Federal Court  Cour fédérale

**Date: 20240711**

**Docket: IMM-2215-23**

**Citation: 2024 FC 1091**

**Ottawa, Ontario, July 11, 2024**

**PRESENT: Madam Justice Sadrehashemi**

**BETWEEN:**

**DANIEL YAW JOHNFIAH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicant, Daniel Yaw Johnfiah, sought asylum through a Pre-Removal Risk Assessment application ("PRRA") because he feared persecution as a bisexual man in Ghana. Mr. Johnfiah's PRRA was refused. He is challenging this refusal on judicial review.

[2] The Officer accepted that the objective evidence established "adverse treatment of the LGBT community in Ghana including discrimination, abuse and violence." The Officer rejected the claim because there was "insufficient evidence" to establish on a balance of probabilities that Mr. Johnfiah "fits the profile or could be perceived to fit the profile of a bisexual person." On judicial review, Mr. Johnfiah makes two arguments: i) the Officer's finding on the insufficiency of evidence is based on stereotypes and ignores his explanations for the lack of other corroborative evidence; and ii) the Officer was really making a veiled credibility finding on the determinative issue of the claim—whether he is bisexual—and therefore an oral hearing was required.

[3] I agree that the Officer made a disguised negative credibility finding on the determinative issue of the claim and therefore was required to consider whether an oral hearing had to be held. On this basis, I find the matter must be sent back for redetermination.

## II. Issue and Standard of Review

[4] The PRRA determination process engages the principle of non-refoulement, the prohibition on returning refugees to countries where they are at risk of human rights violations (*Németh v Canada (Justice)*, 2010 SCC 56 at paras 1, 19; *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 774 at para 48). These critical rights and interests at the core of a PRRA decision mean that there is a heightened obligation to provide applicants with both a procedurally fair process (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 22–23) and responsive reasons that reflect the

serious issues at stake (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 133).

[5] The key issue is whether the Officer ought to have considered whether an oral hearing had to be held. There is a divergence in the Court's jurisprudence on how this Court ought to review this issue: some have found that it is subject to a reasonableness review as it consists of the decision-maker interpreting the factors in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], the decision-maker's home statute, to determine whether an oral hearing is required (see *Balogh v Canada (Citizenship and Immigration)*, 2022 FC 447 at paras 11–21), while others have viewed the question as one about procedural rights requiring a correctness-like approach (see *Iwekaeze v Canada (Citizenship and Immigration)*, 2022 FC 814 at paras 7–14).

[6] In this case, given my finding that the Officer made a veiled credibility finding that went to the determinative issue of the claim, the outcome would be the same whether I review the decision on a reasonableness standard or consider it as a procedural fairness issue on a correctness-like standard. In either case, the matter must be sent back to be redetermined.

## III. Analysis

[7] Mr. Johnfiah provided a lengthy, detailed affidavit as part of his PRRA application. In his sworn statement, Mr. Johnfiah provides details about growing up in Ghana, the emergence of his sexual identity as a bisexual person, his reasons for not disclosing his sexual orientation to his family or friends either in Ghana or later in Canada, and the nature of his sexual relationships in

Ghana and Canada. The Officer finds this evidence to be insufficient to establish on a balance of probabilities that Mr. Johnfiah is bisexual.

[8] In general, when PRRA officers are making negative credibility findings about key issues, they must hold an oral hearing. Section 113(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] provides that PRRA officers may hold a hearing and section 167 of IRPR sets out the circumstances where a hearing is required to be held, codifying common law procedural fairness guarantees (*Ahmed v Canada (Citizenship and Immigration)*, 2018 FC 1207 [*Ahmed*] at para 27). Essentially, an oral hearing is generally required where "there is a credibility issue regarding evidence that is central to the decision and which, if accepted, would justify allowing the application" (*Huang v Canada (Citizenship and Immigration)*, 2019 FC 1439 at para 41). In other words, applicants must be afforded the right to be able to respond to credibility concerns that are determinative of their claim.

[9] The Minister argues that the Officer did not make a negative credibility finding and therefore no hearing was required. It is true that the Officer made no explicit negative credibility finding and that the Officer states that they rejected the claim because of the insufficiency of evidence. However, this cannot be the end of the inquiry. This Court has found on numerous occasions in the PRRA context that: 1) the basis on which the Officer asserts they are rejecting the claim is not determinative of this issue; and 2) it can be difficult to distinguish negative credibility findings from findings on insufficiency of evidence.

[10] The exercise of determining whether an insufficiency of evidence finding is effectively a negative credibility finding is fact specific (*Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at para 36). Justice Norris suggests the following approach: "if the factual propositions the evidence is tendered to establish, assuming them to be true, would likely justify granting the application and, despite this, the application was rejected, this suggests the decision maker had doubts about the veracity of the evidence" (*Ahmed* at para 31).

[11] Applying this approach to the evidence considered by the Officer, namely the Applicant's affidavit, the Officer clearly made a negative credibility determination. If the Officer believed Mr. Johnfiah's sworn and detailed evidence, they could not have concluded that he had not established that he fit the "profile of a bisexual person."

[12] I am further convinced when I consider the reasons the Officer offered for finding the Applicant's evidence insufficient. First, the Officer does not explain why corroborative evidence is necessary in these circumstances and instead starts with the assumption that corroborative evidence is required. This is contrary to the approach to corroborative evidence in the refugee context set out by Justice Grammond in *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968 at paras 23–36. Second, the reasons given for requiring further evidence rely on stereotypes, and ignore the explanations already provided by the Applicant in his sworn statement. This further supports the conclusion that the problem was not with the sufficiency of his evidence, but rather that the Officer had doubts as to its veracity.

[13] The Officer takes issue with the lack of information provided about the Applicant approaching LGBT groups in Canada or being involved in "social activities of bisexual or gay men in Canada," stating that "[t]he information before me does not inform that the applicant has taken advantage of the much more liberal environment for bisexuals in Canada." Underlying this critique of the Applicant's evidence is the assumption that if one really was a bisexual person, one would take part in these particular groups and activities in Canada. This is a stereotype and is certainly not a sound basis on which to find insufficient evidence was provided. As noted in the Immigration and Refugee Board's *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression*, assuming that "individuals would actively participate in LGBTIQ2 culture in Canada or be involved in, or aware of, community organizations and groups" is a stereotype that "derogate[s] from the essential human dignity of an individual."

[14] The Officer also did not seem to accept the Applicant's evidence that he was fearful of disclosing his sexual orientation, even in Canada, and took many steps to be discreet about it. The Officer does not appear to accept the Applicant's explanations about why he could not obtain a letter from a former partner, namely that he no longer has contact with the former partner, and does not know his whereabouts —suggesting the Applicant could have made more efforts. This too was an unreasonable finding given the evidence before the Officer and again it appears, though not explicitly stated, that the Officer did not believe the Applicant's explanations.

[15] Ultimately, the Officer did not accept the Applicant's evidence about his sexual orientation. This was the key issue. If the Officer accepted it, the application would have been granted. In these circumstances, the Applicant has to have an opportunity to be able to respond to the Officer's concerns about his evidence. This was not done, and therefore the matter has to be redetermined. Neither party raised a question for certification and I agree none arises.

**JUDGMENT in IMM-2215-23**

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

1. The application for judicial review is allowed;
2. The decision dated January 24, 2023 is set aside and sent back to be redetermined by a different decision maker; and
3. No serious question of general importance is certified.

"Lobat Sadrehashemi"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-2215-23 |
| **STYLE OF CAUSE:** | DANIEL YAW JOHNFIAH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JANUARY 11, 2024 |
| **JUDGMENT AND REASONS:** | SADREHASHEMI J. |
| **DATED:** | JULY 11, 2024 |

**APPEARANCES:**

| | |
|---|---|
| Jonathan Porter | FOR THE APPLICANT |
| Brad Gotkin | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Landings LLP<br>Barristers and Solicitors<br>Toronto, Ontario | FOR THE APPLICANT |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |