA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD], dated January 6, 2021 [Decision]. The RAD confirmed a decision of the Refugee Protection Division [RPD] which determined the Applicant is neither a Convention refugee nor a person in need of protection pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA]. The Decision is set aside for redetermination for the following reasons, including a failure to respect *Guideline 9: Proceedings Before the IRB*

Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics [the *SOGIE Guidelines*]. I note the *SOGIE Guidelines* have been renamed and revised as *SOGIESC Guidelines*, however I will refer to the version at issue below.

[2] The Applicant is a 44-year-old male citizen of Ghana. He claims to be bisexual. In his Affidavit he says he became aware of his bisexual orientation at an all boys high school, where he had a sexual experience with a gay senior student. They kept their sexual encounters a secret. He did not disclose this sexual relationship in his Basis of Claim [BOC] but did so in his testimony before the RPD.

[3] The Applicant also had a long-term almost 19-year relationship with another man he had known since elementary school. They became partners around 1999. Around 2003, the Applicant's family pressured him into marrying a woman. The Applicant never formally married her because it was a relationship without love. However, they had three children.

[4] The Applicant continued to see the other man and kept him a secret until July 2018, when they were attacked and beaten by neighbours who caught them having intimate relations. The police refused to help him and the Applicant fled to hide. Shortly afterwards, rumours began to spread throughout the community and the Applicant and his family began to receive threats and verbal abuse. The Applicant was able to speak with the man once while he was in Ghana but fled without him and without his common-law spouse and children. The Applicant discussed this in his BOC, unlike the situation with the senior student many years earlier.

[5] The Applicant left Ghana and applied for refugee protection in Canada in 2018. A hearing before the RPD was held on October 15 2019, and on the same day, the RPD recorded its decision finding the Applicant is neither a Convention refugee nor a person in need of protection. The determinative issue at the RPD hearing was credibility.

[6] The RAD dismissed an appeal on January 6, 2021 and upheld the RPD's finding that the Applicant is neither a Convention refugee nor a person in need of protection. The RAD made the following material conclusions:

- The RPD erred in its application of the principles pertaining to the presumption of truth as set out in *Maldonado*. The RPD applied the principles contained in *Maldonado* incorrectly by making statements too wide in scope and held that “[t]he fact that the Appellant made misrepresentations on basic questions does not impugn his credibility with regard to unrelated questions”;
- The RPD's error in applying the principles regarding the presumption of truth was not determinative of the appeal;
- The RPD did not err by lacking sensitivity to the SOGIE Guidelines by assuming that the Applicant was not still “working on his gender identity.” Given the Applicant was comfortable speaking of his long-term relationship with the man, there was no reason why he should have not been comfortable discussing other sexual relationships with men;
- The RPD did not err in drawing a negative credibility inference regarding the Applicant's sexual orientation due to the lack of corroborating documentation of his long-term relationship with the man; and
- The Applicant did not challenge the finding he had not established he had been in any relationships with men in Canada, and the RPD did not err in concluding he had failed to establish on a balance of probabilities that he is bisexual and that he had relationships with men.

[7] The only issue is whether the Decision is reasonable. The test is whether the Decision is justified, intelligible and transparent.

(1) Presumption of Truthfulness

[8] The Applicant submits the RPD's conclusion that the presumption of truthfulness per *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA) [*Maldonado*] did not apply to the Applicant's testimony, based on inconsistencies and omissions in the Applicant's initial refugee interview and immigration documents, tainted the RPD's assessment of the Applicant's credibility, particularly with respect to his sexual orientation, such that the error rendered the entire decision unreasonable.

[9] The RAD held the RPD erred in its application of *Maldonado* but on its own review concluded this error was not determinative of the appeal before it. The Applicant disagrees and submits the RAD erred in concluding this error was not determinative of the appeal.

[10] I find no merit in the Applicant's submissions in this respect. I am satisfied the RAD did a proper correctness review on the record before it. The RAD's conclusions may have been the same as the RPD's but that does not constitute unreasonableness. Given there was a proper review, the RAD's conclusion that the *Maldonado* error was not determinative of the appeal is justified and intelligible.

(2) *SOGIE Guidelines*

[11] That said, in my respectful view the RAD failed to respect the *SOGIE Guidelines*. While the RAD referred to them at the outset, that is not enough. It is trite to say the *SOGIE Guidelines* must be meaningfully applied. Here they were not. I say this because the RAD incorrectly refers

to the Applicant's "gender identity" as the issue before it, instead of referring to the actual issue before it, namely the Applicant's "sexual orientation." His gender identity was never at issue: he is a man. His sexual orientation was the issue, namely whether he is bisexual hence at risk if returned to Ghana.

[12] This error – confusing gender identity with sexual orientation – is made on multiple occasions and throughout the Decision: see paras 4, 5, title before 13, 13, title before 17, 18, and 22. While I agree that guidelines such as the *SOGIE Guidelines* are not binding, and that the *SOGIE Guidelines* are not a "cure-all" (*L.A. v Canada (Citizenship and Immigration)*, 2016 FC 1334 [per Bell J]), in my respectful view, the disregard of the basics shown here demonstrates a lack of sensitivity to this Applicant. It also constitutes a failure to respect the *SOGIE Guidelines*, which require IRB decision-makers to use appropriate language both at hearings and in their decisions per Article 4.1:

All participants in proceedings before the IRB have a responsibility to be respectful toward other participants. Part of this responsibility includes the use of appropriate language by all participants. Appropriate language is defined as language that reflects that person's self-identification and avoids negative connotations. Individuals should be addressed and referred to by their chosen name, terminology, and pronouns.

[13] The Applicant also submits the RAD erred in upholding the RPD when it made a negative credibility inference from the Applicant's omissions in his BOC regarding his first sexual relationship when at school. The Applicant's BOC states he knew this man was gay but does not explicitly state they had sexual encounters. At the hearing, the Applicant explained his relationship with this man was sexual and provided details. When asked by the Member about

why this was not stated in the BOC, the Applicant stated that it was difficult for him to state this in his narrative. Despite this explanation, the RPD took issue with the fact the Applicant mentioned having a 19-year sexual relationship with a man but did not state clearly he had a sexual relationship with the school boy in his BOC. I agree this evidence was not treated with sensitivity and in particular note *SOGIE Guidelines* Article 3.2 was not respected:

An individual's testimony may be the only evidence of their SOGIESC where, in a given case, corroborative or additional evidence is not reasonably available.

[14] While the Applicant contests the RAD's conclusions regarding the Applicant's lack of corroborative evidence of both his long-term relationship with the other man, and his casual relationships with men since he has been in Canada, the RAD notes these were not contested before it, which Applicant's counsel confirmed. This Court will not entertain grounds of appeal that were not contested before the RAD; to do otherwise fundamentally alters the appeal and judicial review processes in that it opens both to withholding arguments at one level, only to complain they were not dealt with at the next.

[15] In respect of the *SOGIE Guidelines*, however, the Applicant has established the decision of the RAD was unreasonable in that it is not justified given constraining law (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, para 104-105). Therefore, it will be set aside.

[16] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-896-21

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded for reconsideration by a different decision-maker, no question is certified and there is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-896-21

STYLE OF CAUSE: ABDUL KARIM SIITA v THE MINISTER OF
CITIZENSHIP, AND IMMIGRATION

PLACE OF HEARING: HELD BY WAY OF VIDEOCONFERENCE

DATE OF HEARING: MARCH 9, 2022

**REASONS FOR JUDGMENT
AND JUDGMENT:** BROWN J.

DATED: MARCH 17, 2022

APPEARANCES:

Nicholas Woodward FOR THE APPLICANT

Nimanthika Kaneira FOR THE RESPONDENT

SOLICITORS OF RECORD:

Battista Smith Migration Law Group FOR THE APPLICANT
Barristers & Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario