

Federal Court



Cour fédérale

Date: 20240524

Docket: IMM-2108-23

Citation: 2024 FC 797

Ottawa, Ontario, May 24, 2024

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

MUHAMMAD SARFARAZ ALI KHAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Muhammad Sarfaraz Ali Khan [Applicant], a citizen of Pakistan, seeks a judicial review of the January 31, 2023 decision [Decision] of the Refugee Appeal Division [RAD] upholding the decision of the Refugee Protection Division [RPD], finding that the Applicant is neither a Convention refugee nor a person in need of protection within the meaning of section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Decision is the result of an agreement by the parties to have the matter re-determined by a different member of the RAD. The determinative issue for the RAD on re-determination was credibility.

[3] The application for judicial review is dismissed.

II. Background

[4] In August 2012, the Applicant came to Canada on a student visa and, after making various immigration applications, he made a refugee protection claim in April 2018 on the basis of his sexual orientation. The Applicant fears that he will be killed because homosexuality is illegal in Pakistan and that he will be the target of homophobic attacks by religious extremists.

[5] During a visit to Pakistan in December 2015, the Applicant's relationship with a man was discovered and unidentified people began seeking out the Applicant. The Applicant could not seek help from the police.

[6] The RPD found that the Applicant was not credible and determined that he was not a Convention refugee or person in need of protection. The RPD found that the Applicant did not provide sufficient credible evidence to establish his sexual orientation or that he was targeted in Pakistan. The RPD based its finding on the following: there were material omissions in the Applicant's basis of claim [BOC] form compared to his hearing testimony; the Applicant's testimony about his father's affidavit was not credible; the Applicant provided inconsistent testimony about the length of his same-sex relationship; and the Applicant had not provided a

reasonable explanation for the lack of corroborative evidence from his former partners in Canada. The Applicant appealed to the RAD.

III. Decision

[7] The RAD refused to admit two new pieces of evidence tendered by the Applicant: a letter written by his current partner [Letter] and a psychological report [Report]. The RAD noted that it could only admit evidence that arose after the RPD decision, that was not available at the time of the decision, or that could not have been expected to be submitted to the RPD before the decision. If one of those requirements is met then the evidence must still be new, credible and relevant in order to be admitted.

[8] The RAD determined that the Letter was inadmissible and lacked credibility because it was unwitnessed and the signature did not match the accompanying driver's licence. The Report was inadmissible because it did not provide evidence about events arising after the RPD hearing and the Applicant did not establish that such a report could not have been reasonably provided prior to the RPD's decision or that he could not reasonably have been expected in the circumstances to have provided it to the RPD.

[9] The RAD agreed with the RPD's finding that the Applicant had not credibly established his allegations of past persecution in Pakistan and his alleged sexual orientation. The RAD found that there were numerous significant and material omissions from the Applicant's BOC form that were not reasonably explained, the corroborative evidence from the Applicant's father did not accord with the Applicant's testimony, the Applicant provided inconsistent testimony about the

relationships he alleged he had at the time of the RPD hearing, and the Applicant did not provide other corroborative evidence reasonably available to him.

IV. Issues and Standard of Review

[10] This matter raises the following issues:

1. Did the RAD breach the duty of procedural fairness in its consideration of the Letter?
2. Was the Decision reasonable?
 - a. Did the RAD reasonably refuse to admit the Report?
 - b. Did the RAD render reasonable credibility findings?

[11] Procedural fairness issues are reviewed on a standard akin to correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]). In assessing procedural fairness allegations, the Court will determine whether the process followed was fair having regard to all the circumstances (*Canadian Pacific* at para 54).

[12] As for the merits of the Decision, I agree with the parties that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). This case does not engage one of the exceptions set out by the Supreme Court of Canada in *Vavilov*. Therefore, the presumption of reasonableness is not rebutted (at paras 16-17).

V. Analysis on Procedural Fairness

(1) Applicant's Position

[13] The RPD and RAD must only make implausibility findings of adverse credibility “in the clearest of cases” (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776; *Kallab v Canada (Citizenship and Immigration)*, 2019 FC 706). Here, the RAD did not allow the Applicant an opportunity to respond before rendering a negative credibility finding in relation to the signature on the Letter.

[14] The RAD member did not have specialized handwriting expertise to determine that the signature on the Letter was inauthentic. The rejection of the evidence constitutes an adverse credibility finding requiring the RAD to hold an oral hearing or at least issue a procedural fairness letter. An oral hearing is required if there is a serious credibility issue regarding evidence that is central to the decision and which, if accepted, would justify allowing the application (*Qosaj v Canada (Citizenship and Immigration)*, 2021 FC 565 at paras 38-42). The Letter was pivotal to evaluating his credibility and risk upon return to Pakistan.

(2) Respondent's Position

[15] An oral hearing was not required. The RAD may hold a hearing if there is new documentary evidence that raises a serious credibility issue, is central to the decision with respect to the claim for protection, and is dispositive of the claim (*IRPA*, s 110(6)). If the RAD concludes that new evidence, which was tendered to address the RPD's credibility concerns, is not reliable or credible, then there is no need to convene a hearing (*Onyeawuna v Canada*

(*Citizenship and Immigration*), 2018 FC 1214 at paras 25-28). There is also no need to convene a hearing “when the RAD finds an additional basis to question the Applicant’s credibility using the evidentiary record before the RPD” (*Adekanbi v Canada (Citizenship and Immigration)*, 2022 FC 38 at para 20, citing *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at para 13).

[16] The RAD’s findings on the Letter are owed deference (*Ahmedin v Canada (Citizenship and Immigration)*, 2018 FC 1127 at paras 55-56 [*Ahmedin*]). Previously, the Applicant had submitted a notarized statutory declaration and there was no reason why he could not have provided a sworn document in this matter, considering that the Applicant, the Applicant’s partner and the Applicant’s counsel live in the same city.

(3) Conclusion

[17] The RAD did not breach the procedural fairness requirements in relation to the Letter. The RAD refused to hold an oral hearing since it did not accept any new evidence. Absent new evidence, the RAD was constrained by subsection 110(6) of *IRPA* in its ability to holding a hearing (*Tota v Canada (Citizenship and Immigration)*, 2015 FC 890 at para 32).

[18] Further, the Applicant conflates plausibility with credibility findings. Plausibility findings are contrasted with findings predicated on inconsistency within the applicant’s own testimony, between the applicant’s testimony and other documents, material omissions, the lack of precision in testimony, or the absence of documentation where documents or corroborative evidence might normally be anticipated (*Chen v Canada (Citizenship and Immigration)*, 2015 FC 225 at para

14). Accordingly, the credibility issues related to the Letter will be addressed in the RAD's assessment of credibility, below.

VI. Analysis on Reasonableness

(1) Did the RAD reasonably refuse to admit the Report?

(a) *Applicant's Position*

[19] The Report met the criteria for admission pursuant to subsection 110(4) of *IRPA* as it was new, credible, relevant, and material to the appeal. The RAD's issue was that the Report did not meet the threshold of "newness". *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [Raza] at paragraph 13 provides guidance that "new" evidence is evidence that is capable of:

- a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD,
- b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
- c) contradicting a finding of fact by the RPD (including a credibility finding)[.]

[20] The newness of the Report related to its analysis of the Applicant's ongoing relationship with his partner, which developed after the RPD and the first RAD decision. It also contradicted a credibility finding of the RPD. In dismissing the Report, the RAD ignored aspects of the Report that evidenced the Applicant's same-sex relationship, its positive influence on him, and that the Applicant would be at risk of interpersonal and mental health adversity if he is forced to return to Pakistan.

(b) *Respondent's Position*

[21] The RAD determined that the Report did not provide evidence about events or circumstances that arose after the RPD hearing. Instead, the purpose of the Report was to address the RPD's adverse credibility finding and to corroborate the Applicant's sexual orientation claim.

[22] Expert reports cannot function as a "cure-all" for deficiencies in an applicant's evidence, nor can expert reports propose to determine issues before a tribunal, like credibility (*Demberel v Canada (Citizenship and Immigration)*, 2016 FC 731 at paras 47-50). The RAD reasonably concluded that the Report did not meet the test for newness because brief references to the Applicant's circumstances do not transform the Report into evidence capable of contradicting the RPD's findings about the Applicant's testimony. The author of the Report had no knowledge of the Applicant's circumstances beyond information that the Applicant supplied in a single interview held without the Applicant's alleged partner. The Applicant recounted events to the author of the report, but that does not make the events more credible or prove an allegation (*Konecoglu v Canada (Citizenship and Immigration)*, 2021 FC 1370 at para 18; *Tacoa Veljovic v Canada (Citizenship and Immigration)*, 2023 FC 1069 at para 44).

(c) *Conclusion*

[23] The RAD reasonably refused to admit the Report.

[24] As the RAD properly noted, the appellant “may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection” (*IRPA*, s 110(4)). The RAD also properly noted that, if the submitted evidence meets one of the statutory factors, the decision-maker must apply the *Raza* criteria and assess the evidence for credibility, relevance, newness, and materiality (*Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 at paras 49, 64; *Okunowo v Canada (Citizenship and Immigration)*, 2020 FC 175 at para 41 [*Okunowo*]).

[25] I agree with the Respondent that the focus of the Report is on the Applicant’s credibility and that the references to the Applicant’s relationship are minimal. The Report states in its introduction that “[i]n your letter of referral, you asked that I assess and diagnose Mr. Khan, with special emphasis on credibility. You have also asked that I provide an evidence-based prognostic opinion, addressing whether his subjective fear would result in psychological harm in a return scenario.” The Report follows this guidance and most of it analyzes the credibility of the Applicant’s claim concerning his sexual orientation and the psychological harm to the Applicant if he returns to Pakistan. The Applicant would have been able to submit a report or other evidence on these major points at the RPD, so it was reasonable for the RAD to find that the Applicant did not meet the statutory requirements of subsection 110(4).

(2) Did the RAD render reasonable credibility findings?

(a) *Applicant’s Position*

[26] The RAD rendered unreasonable credibility findings by not explaining sufficiently why it found the signature on the Letter did not match the signature on the driver's licence and was therefore not credible. The RAD does not explain how it determined that the signatures did not match. There are marked similarities between the signatures and it is inevitable that an individual's original-sized signature will look different than it does on a driver's licence, which is reduced in size. The Court has stated, "like other factual findings, findings of insufficiency must be explained.... Decision-makers should not 'move the goalposts,' as it were, when they have mere suspicions about credibility that they are unable to explain" (*Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 35).

[27] Furthermore, the RAD rendered unreasonable credibility findings concerning the nature of the Applicant's sexual orientation by failing to engage with the Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics [SOGIESC Guidelines]. According to the SOGIESC Guidelines,

7. Establishing principles for assessing credibility and evidence pertaining to SOGIESC

7.1 While an individual's experiences and behaviours related to their SOGIESC may be expressed in both the private and public spheres, an individual's testimony may, in some cases, be the only evidence of their SOGIESC.

7.2 Corroborating evidence

7.2.1 Corroborating evidence from family or friends may not be available in cases involving SOGIESC. An example of when this type of corroboration may not be available is when an individual has concealed their SOGIESC because of perceived stigma or risk of harm.

[28] The RAD member noted that she considered the SOGIESC Guidelines, but she failed to apply them in a substantive way. The RAD found that the Applicant should have provided corroborative evidence from previous partners because it seemed like the Applicant was in recent contact with them and, as a result, found that the lack of corroborative evidence undermined his credibility. However, the RAD's reasons were speculative and ran counter to the SOGIESC Guidelines since it was not clarified when the Applicant was last in contact with his former partners or what the nature of their relationship was at the time of hearing.

(b) *Respondent's Position*

[29] The RAD reasonably rejected the Letter as new evidence because it *prima facie* lacked credibility and the Applicant did not establish that it was sufficiently credible for admission as new evidence. The RAD was entitled to evaluate the two signatures to assess the credibility of the Letter and upon doing so, determined that they were significantly different (*Orukpe v Canada (Citizenship and Immigration)*, 2020 FC 674 at paras 23-24). The RAD also appropriately considered the circumstances of the Letter and found it reasonable to expect the Applicant to arrange for an affidavit or other notarized document, rather than provide an unwitnessed letter. The RAD did make it clear that the fact that the Letter was not witnessed or notarized was not, in and of itself, determinative of credibility. The RAD's findings are owed deference (*Ahmedin* at paras 55-56).

[30] The RAD found a number of inconsistencies and material omissions in the evidentiary record, including in the BOC form and the affidavit of the Applicant's father. Due to the inconsistencies and omissions, the RAD reasonably considered whether there was sufficient

corroborating evidence to address the other credibility issues in the Applicant's claim. As a result, the RAD examined the Applicant's own evidence and found he had been in recent enough contact with former partners to expect that they could have provided corroborative evidence. The RAD's credibility concerns did not turn solely on the lack of corroborative evidence.

[31] Furthermore, the SOGIESC Guidelines cannot be a "cure-all" to repair adverse credibility findings, nor can the fact that the RAD found inconsistencies or implausibility in the evidence mean that the RAD did not apply the SOGIESC Guidelines (*Jayaraman v Canada (Citizenship and Immigration)*, 2022 FC 458 at para 24).

(c) *Conclusion*

[32] The RAD rendered reasonable credibility findings.

[33] First, the RAD considered the admissibility of the Letter in terms of the subsection 110(4) requirements and the *Raza* factors in making the determination that the Letter was not credible. According to *Raza*, the relevant question to consider is, "[i]s the evidence credible, considering its source and the circumstances in which it came into existence?" (at para 13). If the answer is no, then the evidence need not be considered (at para 13). Accordingly, the RAD considered the discrepancy in the signatures and the circumstances of its submission to conclude that the Letter was not credible. There is no strict requirement for documents to be notarized and evidence cannot be discounted on this basis alone (*Paxi v Canada (Citizenship and Immigration)*, 2016 FC 905 at para 52; *Mathieu v Canada (Citizenship and Immigration)*, 2021 FC 249 at paras 28-29). However, the RAD is entitled to assess whether there are other

indicators of credibility in addition to a signature (*Vicente v Canada (Citizenship and Immigration)*, 2021 FC 537 at paras 14-16; *Stephen Oderinde v Canada (Citizenship and Immigration)*, 2023 FC 245 at paras 17, 23). The RAD's discussion on the circumstances of the Letter's submission focuses on the benefits that a notarized or witnessed statement provide: verification and authentication. Similarly, a sworn statement and testimony attracts a presumption of truth. As neither of these features applied to the Letter, the RAD reasonably was unable to overcome its concerns about the credibility of the Letter, given the lack of any other indicators of credibility and the discrepancy with the signatures. It is also important to note that the overall credibility findings were not based solely on the requirement for a sworn document or on the assessment of the signature. There were inconsistencies and omissions in the evidentiary record that the Letter could not overcome.

[34] Second, the RAD identified that the appeal must be considered in the context of the SOGIESC Guidelines. The RAD noted that the Applicant's submission was that the SOGIESC Guidelines state that sometimes a claimant's testimony is the only available evidence of their sexual orientation and that the decision-maker must examine whether there are cultural, psychological, or other barriers in providing evidence in support of their claim. The RAD reasonably was not persuaded by this argument because the other credibility issues in the claim gave rise to the need for corroborating evidence to the Applicant's testimony. However, the RAD also found that corroborative evidence from the Applicant's former partners should have been reasonably available and that the Applicant did not provide a reasonable explanation for failing to provide it when given a chance to explain. The basis for these determinations was that the Applicant's evidence suggested he was in somewhat recent contact with at least one former

partner and that nonetheless, it would be reasonable to expect the Applicant to attempt to seek corroborative evidence.

[35] The Court has provided some guidance in how to address this matter. First, while a lack of corroborating evidence of an applicant's sexual orientation, absent negative, rational credibility or plausibility findings related to that issue, is not enough to rebut the presumption of truthfulness, the RAD may make findings of a lack of credibility from an accumulation of inconsistencies and contradictions (*Lawal v Canada (Citizenship and Immigration)*, 2022 FC 601 at para 31, citing *Obinna v Canada (Citizenship and Immigration)*, 2018 FC 1152 at para 33). Second, it is reasonable for the RAD to make a finding not based on the lack of corroboration but based on an applicant's inadequate answers and explanation for the failure to obtain corroborative evidence (*Singh v Canada (Citizenship and Immigration)*, 2020 FC 179 at para 19). Third, the SOGIESC Guidelines cannot be a cure-all for negative credibility findings (*Okunowo* at para 66).

[36] Given that the RAD found an accumulation of inconsistencies and contradictions, as well as an inadequate explanation for the absence of corroborative evidence to remedy any issues it had with the Applicant's evidence, the RAD reasonably assessed the credibility issues, including the application of the SOGIESC Guidelines.

VII. Conclusions

[37] For the reasons above, this application for judicial review is dismissed.

[38] The parties do not propose a question for certification and I agree that none arises.

JUDGMENT in IMM-2108-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question for certification.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2108-23

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MINISTER OF CITIZENSHIP AND IMMIGRATION

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