

Federal Court



Cour fédérale

Date: 20250218

Docket: IMM-14874-23

Citation: 2025 FC 307

Toronto, Ontario, February 18, 2025

PRESENT: Madam Justice Go

BETWEEN:

Thi Loan PHAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Thi Loan Pham [Applicant], a Vietnamese citizen, filed a refugee claim alleging fear of persecution, danger, or a risk to life or cruel and unusual punishment in Vietnam based on her sexual orientation.

[2] The Applicant's hearing took place over three sittings between 2022 and 2023. By a decision dated June 27, 2023, the Refugee Protection Division [RPD] dismissed the Applicant's claim due to lack of credible evidence that she would face discrimination amounting to persecution under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] or danger and risks as contemplated by subsection 97(1) of the IRPA on the basis of her sexual orientation if returned to Vietnam.

[3] The RAD confirmed the RPD's decision that the Applicant failed to credibly establish her claim and dismissed the appeal [Decision]. The RAD's adverse credibility finding relied on omissions, inconsistencies, and contradictions in the Applicant's evidence and testimony about allegations of harm by her ex-husband and of her prior same-sex relationships. The RAD also found the new evidence proposed by the Applicant to be inadmissible.

[4] The Applicant seeks a judicial review of the Decision, arguing that the RAD wrongly excluded her new evidence, erred in its credibility assessment and analysis of evidence, and failed to conduct a separate section 97 analysis.

[5] For the reasons set out below, I dismiss the application.

II. Preliminary Issue

[6] Prior to the hearing, I advised the parties of my intention to issue an order to the RAD to provide the Court with a revised Certified Tribunal Record [CTR], in order to redact from the CTR all information concerning another claimant, L.T.T.

[7] Before the RPD, the Minister of Immigration, Refugees and Citizenship [Minister] had brought an application for joinder of the Applicant's claim with L.T.T.'s claim. In her claim, L.T.T. stated in her Basis of Claim [BOC] narrative that she was in a relationship with someone of the same name as the Applicant. The Applicant objected to the potential joinder of the two claims, noting that she was no longer in a relationship with L.T.T. The RPD dismissed the joinder application.

[8] However, despite the RPD's ruling, I note that some of the materials with regard to L.T.T.'s claim remain in the CTR. Given L.T.T. is not an applicant in the matter before the Court and has not consented to having her materials disclosed to the Court and hence the public, I find it inappropriate for the RAD to have included her materials in the CTR.

[9] At the hearing, the parties confirmed that they have no objection to having L.T.T.'s materials redacted from the CTR, and I will so order.

III. Issues and Standard of Review

[10] The Applicant raises the following issues:

- a. Did the RAD err in excluding the Applicant's proposed new evidence?
- b. Did the RAD err in assessing the Applicant's credibility?
- c. Did the RAD err by failing to consider evidence of persecution?
- d. Did the RAD unreasonably assess the Applicant's documentary evidence?
- e. Was the Decision procedurally unfair for failing to conduct a separate section 97 analysis?

[11] The parties agree that the reasonableness standard applies when reviewing the merits of the Decision: *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [Vavilov]. A reasonable decision is one that displays justification, transparency, and intelligibility with a focus on the decision actually made, including the justification for it: *Vavilov* at para 15. Overall, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85.

[12] The Applicant frames the issue of the RAD's section 97 analysis as one of "interpretation and application of the law" and proposes that procedural fairness be reviewed under a standard akin to correctness: *Vavilov* at para 77, citing *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC) at paras 22-23.

[13] I disagree. The Applicant is seeking a review of the merits of the RAD's reasons for rejecting her section 97 claim, and I find there is nothing to warrant a departure from the reasonableness standard of review.

IV. Analysis

A. *Did the RAD err in excluding the Applicant's proposed new evidence?*

[14] The Applicant argues that the RAD erred by deeming her proposed new evidence inadmissible pursuant to subsection 110(4) of the *IRPA*. In particular, the Applicant took issue with the RAD's consideration of the following evidence:

- a. Mental Health Evidence, consisting of: (i) a psychotherapy assessment report dated August 1, 2023; (ii) an advocacy letter from a retired psychotherapist dated July 20, 2023; and (iii) a Humber River Hospital emergency room referral for concussion care dated July 6, 2023;
- b. A letter dated August 10, 2023 from the 519 Community Centre [519 letter];
- c. Letter from T. N., the Applicant's same-sex partner, dated August 18, 2023; and
- d. Photos of the Applicant and her partner dated between July and August, 2023.

[15] The Applicant submits the RAD erroneously excluded the Mental Health Evidence as the evidence arose after the RPD decision and was not reasonably available at the time of the decision because the applicant was severely impacted by the psychological difficulties indicated in the report. The Applicant also claims that the RAD erroneously found the Mental Health Evidence to be irrelevant, citing *Alfaro Barahona v Canada (Citizenship and Immigration)*, 2006 FC 1270 at para 1 in support of her position.

[16] The Applicant also argues that the RAD should have considered the Mental Health Evidence in assessing her credibility because it was medical documentation that demonstrated her psychological condition, citing *Lubana v Canada (Citizenship and Immigration)*, 2003 FCT 116 at paras 12, 14; *Dhanju v Canada (Citizenship and Immigration)*, 2004 FC 850 at paras 14, 17.

[17] I reject the Applicant's arguments.

[18] Citing subsection 110(4) of the *IRPA*, the RAD noted that it could only accept evidence that: (a) arose after the RPD decision; (b) was not reasonably available at the time of the decision; or (c) the claimant could not reasonably have been expected in the circumstances to bring to the RPD before its decision. The RAD also noted that if the evidence meets one or more of these requirements, it must decide if the evidence is new, credible, and relevant before it could be accepted.

[19] With respect to item (i), the psychotherapy assessment report, the RAD reviewed the three RPD sittings that took place over the course of 2022 and 2023. The RAD noted that the application for new evidence did not fully explain why the report was only necessary after the hearing when the Applicant had expressed anxiety and stress at the hearings. The RAD specifically noted that at the third sitting, the Applicant's testimony completely contradicted her previous testimony regarding her same-sex relationships in Vietnam. When asked by the RPD why she was providing different evidence, the Applicant explained that she was "confused" and not "calm." Counsel for the Applicant also made submissions about the Applicant's ability to recollect questions. The RAD noted that despite this, at no time did the Applicant—who was represented by counsel—make an application to request further psychological evidence.

[20] The RAD also provided reasons for rejecting item (ii), noting it was reasonably available prior to the RPD rejection, as much of the content refers to events that predated the RPD decision.

[21] As for item (iii), the RAD noted the evidence related to the Applicant's ongoing headaches and sustained concussion from 10 years ago, and as such, was not new evidence according to subsection 110(4).

[22] I find the RAD reasonably addressed the admissibility of the Mental Health Evidence under subsection 110(4) of the *IRPA*; it addressed circumstances predating the RPD decision and the Applicant's failure to offer an explanation as to why she could not have obtained the evidence prior to the RPD decision.

[23] As the Respondent points out, absent adequate explanation as to why previously available evidence had not been provided to the RPD, the RAD may reasonably exclude such evidence pursuant subsection 110(4) of the *IRPA*: *Abdi v Canada (Citizenship and Immigration)*, 2019 FC 54 at paras 24-25.

[24] Having reasonably found the Mental Health Evidence did not meet the admissibility requirement under subsection 110(4), the RAD did not have to take into consideration such evidence in assessing the Applicant's credibility. The cases cited by the Applicant do not address the issue of admissibility of new evidence and are therefore not relevant to the issue at hand.

[25] At the hearing, counsel for the Applicant submitted that the emotional strain due to the abuse and the stressful refugee hearing prohibited the Applicant from accessing help, and that it was only after the RPD hearing that the Applicant was able to access appropriate psychiatric help. I note that the same counsel represented the Applicant at the RAD appeal. Counsel did not

provide these explanations when submitting new evidence. In fact, counsel gave no explanation at all for why these reports were not available sooner, but instead relied solely on the argument that they were relevant to the Applicant's claim as the basis for admission.

[26] With regard to the remainder of the excluded evidence, including the 519 Community Centre letter, and the support letter from T.N. and associated photographs, the Applicant argues that the evidence should have been admitted because it was "not before" the RPD. The Applicant argues that the 519 letter addresses circumstances that post-dated the RPD decision, alerting the RAD to the Applicant's continued relationship and her membership of the LGBTQ2S+ community.

[27] The Applicant's submission lacks merit.

[28] With respect to the 519 letter, the RAD noted that the Applicant already had presented evidence related to her membership with the 519 Community Centre as part of her RPD record. The RAD also considered the evidence from T.N. and noted that this was all evidence that was presented to the RPD. The RAD noted none of this evidence is new, as it was already evidence considered by the RPD. The Applicant's arguments do not point to any error in these findings.

B. *Did the RAD err in assessing the Applicant's credibility?*

[29] The Applicant raises several points to argue the RAD erred in assessing her credibility, which I summarize here:

- a. The RAD erred in failing to consider her evidence in light of her explanations, and instead, selectively considered other evidence in making an adverse credibility finding: *Geneus v Canada (Citizenship and Immigration)*, 2019 FC 264 at para 10; *Calderon v Canada (Citizenship and Immigration)*, 2014 FC 557 at para 22 [*Calderon*];
- b. The RAD failed to consider her explanations for the omissions and inconsistencies about her history of same-sex relationships that informed its negative credibility finding. The RAD also overlooked and unreasonably rejected her explanation offered to the RPD that in Vietnam she “liked the women, and they did not like her back;”
- c. The RAD unreasonably dismissed her explanation about contradictory statements regarding whether she had lived with L.T.T. in Canada; and
- d. A refugee claim is “not a memory test” and the RAD unreasonably expected sophisticated responses and explanations given the Applicant’s age and level of education: *Sivaraja v Canada (Citizenship and Immigration)*, 2015 FC 732 at para 31 [*Sivaraja*]; *Duversin v Canada (Citizenship and Immigration)*, 2018 FC 466 [*Duversin*].

[30] With respect, the Applicant’s arguments amount to seeking a reweighing of the evidence. Having reviewed the record and the Decision, I find the Applicant fails to raise any reviewable errors.

[31] As a starting point, it is the Applicant’s onus to demonstrate that the RAD ignored her explanations: *Calderon* at para 22.

[32] Further, jurisprudence establishing that decision-makers enjoy deference in credibility findings, and that credibility may be impugned by inconsistent evidence: *Azenabor v Canada*

(*Citizenship and Immigration*), 2020 FC 1160 at para 6; *Vavilov* at para 125; *Reyes Ramirez v Canada (Citizenship and Immigration)*, 2021 FC 472 at paras 25, 28.

[33] In this case, I agree with the Respondent that the “accumulation” of contradictions, inconsistencies, and material omissions reasonably supported the RAD’s adverse credibility findings.

[34] The following are some, but not all, of the inconsistencies, contradictions, and omissions noted in the Decision:

- Inconsistencies in the Applicant’s reported name of her husband, his date of birth, and her marital status in her prior four applications for a work permit while residing in Canada (while the Applicant indicated that she applied for only one work permit);
- The Applicant indicated in her BOC narrative that her ex-husband was angry and physically abusive towards her after she came out, while the letter from T.N. stated that the Applicant’s ex-husband was willing to take care of her and did not mind knowing she is lesbian;
- The Applicant’s inconsistent evidence about when she advised her ex-husband about her sexual identity;
- The Applicant’s BOC did not mention any relationships in Vietnam, but she later attested to having three relationships with women before coming to Canada, and she then contradicted herself at a later hearing that these women do not like her back; and
- Inconsistencies and omissions noted in the details about the Applicant’s relationship with the other related claimant, L.T.T., in Vietnam and Canada.

[35] The RAD also addressed the Applicant's explanations for the inconsistencies but found the explanations unreasonable. My role is not to reweigh the evidence but to assess whether the RAD conducted a reasonable analysis. I see no error in the RAD's analysis.

[36] I also note that, contrary to the Applicant's assertion, the RAD did note the Applicant's explanation about the inconsistent evidence regarding her relationship with L.T.T. but found the explanation unreasonable because it was also contradicted by the Applicant's sister's testimony before the RPD.

[37] I also find *Sivaraja* and *Duversin* do not assist the Applicant given that the RAD's findings of inconsistencies and contradictions were not based solely on what the Applicant could recall, but also on the evidence of the Applicant's own witnesses.

[38] The RAD's credibility findings are justified in light of their assessment of all of the evidence before it.

C. *Did the RAD err by failing to consider evidence of persecution?*

[39] While the Applicant lumps many of her arguments under the heading of credibility findings, some of the Applicant's arguments appear to be challenging the RAD's conclusion with respect to the Applicant's allegations of the cumulative effects of discrimination. The Applicant argues:

- a. The RAD failed to "conduct an independent and proper persecution analysis" as it did not consider discrimination that the Applicant may face because her ex-husband "spread

word about her sexuality” should she return to Vietnam. The RAD overlooked and failed to consider her testimony and claim about her ex-husband, and did not otherwise grapple with “events” constituting persecution at the hands of and set into motion by the Applicant’s ex-husband: *Maksoudian v Canada (Citizenship and Immigration)*, 2009 FC 285 at paras 13-14, citing *Chan v Canada (Employment and Immigration)*, [1995] 3 SCR 593, 128 DLR (4th) 213 at para 69.

- b. The RAD unreasonably failed to consider risk of persecution by the Applicant’s ex-husband because of adverse credibility findings that selectively considered T.N.’s “third party narration” and inconsistencies in several work permit applications that the Applicant denies submitting.
- c. The RAD failed to meaningfully grapple with key issues and central arguments raised by the Applicant, and the Decision was unjustified in light of these arguments: *KM v Canada (Citizenship and Immigration)*, 2022 FC 1726 at paras 21-22, citing *Vavilov* at para 128.
- d. The Decision failed to consider the alleged threat of harm from the Applicant’s ex-husband and community and failed to consider whether these incidents of discrimination, considered cumulatively, may constitute persecution.
- e. The jurisprudence establishes that a decision may be unreasonable where it fails to address central elements of a claimant’s alleged persecution, including where that persecution is the cumulative effect of individual discriminatory incidents: *Ban v Canada (Citizenship and Immigration)*, 2018 FC 987 at para 23; *Canada (Citizenship and Immigration) v Munderere*, 2008 FCA 84 at para 42.

[40] Contrary to the Applicant’s submission, the RAD did consider her argument that the RPD failed to consider the cumulative effects of the discrimination she faced. However, the RAD did not find it necessary to address this argument, given the Applicant’s lack of credibility relating to the reasons she left Vietnam. The RAD noted that the Applicant’s allegations relate to threats of harm and past harm from her ex-husband and the disclosure of her sexual identity. However, due

to the contradictions in the Applicant's evidence, the RAD did not find it necessary to examine the cumulative nature of discrimination.

[41] As noted above, the RAD found inconsistencies in the Applicant's evidence about her ex-husband's reaction towards her after she came out, as well as about when the Applicant advised her ex-husband about her sexual identity, among other issues. I see no error arising from the RAD's decision not to examine the allegations of past harm and cumulative discrimination in light of its credibility findings.

D. *Did the RAD fail to properly assess the Applicant's documentary evidence?*

[42] The Applicant characterizes the RAD's analysis as "microscopic and selective," favouring contradictory elements of the record over those that corroborate her claim. The Applicant argues that decision-makers should not focus on "minor inconsistencies" such as dates and must also consider minor inconsistencies in the broader context of the totality of her evidence and claim: *Mahmoud v Canada (Citizenship and Immigration)*, 2014 FC 1232 at para 33.

[43] The Applicant also alleges that the RAD overlooked "credible and trustworthy evidence," including photographs with her same-sex partner in Canada and her witness testimony, a support letter from her sister, her divorce documents, and membership registration with the 519 Community Centre. She argues that a decision-maker errs by failing to address credible corroborative evidence alongside evidence leading to adverse credibility findings, or by discounting credible corroborative evidence solely based on adverse credibility findings:

Haramicheal v Canada (Citizenship and Immigration), 2016 FC 1197 at para 17; *George v Canada (Citizenship and Immigration)*, 2019 FC 1385 at para 62.

[44] The Applicant asserts that where the record offers sufficient, independent, and credible evidence to support a positive decision, a decision-maker cannot reject the claim even if other aspects of the claim lack credibility: *Chen v Canada (Citizenship and Immigration)*, 2015 FC 1133 at para 16; *Manickan v Canada (Citizenship and Immigration)*, 2006 FC 1525 at paras 3-4. She submits that the RAD unreasonably discounted the objective country conditions evidence regarding Vietnam and the credible personal documentary evidence.

[45] I reject the Applicant's characterization of the RAD's analysis as "microscopic." The RAD reasonably focused its analysis on evidence with respect to the Applicant's core allegations of being bisexual/lesbian as well as of being threatened and harmed by her ex-husband. The RAD found that the Applicant's sexual orientation and her history of same-sex relationships as "not peripheral matters," but rather as central issues going "to the heart" of her refugee claim. I see nothing unreasonable about this finding in light of the basis of the Applicant's claim for protection.

[46] The RAD also analyzed the documentary evidence and noted the letters from the Applicant's sister and from the Applicant's partner contradicted some of the Applicant's evidence. The RAD further noted the confusing and contradictory testimonial evidence by these two witnesses the Applicant brought to support her claim.

[47] The RAD's characterization of the above-noted inconsistencies as "central elements of the Applicant's claim" was open to the RAD to make, and for the reasons detailed above, these inconsistencies provided intelligible justification for the RAD's negative credibility assessment.

E. *Did the RAD err by failing to conduct a separate section 97 analysis?*

[48] The Applicant alleges that the RAD erred in failing to conduct a separate analysis under subsection 97(1) of the *IRPA* to determine whether the Applicant would, on a balance of probabilities, be subjected to prospective danger of torture, a risk to life, or a risk of cruel and unusual treatment or punishment if returned to Vietnam. The Applicant notes that a negative credibility determination is not necessarily determinative of a claim under subsection 97(1) of the *IRPA*.

[49] The Applicant cites jurisprudence suggesting that a separate section 97 analysis may be required if the Applicant provides independent and credible evidence that may support a positive disposition of their claim: *Soliman v Canada (Citizenship and Immigration)*, 2007 FC 162 at para 9, citing *Anthonimuthu v Canada (Citizenship and Immigration)*, 2005 FC 141 at paras 51-52; *Paramananthalingam v Canada (Citizenship and Immigration)*, 2017 FC 236, citing *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at para 3 [*Sellan*].

[50] The Applicant alleges that there was sufficient credible evidence, including her sister's letter, that shows the Applicant would face risks enumerated under subsection 97(1), and the RAD's credibility findings were insufficient to dispose of her claim without a separate section 97 analysis: *Asu v Canada (Citizenship and Immigration)*, 2005 FC 1693 at para 11; *Bouaouni v*

Canada (Citizenship and Immigration, 2003 FC 1211 at para 41. Therefore, the RAD's failure to do so was a breach of procedural fairness providing grounds for this Court's intervention.

[51] I am not persuaded by the Applicant's arguments.

[52] In this case, the RAD concluded that the Applicant was not credible with respect to her Sexual Orientation, Gender Identity and Expression, and Sex Characteristics status. The RAD noted, for instance, the Applicant's BOC narrative makes no mention of any relationships with women either in Vietnam or in Canada. When questioned about her relationship history, the Applicant's testimonies over the course of three sittings were confusing, evolving, and contradictory. The RAD also considered the relationship between the Applicant and L.L.T., as well as her relationship with N.T. The RAD noted the numerous instances of contradictory evidence, omissions, and inconsistencies that the RPD considered, and concluded that the Applicant was lacking in credibility with respect to the central allegations.

[53] The RAD also cited *Sellan* in dealing with the question of whether the RPD was required to assess objective evidence under section 97 of the *IRPA* if it did not find the claimant's subjective evidence credible. The Federal Court of Appeal held at para 3 of *Sellan*:

... where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

[54] In this case, where the RAD found the Applicant's core allegations based on her sexual orientation to be lacking in credibility, and where the RAD concluded the Applicant failed to provide independent and credible documentary evidence supporting a positive disposition of her claim, I find that the RAD's negative credibility analysis was reasonably reached and sufficient to dispose of the Applicant's claim under both section 96 and subsection 97(1).

V. Conclusion

[55] The application for judicial review is dismissed.

[56] There is no question to certify.

JUDGMENT in IMM-14874-23

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. By March 20, 2025, the Refugee Appeal Division [RAD] shall provide a revised Certified Tribunal Record [CTR] with all information with regard to a claimant with the initial L.T.T. redacted.
3. The Registrar shall treat the original CTR as confidential and replace the original CTR with the revised CTR within 15 days after it is filed by the RAD.
4. There is no question to certify.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: THI LOAN PHAM v THE MINISTER OF
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