

Federal Court



Cour fédérale

Date: 20220426

Docket: IMM-2322-21

Citation: 2022 FC 606

Ottawa, Ontario, April 26, 2022

PRESENT: Madam Justice McDonald

BETWEEN:

ANDREW CHRISTOPHER SABAYA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a decision of the Refugee Appeal Division (RAD) dated March 22, 2021, finding that the Applicant is not a Convention refugee nor a person in need of protection.

[2] The Applicant is a 42-year-old citizen of Tanzania who arrived in Canada in December 2016. He made a refugee claim alleging his life is in danger because he is a bisexual man, and HIV positive.

[3] For the reasons that follow, the judicial review is granted as the RAD failed to assess the Applicant's claim on the basis of his perceived sexuality.

I. Background

[4] In 2007, the Applicant entered in a partnership with Mr. A to mine a piece of land in Tanzania. The "witch master" they hired to ensure the success of their mining venture told them they would have to engage in intercourse with each other to be successful. The Applicant stated in his Basis of Claim (BOC) form that although this was against his beliefs, he engaged in intercourse with Mr. A and ultimately realized that he was happier with Mr. A than he was with women.

[5] The Applicant married a woman in 2009 and they had a son in 2010. In 2013, the Applicant stated that his wife and the community learned of his relationship with Mr. A and he started to receive death threats. He claims that the police refused to take action because his conduct with Mr. A was against the law, and against African culture and values. He left his community and relocated to another city.

[6] In 2014, he started a relationship with another man. He claims he was approached by men from his community and threatened again. His wife also began receiving threats. He subsequently fled to Canada, and discovered he was HIV positive shortly after arriving.

[7] In support of his refugee claim, the Applicant submitted photos of himself attending the 2018 Toronto Pride Parade and letters of support from various LGBTQ and HIV community organizations. He submitted information from the Toronto General Hospital confirming that he is HIV positive. He also provided letters from individuals in Tanzania warning him not to return given his homosexuality.

II. Refugee Protection Division (RPD) Decision

[8] The RPD denied the Applicant's claim on the grounds of credibility, because of the inconsistencies in the Applicant's testimony and the information in his BOC. The RPD did not believe the Applicant's claim to be bisexual.

[9] The RPD considered whether a heterosexual male with HIV would be at risk of persecution based solely on his HIV status and determined that "[a]lthough it is more likely than not that the claimant may suffer from discrimination based on his HIV status should he return to Tanzania, the panel cannot find that this discrimination rises to the level of persecution."

[10] The RPD also found that the risk to the Applicant with respect to his inability to access medical care was the same risk faced by everyone in Tanzania, and fell under the exception in subpara 97(1)(b)(iv) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

III. RAD Decision

[11] On appeal to the RAD, the Applicant submitted new evidence. The RAD admitted an European Parliament resolution, a letter from the United States Secretary of State, a church public statement excommunicating the Applicant for homosexuality, a police-wanted notice, a divorce record from the Registrar General of Tanzania, and an Amnesty International Report. The RAD declined to admit various news articles, as they could have been provided with the Applicant's perfected appeal record. The RAD also held an oral hearing pursuant to s 110(6) of the IRPA.

[12] The RAD agreed with the RPD that the Applicant was not credible with respect to his relationships with Mr. A and the other man. Further, although the Applicant testified about hostile messages he received through WhatsApp and text messages, the RAD drew a negative inference given his failure to previously mention the messages, and his failure to provide copies.

[13] With respect to the statement from the Applicant's church that he was excommunicated because of rumors about his homosexuality, the RAD noted the statement was undated and did not contain an address or location of the church. The Applicant testified that the statement was published in early 2018, and stated that it was only sent to his wife. According to the Applicant, he did not think to include it in his original narrative or appeal record. The RAD, therefore, drew a negative credibility inference and gave the notice no weight.

[14] In considering the police-wanted notice, which indicated that the Applicant was being sought by police, the RAD noted that it did not state why he was wanted, and gave it little weight in establishing his bisexuality.

[15] Regarding the divorce record, the RAD accepted this document showed the Applicant was ordered divorced from his ex-wife in November 2019, and acknowledged the document contains an entry that states that the “Kind of Decree” is “Bisexual”. However, because the document did not indicate what kind of evidence his ex-wife provided to the court to obtain a divorce on the grounds of bisexuality, and because the Applicant failed to obtain evidence directly from his ex-wife, the RAD gave the document little weight in establishing the Applicant’s sexual orientation.

[16] Finally, the RAD gave no weight to supporting letters provided by the Applicant’s friends and community organizations. With respect to letters from friends, the RAD noted the letters were typed, not signed, contained no information on the identity of the authors, and did not have information on how they were produced. With respect to the community organizations letters from the 519 Community Centre, the Metropolitan Community Church of Toronto, Black Coalition for AIDS Prevention, and the Toronto People with AIDS Foundation, the RAD held that the letters were of limited value. While some of the letters indicated the authors believed the Applicant to be bisexual, the RAD stated the letters did not explain the basis on which the authors formed their opinions or otherwise did not establish the Applicant’s sexual orientation.

[17] The RAD concluded:

...there is very little credible, reliable, or relevant evidence that would establish [the Applicant's] sexual orientation. While I do not doubt that [the Applicant] was acquainted in some way with [Mr. SP] or [Mr. AA], the evidence before me is insufficient to establish, on a balance of probabilities, that his relationships with either of these men was romantic or sexual. It is also insufficient to establish that he is bisexual. I therefore find that [the Applicant] has not established a serious possibility of persecution on the basis of his real or perceived sexual orientation.

[18] Finally, the RAD assessed the Applicant's risk of persecution as a heterosexual male who is HIV positive. The RAD agreed with the RPD and held that "[t]here is evidence in the NDP to indicate that queer identified men face considerable degrees of stigma and discrimination, that would rise to the level of persecution because it affects their access to healthcare, privacy, housing and employment. However, I do not find that the evidence demonstrates this extends to cisgender straight men."

[19] Therefore, the RAD dismissed the appeal.

IV. Issues and Standard of Review

[20] The Applicant challenges the RAD's failure to admit certain evidence as well as the weight afforded to the evidence. However, in my view, the determinative issue is the failure of the RAD to assess the risk to the Applicant arising from the perception that he is bisexual. I, therefore, decline to address the other issues.

[21] Both parties agree that the standard of review is reasonableness. As stated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 99, “A reviewing court must develop an understanding of the decision maker’s reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision.”

V. Analysis

[22] The Applicant argues that the RAD failed to assess his claim based on a perceived sexual orientation. The evidence before the RAD included a copy of an entry in the “Register of Annulments and Divorces”, which states the “Kind of Decree” is “Bisexual”. The RAD did not reject this evidence as being a non-credible document, but, rather, held it did not reveal on what basis the court accepted the Applicant was bisexual, given that the Applicant was not involved in the divorce proceedings.

[23] Additional information in the National Documentation Package [NDP] states that “suspected gay men in Tanzania are subjected to forced anal examinations” (emphasis added). Another document describes how Regional Commissioner Makonda called on the public to report LGBT people, which raised a fear of “violence, intimidation, bullying, harassment and discrimination against those perceived to be LGBT” (emphasis added). Another document speaks of a man being arrested for suspected homosexuality based on his Instagram posts.

[24] As noted by Justice Zinn in *Brown v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 958: “Being perceived to be bisexual may be relevant if one is not bisexual because the mere perception may create a risk of harm in some societies” (at para 7).

[25] The failure by decision makers to assess the perceived risk was addressed in *Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760. In that case, an officer rejected a Pre-Removal Risk Assessment (PRRA) application due to credibility concerns around the applicant’s claim that he was gay. On review of the PRRA decision, Justice Russell held the PRRA officer failed to consider the risk arising from the perception that the applicant was gay, given the evidence from Nigerian authorities that he was being sought because of his “gay activities” (at paras 16, 38). Justice Russell stated: “What the Officer fails to consider is that what mattered with respect to the Arowojobe Affidavit was not whether the Applicant is homosexual, but that the authorities in Nigeria believe he is homosexual” (at para 38).

[26] The same error arises here. Despite the statement that the Applicant had not established “a serious possibility of persecution of [sic] the basis of his real or perceived sexual orientation”, the RAD did not actually assess the risks to the Applicant if he is perceived as bisexual. Relatedly, the RAD also did not assess the risks to the Applicant as being perceived as a bisexual man with HIV. The RAD only assessed whether the Applicant would face persecution as a heterosexual, HIV positive male, but failed to assess whether he would face persecution if he was *perceived* to be a non-heterosexual, HIV positive male.

[27] The RAD's failure to assess the Applicant's claim on the basis of his perceived sexuality is unreasonable and this matter is remitted for redetermination.

[28] There is no question for certification.

JUDGMENT IN IMM-2322-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision under review is set aside and the matter returned for redetermination by a differently constituted panel.
2. There is no certified question.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2322-21

STYLE OF CAUSE: ANDREW CHRISTOPHER SABAYA v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: FEBRUARY 24, 2022

JUDGMENT AND REASONS: MCDONALD J.

DATED: APRIL 26, 2022

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