

Federal Court



Cour fédérale

Date: 20241023

Docket: IMM-8818-23

Citation: 2024 FC 1671

Ottawa, Ontario, October 23, 2024

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

MD MONSURUL ISLAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, MD Monsurul Islam [Mr. Islam] seeks judicial review of the June 2, 2023, decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada. The RPD found that Mr. Islam failed to establish his claim that he faces a serious possibility of persecution on a Convention ground under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The RPD further found that he had failed to establish that he faces a danger of torture or a risk to life or risk of cruel and

unusual treatment or punishment upon return to Bangladesh in accordance with section 97 of the Act.

[2] The RPD made extensive credibility findings and concluded that Mr. Islam was not a reliable witness. The RPD concluded that the remaining documentary evidence was not sufficient to establish his claim that he is a homosexual man or that he is at risk in Bangladesh.

[3] For the reasons that follow, the Application for Judicial Review has been determined on its merits and is dismissed. The RPD did not breach the duty of procedural fairness as there is no requirement for the RPD to advise an applicant that their explanations for inconsistencies and contradictions in their evidence are unsatisfactory and to invite further clarification. The RPD reasonably found that Mr. Islam was not a reliable witness and that there was insufficient credible evidence to support his claim that he was homosexual and was at risk from his family, relatives and/or others due to his sexual orientation. The RPD was also not required to assess whether Mr. Islam would be at risk because he would be perceived to be homosexual; that was not his claim and, in addition, given the adverse credibility findings the RPD was not required to pursue another basis for his claim. There is no evidence to support Mr. Islam's contention that the RPD failed to apply the Chairperson's Guideline 9 - *Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics* [SOGIESC Guideline].

I. The Decision of the RPD

[4] The RPD noted Mr. Islam's allegations, set out in detail in his Basis of Claim [BOC]; he stated that he is homosexual and that his sexual orientation became known to his family, relatives and his community and society in general, including due to a fatwa that he claimed identified him by name as homosexual; he alleges fear of persecution in Bangladesh from his father and relatives and from the family of the women he was chosen to marry on the basis of his sexual orientation.

[5] The RPD concluded that Mr. Islam failed to establish that he is homosexual or that he is at risk in Bangladesh on this basis. The RPD reached this conclusion upon finding that Mr. Islam was not a reliable witness, noting that his evidence contained several material omissions and inconsistencies, his tendering of a non-genuine newspaper article regarding the fatwa further undermined his credibility, and the remaining evidence was insufficient to establish his claim.

[6] The RPD noted, among other concerns, that Mr. Islam's evidence about whom he feared in Bangladesh was inconsistent. He initially stated that he feared his relatives, then later stated that he feared his father. He provided inconsistent accounts of whether his father slapped him, beat him or left him in a near-fatal state requiring medical assistance. Upon questioning, the RPD found that Mr. Islam's explanation for his failure to mention serious threats from his own father in his BOC was not satisfactory.

[7] The RPD found that Mr. Islam's evidence about when his family or others learned of his sexual orientation was inconsistent and evolved between his BOC and the hearing. The RPD again found Mr. Islam's explanation of this inconsistency to be unsatisfactory. Mr. Islam did not clarify the issue, rather stated that his relatives were unaware of his sexual orientation and attributed his earlier misstatements to the use of masks and screens at his interview with the Canada Border Service Agency (which occurred 5 months after he arrived in Canada).

[8] The RPD also found that Mr. Islam provided inconsistent evidence about whether his sexual orientation was known to others beyond his immediate family when he returned to Bangladesh on three occasions while studying in Malaysia.

[9] The RPD found that Mr. Islam's evidence about his first relationship and its duration was inconsistent. The RPD found that Mr. Islam's explanation for the inconsistency was not reasonable as he would be expected to recall his first relationship. However, the RPD noted that this was a comparatively minor issue.

[10] The RPD further noted that Mr. Islam's evidence about his plans to make a refugee claim in Malaysia was inconsistent and his explanation—that his earlier statement that he planned to make a claim was mistranslated—was not reasonable. The RPD noted that although no concerns had been raised about translation previously, and the fact that Malaysia would not be a safe place for homosexuals was brought to his attention, he did not amend his BOC to address this issue. Again, the RPD noted that this was a comparatively less significant credibility issue.

[11] More generally, with respect to the inconsistencies in his evidence at the RPD hearing compared to his BOC, the RPD noted that it asked Mr. Islam at the outset of the hearing, if he had any amendments to his BOC and none were provided.

[12] The RPD considered the other supporting documents, including the copy of a newspaper article (which was either a scan or a digital version), allegedly reporting on the fatwa, and found it not genuine.

[13] The RPD also considered the photos of Mr. Islam with another man, who he stated was his boyfriend, Mr. Dan. The RPD found that the photos did not establish the identity of Mr. Dan or that Mr. Islam was in a relationship with Mr. Dan.

[14] The RPD assessed the letters from the 519 Centre, Mr. Islam's workmate and Mr. Islam's sister. The RPD noted that the letters were not dated nor notarized and neither Mr. Islam's sister nor workmate were offered as witnesses to test their evidence.

II. Preliminary Issue: Abuse of Process

[15] The Respondent submits that Mr. Islam has abused the Court's process by setting out allegations in his Application for Leave and Judicial Review [leave application] that are not accurate. The Respondent notes that in the leave application, Mr. Islam argued that he had submitted an original newspaper article to the RPD, which the RPD had not considered. The RPD had considered the scanned or digital copy of the newspaper article provided by Mr. Islam, which purported to report on a fatwa issued against Mr. Islam and others, by name. The RPD

found that the article was not genuine. In the leave application, Mr. Islam submitted a personal affidavit and excerpts of the transcript of the RPD hearing regarding the RPD's questions about the newspaper article. The Respondent notes that this excerpt was incomplete and misleading. The complete transcript of this exchange confirms that Mr. Islam did not have and did not provide the RPD with the original document, but only the digital version. Hence, the allegation that the RPD did not consider the original document is unfounded.

[16] The Respondent submits that, although it is not possible to determine on what basis the Court granted leave, one of Mr. Islam's better grounds may have been the alleged failure of the RPD to consider the original newspaper article, rather than finding it not to be genuine on the basis of the digital copy.

[17] The Respondent submits that it is not sufficient for Counsel for Mr. Islam to now offer his sincere apology for mistakenly raising a ground of possible error on the part of the RPD in the leave application that is contrary to the evidence on the record. The Respondent notes that Counsel for Mr. Islam had the more complete transcript or at least had access to it and had access to the recording of the hearing, yet submitted only excerpts of the transcript, leaving out Mr. Islam's testimony stating that he did not have the original, but only the scanned copy. The Respondent submits that Counsel for Mr. Islam did not acknowledge the misstatement until long after leave was granted and only in response to the Respondent's further memorandum of argument. The Respondent submits that the failure of Counsel for Mr. Islam to withdraw his argument based on the newspaper article until after leave was granted aggravates the abuse of process.

[18] The Respondent notes that an applicant's affidavit at the leave application stage is a critical document that the Court must be able to rely on (*Balouch v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1599 at paras 7, 15). The Respondent further submits that swearing false evidence in a leave application is an abuse of process that justifies dismissing the Application for Judicial Review without considering the merits.

[19] Counsel for Mr. Islam responds that he made an error in his review of the material in support of the leave application and accepts responsibility for the inaccurate information. He asks that his error not be visited upon Mr. Islam. He further submits that an abuse of process has not been established on the basis of the factors set out in *Thanabalasingham v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 14 [*Thanabalasingham*]. He emphasizes that the refugee claim is of great importance to Mr. Islam, he clearly noted that he abandoned his argument regarding the genuineness of the newspaper article, and argues that there are other meritorious grounds for judicial review.

[20] Both the Respondent and Mr. Islam point to the same jurisprudence. The Respondent submits the jurisprudence supports finding an abuse of process. Mr. Islam submits that jurisprudence where the court has dismissed the application without considering the merits can be distinguished on the facts. However, the jurisprudence reflects that the applicable principles, established in *Thanabalasingham* have not changed and govern the determination.

[21] In *Harvan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1458 [*Harvan*], I considered the respondent's motion to dismiss an application for judicial review without

considering its merits due to the inaccurate and misleading affidavit of the applicant's spouse. In *Harvan*, the respondent argued that it was offensive to the administration of justice to create an issue where none existed and that the court should not condone the use of misleading affidavits.

[22] In *Harvan*, I noted at para 14:

[14] Adducing false or misleading affidavits in judicial review applications is very serious because at the leave stage, neither the Court nor the respondent has access to the tribunal record to verify the facts. The integrity of the affidavits is essential: *Balouch*, above, at paras 6-7.

[23] I note that the Court's current practice is to order that the Certified Tribunal Record [CTR] be produced to the applicant earlier in the process to encourage possible settlement discussions. The production of the CTR is ordered before leave is granted and before the application for judicial review is set down for hearing. In my view, the current practice would place a greater responsibility on an applicant to address any misleading grounds set out in the leave application at the earliest opportunity given their earlier access to the CTR.

[24] In *Harvan*, I considered the factors established in *Thanabalasingham*, at paras 9-11 where the Federal Court of Appeal provided a useful framework on how to approach misrepresentations and misconduct by applicants:

...the case law suggests that, if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court *may* [emphasis in original] dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief.

In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and,

on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

These factors are not intended to be exhaustive, nor are all necessarily relevant in every case...

[25] In *Harvan*, I declined to exercise my discretion to dismiss the application without considering its merits (at para 20).

[26] The facts in *Harvan* were different from the current facts in that there were other affidavits filed in support of the leave application apart from the misleading affidavit of the applicant's spouse, the grounds for leave were not related to, or contingent on, the misleading affidavit, and the applicant's submissions on the reasonableness of the decision had some merit.

[27] In *Canada (Minister of Citizenship and Immigration) v Matar*, 2015 FC 669 [*Matar*], this Court considered whether the applicant's memo submitted at the leave stage, which included inaccurate information, should lead the Court to dismiss the application without considering the merits. Justice Tremblay-Lamer cited *Thanabalasingham*, noting at para 15 that "the Federal Court of Appeal held that, even where an applicant has intentionally presented false evidence on an application for leave, which I do not suggest was the case here [in *Matar*], the Court has a discretion to hear the application on its merits."

[28] In *Matar*, Justice Tremblay-Lamer applied the relevant factors and dismissed the respondent's motion, noting at para 16:

16 Despite the error in the applicant's affidavit, I choose to exercise my discretion in this case to hear the application on its merits. I am not prepared to second guess the basis on which leave was granted and I am satisfied that the incorrect attribution of the notes was not intentional. Further, the error does not undermine the proceeding or substantively affect the applicant's argument that the record does not support that the respondent met the residency requirement, especially in light of the fact that the notes simply listed the date stamps in the respondent's passport and other information already contained elsewhere in the record. Finally, even absent the notes, the applicant has a strong case on the basis of the remainder of the record.

[29] The importance of setting out complete and well-founded arguments at the leave stage cannot be overstated. The Court devotes careful attention and time to making such determinations and relies on the integrity of the submissions and any affidavits filed in support to determine whether an arguable case with a reasonable chance of success has been established in order to grant leave.

[30] In the present case, consideration of the *Thanabalasingham* factors would point toward dismissing this Application for Judicial Review without considering its merits. The argument in the leave application was based on an inaccurate account of what transpired at the RPD hearing and the transcription of the relevant question and answer relied on in the leave application was very selective. However, as Justice Tremblay-Lamer noted in *Matar*, I cannot "second guess" the basis upon which leave was granted. Therefore, I decline to dismiss the Application for Judicial Review on the basis of an abuse of process. In addition, Mr. Islam should have the benefit of the

Court's consideration of his arguments and the Court's reasons for finding that he has not identified any reviewable error in the RPD's decision.

III. The Applicant's Submissions

[31] Mr. Islam submits that the RPD ignored his explanations in response to the RPD's credibility concerns and did not provide reasons for rejecting his explanations. He also submits that the RPD ignored evidence supporting his sexual orientation and his claim for refugee protection, in particular his account of his relationship with Mr. Dan. Mr. Islam more generally submits that the RPD's credibility findings were microscopic.

[32] Mr. Islam also argues that the RPD failed to engage with his explanations offered in response to the RPD's questions regarding his evidence, which led to unreasonable credibility findings.

[33] Mr. Islam contends that there was no inconsistency in his evidence regarding his father's reaction to his disclosure of his sexual orientation; he contends that being beaten versus almost dying and needing medical attention flow from the same incident. He submits that he elaborated at the hearing beyond his BOC, but his evidence is not inconsistent. He also submits that any differences in his evidence provided to the Canada Border Services Agency [CBSA] Officer can be accounted for due to lack of interpretation and the use of masks and screens due to COVID-19 protocols.

[34] Mr. Islam argues that the RPD failed to engage with his evidence regarding his relationship with Mr. Dan, for which the RPD did not make any negative credibility findings. He submits that the RPD's scant references to this evidence does not reflect that this evidence—which he submits contradicts the RPD's finding that he failed to establish that he was homosexual—was addressed and given weight.

[35] Mr. Islam also argues that the RPD breached procedural fairness in the manner in which the RPD posed their questions. He alleges that the RPD did not alert him to their concerns or dissatisfaction with his explanation for omissions, inconsistencies and embellishments to his evidence. He submits that the RPD was required to advise him that his responses to their probing questions were not satisfactory, but failed to do so and simply moved on to a different line of questioning, without permitting him to clarify his responses.

[36] Mr. Islam submits that the RPD unreasonably concluded that he was not homosexual and further erred by not assessing the risk he would face upon return because he would be perceived to be homosexual. Mr. Islam submits that this additional ground was apparent on the record before the RPD, yet not addressed.

[37] Mr. Islam also argues that the RPD's passing reference to the SOGIESC Guideline is not sufficient; the RPD's decision and approach reflects that it did not apply the the SOGIESC Guideline. He argues that this is a reviewable error on its own.

IV. The Respondent's Submissions

[38] The Respondent submits that the RPD identified numerous inconsistencies and embellishments in Mr. Islam's evidence, asked for an explanation and reasonably concluded that his explanations did not address their concerns about his credibility.

[39] With respect to Mr. Islam's submission that the RPD overlooked his evidence regarding his relationship with Mr. Dan, the Respondent submits the RPD acknowledged Mr. Islam's account of such a relationship but was not required to delve into further analysis of this assertion. The Respondent notes that there was no evidence of this relationship other than Mr. Islam's assertion and his photos with an unidentifiable person.

[40] The Respondent refutes the allegation that the RPD failed to provide an opportunity for Mr. Islam to clarify his explanations or that there was any obligation on the RPD to advise him that his explanations were not reasonable. The Respondent notes that the burden was on Mr. Islam to establish his claim and to provide complete and truthful answers to the RPD's questions.

[41] The Respondent argues that the RPD was not required to assess whether Mr. Islam would be at risk in Bangladesh because he would be perceived to be homosexual. The Respondent notes that Mr. Islam clearly claimed that he was homosexual; he claimed that his family, relatives and community and others knew he was homosexual and he was at risk from them. The Respondent submits that there is nothing on the record before the RPD to suggest that Mr. Islam would be

perceived to be homosexual. The Respondent notes that Mr. Islam's counsel questioned him at the hearing regarding his physical appearance and mannerisms in the context of seeking to establish that he was—as he claimed—a homosexual man.

[42] The Respondent submits that the RPD noted that it had considered the SOGIESC Guideline and there is no reason to suggest otherwise. The Respondent submits that the RPD's assessment of credibility and all other evidence reflects the Guideline. Mr. Islam was able to disclose his sexual orientation; he asserted that he lived with Mr. Dan, had a relationship with Alamin and that his family knew of his sexual orientation. He was not reluctant to make these claims.

V. The Standard of Review

[43] The issues are whether the RPD's process was procedurally fair and whether the decision is reasonable.

[44] Whether the decision is reasonable is reviewed in accordance with the principles set out in *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 [*Vavilov*]). A reasonable 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 paras 85, 102, 105–07). The Court does not assess the reasons against a standard of perfection (*Vavilov* at para 91). A decision should not be set aside unless it contains “sufficiently serious shortcomings ... such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (*Vavilov* at para 100).

[45] It is well-established that credibility findings are findings of fact and are reviewed on the reasonableness standard; significant deference is owed to the RPD's credibility findings.

[46] Where allegations of a breach of procedural fairness are made, the Court must determine whether the procedure followed by the decision-maker is fair having regard to all of the circumstances. The Court must ask "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). Where a breach of procedural fairness is found, no deference is owed to the decision-maker.

VI. There was No Breach of Procedural Fairness

[47] Contrary to Mr. Islam's argument that the RPD breached procedural fairness by not advising him that his responses did not resolve the RPD's concerns regarding his inconsistent and evolving evidence, the RPD was not required to do so. Mr. Islam bears the burden of establishing his claim with credible and reliable evidence. Mr. Islam was under a duty to be truthful. The RPD alerted him to the differences in his evidence regarding when his family became aware of his homosexuality, whether he was in fear of his family or others, whether his father slapped him or beat him, why he travelled to Malaysia, and his relationships, among other areas of his evidence. The RPD was not required to then advise him that he should make a better effort to provide a reasonable explanation for the inconsistencies in his account.

[48] Mr. Islam was assisted by counsel and had an oral hearing at the RPD over two sessions. His counsel had an opportunity to attempt to rehabilitate his evolving evidence through questioning and also made submissions to the RPD. As noted, Mr. Islam was alerted to the option of amending his BOC and did not do so. The transcript—to the extent it is available—supports that he was questioned in an open-ended manner, asked to clarify his responses, and that he provided responses—although some were not responsive and some others were similarly inconsistent.

[49] Clearly, Mr. Islam had an opportunity to make his claim, to support it, to be heard and to respond to the RPD’s concerns.

VII. The RPD’s Credibility Findings are Reasonable

A. *Basic principles regarding credibility findings*

[50] It is well-established that boards and tribunals are ideally placed to assess the credibility of refugee claimants: *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, [1993] FCJ No 732 at para 4 (FCA) [*Aguebor*]; and that given its role as trier of fact, the Board’s credibility findings should be given significant deference (*Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052 at para 13; *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at para 65; *Zhou v Canada (Minister of Citizenship and Immigration)*, 2015 FC 5 at para 13; *Cao v Canada (Citizenship and Immigration)*, 2020 FC 337 at para 24). Credibility findings by the RPD have been described as “the heartland of the Board’s

jurisdiction” given the RPD’s role in hearing the evidence of a claimant, and making findings of fact (*Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 619).

[51] A useful summary of the principles applicable to the review of the RPD’s credibility findings can be found in the often cited decision of Justice Mary Gleason, as she then was, in *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paras 42-46 [*Rahal*]. Justice Gleason explained at para 42:

[42] First, and perhaps most importantly, the starting point in reviewing a credibility finding is the recognition that the role of this Court is a very limited one because the tribunal had the advantage of hearing the witnesses testify, observed their demeanor and is alive to all the factual nuances and contradictions in the evidence. Moreover, in many cases, the tribunal has expertise in the subject matter at issue that the reviewing court lacks. It is therefore much better placed to make credibility findings, including those related to implausibility. Also, the efficient administration of justice, which is at the heart of the notion of deference, requires that review of these sorts of issues be the exception as opposed to the general rule. As stated in *Aguebor* at para 4:

There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review...

(see also *Singh* at para 3 and *He v Canada (Minister of Employment and Immigration)*, 49 ACWS (3d) 562, [1994] FCJ No 1107 at para 2).

[52] In *Rahal*, the Court set out examples of what will justify credibility findings. One example is where there are contradictions in the evidence, particularly in the applicant’s

testimony, and where such contradictions are real and more than trivial or illusory. Another example is demeanor, including hesitations, vagueness and changes or elaboration of the story (with the caution that it is preferable if there are also other objective facts to support credibility findings based on demeanor). Justice Gleason added that the decision-maker must make clear credibility findings with sufficient particulars.

[53] More recently, in *Yu v Canada (Citizenship and Immigration)* 2021 FC 1032 at para 17, Justice Furlanetto noted:

[17] Minor contradictions on trivial or peripheral matters are not sufficient to support a negative credibility finding (*Olajide* at para 13; *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*] at para 23; *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 [*Rahal*] at para 43). However, the accumulation of contradictions or inconsistencies may give rise to a negative credibility finding, particularly where they arise from the claimant's own testimony (*Rahal* at para 43) or pertain to crucial elements of the claim (*Lawani* at para 22).

B. *The RPD's credibility findings are reasonable*

[54] While credibility findings are owed significant deference, they are not beyond review.

For example, where the contradictions or omissions are insignificant or result from a microscopic examination, or when explanations have been unreasonably discounted, or where relevant contextual information has not been considered, the Court may intervene. However, this is not the case here.

[55] The RPD made numerous credibility findings based on omissions in Mr. Islam's account as set out in his BOC, his embellishment, his inconsistencies and his lack of a reasonable

explanations for his evolving evidence. Clearly, Mr. Islam's account varied with respect to the risk or threats he faced, whether from his own family or others; when his family became aware that he was homosexual; whether his father slapped him, beat him with a belt or almost killed him; why he travelled to Malaysia; whether he faced any risk from his family or others when he returned to Bangladesh for periods ranging from 3 to 10 months; and whether a fatwa had been issued against homosexuals in general or against Mr. Islam by name. There were several other examples as noted in the RPD decision.

[56] The RPD did not err in finding Mr. Islam to be an unreliable witness. The RPD's findings were not microscopic as alleged by Mr. Islam. The RPD made clear credibility findings with sound reasons for each finding and noted whether the finding was significant or peripheral.

[57] The RPD reasonably found that the newspaper article allegedly referring to the fatwa and naming Mr. Islam was not genuine. This conclusion did not require expertise in document verification, but was apparent to the RPD. The RPD reasonably attributed no weight to this document.

[58] The RPD did not err by not delving into Mr. Islam's alleged relationship with Mr. Dan as there was no objective evidence of this relationship. Moreover, the RPD is presumed to have considered all the evidence submitted. The RPD clearly acknowledged that Mr. Islam recounted that he had a relationship of some type with Mr. Dan and considered the photos of the person Mr. Islam stated was Mr. Dan.

[59] The RPD assessed the remaining evidence and found it not sufficient to overcome the lack of credibility and to establish Mr. Islam's claim. The RPD reasonably found that photos of Mr. Islam with another man do not establish any homosexual or other relationship with Mr. Dan and that joining the 519 Centre, which welcomes all, does not establish that Mr. Islam is homosexual. The letter from Mr. Islam's sister, which is not sworn or dated, and says very little, was nonetheless given some weight. Similarly, the undated letter from a colleague noting that Mr. Islam participated in Glamazon and the Pride Parade was also given some weight. As the RPD noted, neither Mr. Islam's sister or colleague were witnesses and, as a result, their unsworn statements could not be tested. It was open to the RPD to find that this evidence was insufficient to establish that Mr. Islam was homosexual or that he would face a risk from his own family or others upon return to Bangladesh.

C. *The RPD did not err by failing to address whether Mr. Islam would be perceived to be homosexual and could face persecution or risk on this basis upon his return to Bangladesh*

[60] As the Respondent notes, Mr. Islam did not claim that he would be perceived to be homosexual and would be at risk from his family, relatives and/or community on this basis. He claimed that he is homosexual and is at risk from his family, relatives and/or community who are aware that he is homosexual.

[61] The risk to a person perceived to be homosexual upon return to Bangladesh does not arise on the record, as Mr. Islam now submits. Counsel for Mr. Islam did not make any submissions to the RPD regarding how Mr. Islam would be perceived or any risk he would face arising from

such a perception. Rather, the submissions to the RPD clearly claimed that Mr. Islam is at risk because he is homosexual.

[62] In *Khan v Canada (Citizenship and Immigration)*, 2021 FC 1233, the RPD and RAD dismissed the applicant's claim for refugee protection based on his sexual orientation as gay or bisexual due to numerous credibility findings. On judicial review, the applicant argued that his claim should have been assessed, including based on whether he would be perceived to be gay, regardless of the credibility findings. Justice Pamel disagreed, noting that the applicant's argument was based on misinterpreting the jurisprudence and that the same argument had been rejected in other cases. Justice Pamel noted at paras 7-9:

[7] Here, Mr. Khan was found not to be credible, and the proposition that the RAD is required to engage in an analysis of whether he would be perceived to be gay or bisexual by the agent of persecution after finding that no credible evidence exists that he is actually gay or bisexual cannot be supported by *Ward*. In fact, the argument was already made, without success, in *Adams v Canada (Citizenship and Immigration)*, 2021 FC 1128. The proposition was also explicitly rejected by Madam Justice Pallotta in *Ameh v Canada (Citizenship and Immigration)*, 2020 FC 875 at paragraph 19 [*Ameh*], where Justice Pallotta stated:

. . . The RAD reasonably found that the applicant was not being pursued by an anti-bisexuality group or by the police, that her sexuality was not exposed, and that she did not flee Nigeria because her sexuality was exposed. In my view, the RAD's findings addressed not only the applicant's alleged bisexuality, but also the agents' perception of her sexuality.

[8] Here, after determining that Mr. Khan had not established, on a balance of probability, that he is in fact gay or bisexual on account of a lack of credibility, the RAD was not required to also assess the risks inherent in him being perceived to be gay or bisexual. As stated by Madam Justice Strickland in *Abolupe v Canada (Citizenship and Immigration)*, 2020 FC 90 at paragraph 50:

As to the Applicant's argument that the evidence establishes that he will be perceived as bisexual in Nigeria, the RAD found that the Applicant's narrative about what happened to him in Nigeria – being sought by the police because of his orientation – was not credible. In so finding, the RAD dispensed with any issues related to his bisexual identity and any perception of his sexual identity. Put otherwise, the RAD did not believe the central element of the Applicant's claim that the police in Nigeria were pursuing him because of his sexual orientation and therefore the RAD afforded the affidavit evidence little weight . . .

[Emphasis added.]

[9] In any event, to support a claim of risk of persecution on account of imputed membership in a particular group, such a claim must be grounded in evidence (*Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760); no such evidence exists here. The record in this case includes no reason for Mr. Khan to be perceived as being gay or bisexual other than his claim that he purportedly is. Once that claim was found to lack credibility, any claim of risk on the basis that Mr. Khan may be perceived to be gay or bisexual had no foundation. In other words, once the RAD made negative credibility findings relating to the central story underlying Mr. Khan's claim that he is a gay man whose same-sex relationship was discovered by his family, no separate assessment of his perceived sexual orientation was necessary.

[Emphasis added.]

[63] Mr. Islam seeks to raise the same argument that has clearly been rejected by this Court.

For the same reasons noted in *Khan*, Mr. Islam's assertion that he is at risk because he would be perceived to be homosexual has no foundation.

D. *The RPD did not fail to apply the Chairperson's Guideline 9 - Sexual Orientation, Gender Identity and Expression, and Sex Characteristics*

[64] The RPD did not fail to apply the SOGIESC Guideline. The RPD noted that the Guideline was considered and there is nothing in the record to support Mr. Islam's contention that the Guideline was not respected. The Guideline is not an alternative to the well-established principles governing the assessment of credibility.

[65] The SOGIESC Guideline explains its purpose in section 1.1:

The purpose of this Guideline is to promote greater understanding of cases involving sexual orientation, gender identity and expression and sex characteristics (SOGIESC) and the harm individuals may face due to their non-conformity with socially accepted SOGIESC norms in a particular cultural environment. This Guideline addresses the particular challenges SOGIESC individuals may face in presenting their cases before the Immigration and Refugee Board of Canada (IRB) and establishes guiding principles for members in adjudicating cases involving SOGIESC.

[66] The SOGIESC Guideline, among other things, addresses the assessment of credibility and other evidence pertaining to SOGIESC. The Guideline notes that an individual's testimony may be the only evidence of their sexual identity, corroborative evidence may not be available, and that questioning an individual regarding their sexual identity should be conducted in a sensitive, non-confrontational manner.

[67] The Guideline does not change the established principles regarding the sufficiency of evidence or the *indicia* that support credibility findings. The Guideline notes that members "may draw negative inferences from material inconsistencies, contradictions or omissions that have no

reasonable explanation”; “testimony about same sex relationships that is vague and lacking in detail may support a negative credibility inference”; and, “omissions from testimony of significant events or details relating to the life of the [applicant] may, as in other cases, support a negative credibility assessment if there is no reasonable explanation for the omission”. The Guideline cautions that cultural, psychological or other barriers should be considered in assessing the explanation for an omission.

[68] I acknowledge that it is very difficult for some refugee claimants to share their experiences and establish their sexual identity. The SOGIESC Guideline provides helpful advice to ensure that the RPD and other divisions of the IRB take into account the uniqueness of a claimant’s experience and the challenge a claimant may face in establishing their sexual identity.

[69] As noted by the Chief Justice in *Canadian Association of Refugee Lawyers v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1126 at para 150:

In the case of the SOGIE Guidelines, they simply provide guidance concerning various general themes. These include: how to better understand the unique challenges faced by individuals with diverse SOGIE in presenting evidence pertaining to SOGIE; the importance of avoiding stereotyping and inappropriate assumptions when making findings of fact; the manner in which language can have negative connotations; how to assess credibility in this unique context; and the various ways in which a refugee claimant may have a nexus to a recognized ground for refugee protection. While certain provisions of the SOGIE Guidelines require Board members to take certain matters into account in reaching their decision, they do not impose either an expectation that factual conclusions will be adopted or a requirement to provide a reasoned justification as to why such conclusions were not adopted.

[70] The RPD's assessment of Mr. Islam's claim and his evidence does not suggest that the RPD failed to apply the Guideline. Mr. Islam disclosed his sexual identity without apparent difficulty, he described two relationships, he attested that his family knew of his sexual identity (but was inconsistent regarding when his family became aware, or if and when others became aware). The RPD asked open-ended and non-confrontational questions regarding his sexual identity, but was entitled to probe the inconsistencies, omissions and embellishments in the same manner as for other claimants.

[71] In conclusion, Mr. Islam has not established any error in the RPD's decision; the decision is transparent, intelligible and justified in relation to the facts and the law.

JUDGMENT in file IMM-8818-23

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.
2. There is no question for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8818-23

STYLE OF CAUSE: MD MONSURUL ISLAM v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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JUDGMENT AND REASONS: KANE J.

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