

Federal Court



Cour fédérale

Date: 20250725

Docket: IMM-5061-24

Citation: 2025 FC 1332

Ottawa, Ontario, July 25, 2025

PRESENT: Mr. Justice McHaffie

BETWEEN:

BOUBACAR CELLOU DIALLO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Boubacar Cellou Diallo asserts that while he was in Canada as a student, his father was illegally imprisoned and stripped of his assets by government forces in Guinea because of his membership in and support of an opposition political party. Mr. Diallo sought refugee protection in Canada based on his own risks arising from the government's persecution of his father. The Refugee Protection Division [RPD] and the Refugee Appeal Division [RAD] of the Immigration

and Refugee Board of Canada refused Mr. Diallo's claim on grounds of credibility. Mr. Diallo seeks judicial review of the RAD's decision.

[2] Central to the RAD's decision was its finding that Mr. Diallo's credibility was undermined because he referred to his bisexuality for the first time at his refugee hearing. For both the RPD and the RAD, since this was a potential ground for a refugee claim, this made Mr. Diallo less credible, even though his claim, both before and after the reference to his bisexuality, was based on political issues and not his sexual orientation.

[3] As set out in further detail below, Mr. Diallo referred to his bisexuality not as a new ground of risk, but in response to questions from the RPD about his marriage in Canada. I am unable to see how referring to his sexual orientation in this context undermines either Mr. Diallo's credibility as a witness or his claim of political risk. In this regard, the RAD's characterization of the context in which the issue arose, and its dismissal of Mr. Diallo's explanations in response to the RPD's questions, do not accord with the record of the proceeding before the RPD. I therefore conclude that the RAD's finding on this issue was unreasonable. As this finding was sufficiently central to its decision, it renders the decision as a whole unreasonable.

[4] I therefore need not address Mr. Diallo's other challenges to the RAD's credibility findings, or his argument that his former counsel's appeal submissions, which were the subject of adverse commentary in the RAD's decision, amounted to incompetence affecting the fairness of the decision.

[5] The application for judicial review is therefore granted.

II. Issues and Standard of Review

[6] As noted, Mr. Diallo raises issues both with the fairness of the RAD's decision arising from his former counsel's alleged incompetence, and with the merits of the decision. As I conclude that the latter is determinative, the only issue on this application for judicial review is whether the RAD's decision was reasonable.

[7] As the parties agree, the RAD's decision on the merits is reviewable on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. When reviewing an administrative decision on this standard, the Court reviews the decision in its administrative context and in light of the record before the decision maker to assess whether it shows the requisite characteristics of intelligibility, transparency, and justification, and whether it is justified in light of the factual and legal constraints that bear upon it: *Vavilov* at paras 15, 83–86, 91–95, 99–100, 105–106.

[8] A reviewing Court will only interfere with an administrative tribunal's factual findings, including its credibility findings, in exceptional circumstances: *Vavilov* at para 125. At the same time, while the Court will not simply reassess or reweigh the evidence, the credibility findings that are not justified in light of the record or are otherwise unreasonable are subject to being set aside on review: *Vavilov* at para 126; *Bhuiyan v Canada (Citizenship and Immigration)*, 2024 FC 1359 at para 31. For example, a credibility finding may be set aside where it is made based on an overly zealous or microscopic reading of the evidence, where explanations given by an applicant

are unreasonably discounted, or where the credibility finding is unexplained, based on conjecture or unsupported inferences, or otherwise inconsistent with the evidence: *Owusu-Ansah v Canada (Minister of Employment & Immigration)*, 1989 CanLII 10377 (FCA) at pp 112–113; *Jamil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 792 at paras 24–25; *Balyokwabwe v Canada (Citizenship and Immigration)*, 2020 FC 623 at paras 42, 44; *Manege v Canada (Citizenship and Immigration)*, 2014 FC 374 at para 17; *Cooper v Canada (Citizenship and Immigration)*, 2012 FC 118 at para 4; *N’kuly v Canada (Citizenship and Immigration)*, 2016 FC 1121 at paras 20–26; *Vavilov* at paras 125–126.

III. Analysis

A. *Mr. Diallo’s Refugee Claim*

[9] Mr. Diallo came to Canada as a student in 2018. Later that year, he says he learned from his mother that his father had been arrested and imprisoned after participating in a demonstration organized by the Union of Democratic Forces of Guinea [*Union des forces démocratiques de Guinée*, or UFDG], the main opposition party in the country. Attempts by his mother to secure his father’s release were said to have been unsuccessful because his father was accused of financing the UFDG. Fearing for her life, his mother fled to Senegal.

[10] Mr. Diallo’s refugee claim, filed in 2021, raised the foregoing issues, the violent state of politics in Guinea, his Fulani ethnicity, and his own experience as a victim of violence during opposition demonstrations in 2015. Mr. Diallo later learned that in late 2021, his family home

and all of his father's bank accounts had been confiscated by the state. He filed an amendment to his basis of claim narrative to this effect shortly before his hearing before the RPD in May 2023.

B. *The Refugee Protection Division's Hearing and Decision*

[11] During the course of questions about his arrival in Canada and his immigration status, Mr. Diallo indicated that he was married in Canada and that his wife had sponsored him, but that he had not obtained permanent resident status. In response to a question from the RPD about the current state of his marriage, Mr. Diallo indicated that they had separated for reasons associated with his sexual orientation, because his wife had discovered he was bisexual and could not accept that. The questioning then turned to Mr. Diallo's fears on returning to Guinea, which he testified were related to his father's continued detention, his father's disputes with the current Minister of Defence, his own risk of his imprisonment, and the persecution of Fulani people in Guinea. He gave evidence regarding his membership and involvement in the UFDG and his father's active membership in the party.

[12] Later in the hearing, the RPD member asked whether Mr. Diallo had ever been directly or indirectly threatened. He said that he had been threatened before coming to Canada because of his bisexuality. This led to a question by the RPD that assumed Mr. Diallo feared return to Guinea because of his sexual orientation, the answer to which was interrupted by the RPD's question as to why this was not raised previously. Mr. Diallo indicated that he had not raised it when asked about his fear of return to Guinea because with the difficulties with his wife, he decided not to mention it; and that he had not raised it in his basis of claim form because he believed it was not related to the situation he had raised in his narrative, so he decided not to

refer to it. A series of questions about Mr. Diallo's bisexuality and his divorce followed. He gave a similar answer when asked why he did not bring witnesses to speak to his sexual orientation, namely that he did not know that it was important for his claim. When asked why his letter of support from his mother did not speak to his sexual orientation, he again answered that she did not mention it because it was not the basis of his claim.

[13] The RPD refused Mr. Diallo's refugee claim on grounds of credibility, raising concerns with several aspects of his testimony. The first of these was Mr. Diallo's reference to his bisexuality during the hearing when it was not raised in his basis of claim narrative or in his statement at the beginning of the hearing regarding what he feared in Guinea. The RPD did not accept Mr. Diallo's explanations for not raising his bisexuality, finding that he did not have any difficulty speaking of the subject during the hearing, and that it was Mr. Diallo who himself tried to put the issue forward during the hearing. The RPD found the explanation that Mr. Diallo's sexual orientation was not related to his claim for protection based on his father's political involvement unreasonable, since a claim can be based on multiple grounds, which, the RPD concluded, the applicant knew on the balance of probabilities since he was represented by experienced counsel.

[14] Other grounds of credibility raised by the RPD related to the specific individual within the Guinean government that he most feared, his membership in the UFDG, his reference to being on a [TRANSLATION] "blacklist," the absence of a signature on his mother's letter, and the absence of supporting evidence to support his allegations regarding his sexual orientation.

C. *Mr. Diallo's Appeal to the Refugee Appeal Division*

[15] Mr. Diallo filed an appeal with the RAD, represented by new counsel. As the RAD itself remarked in its decision, counsel's submissions lacked clarity and structure, with submissions the RAD described as vague, disjointed, and convoluted, lacking specific argument as to the alleged errors of the RPD. Nonetheless, the RAD reviewed the matter, including the recording of the hearing, and undertook its own analysis to determine whether the RPD had erred.

[16] The RAD concluded that the RPD had not erred in its credibility assessments. In particular, the RAD found the RPD was correct in making an adverse credibility finding based on the applicant having omitted his sexual orientation from his basis of claim narrative. The RAD summarized the RPD's reasons for the credibility finding. It then rejected Mr. Diallo's arguments, finding that the recording of the hearing confirmed that Mr. Diallo had raised the issue spontaneously and without difficulty, without having raised a particular fear about this allegation at the beginning of the hearing. The RAD considered this to be a significant omission and that the applicant's explanations were neither convincing nor satisfying, which undermined his credibility.

[17] The RAD also affirmed the RPD's other credibility findings in respect of the identity of the agent of persecution, Mr. Diallo's membership in the UFDG, and his appearance on a "blacklist."

[18] Subsequent to the RAD's decision, Mr. Diallo, with new counsel, asked the RAD to re-open his appeal, on grounds that he had not been competently represented on the appeal by former counsel. The RAD rejected this request, finding that Mr. Diallo had not established that it was reasonably probable that, absent counsel's errors, the outcome would have been different, noting that the RAD had nonetheless conducted its own analysis.

D. *The RAD's Credibility Finding is Unreasonable*

[19] Having reviewed the RAD's reasons, the parties' arguments, and the record, I conclude that the RAD's credibility finding based on Mr. Diallo's sexual orientation is not reasonable.

[20] It is important to begin by characterizing the nature of the RAD's credibility finding. It is, in essence, that Mr. Diallo not only failed to establish that he was bisexual, but that he lacked credibility generally for having referred to his bisexuality at the hearing. The implicit reasoning is that if Mr. Diallo were truly bisexual, then he would have raised this as a basis for his refugee claim from the outset, and the fact that he did not do so indicates that he is not truly bisexual, and that he simply raised it at the hearing in an untruthful effort to add a new ground to his claim. This is clear from the RAD's reasons, in which the primary ground for making an adverse credibility was the spontaneity of Mr. Diallo's mention of this [TRANSLATION] "new allegation," without difficulty in expressing himself, and without raising a fear about it at the outset of the hearing.

[21] However, this assessment characterizes Mr. Diallo's statement regarding his sexual orientation as an "allegation," *i.e.*, as a basis for his claim for refugee protection, when

Mr. Diallo's evidence was in fact that he was *not* raising it as a ground for protection. As is clear from the transcript, the issue of Mr. Diallo's marriage (also not a basis for his claim) arose only in response to the RPD's questions about his immigration status after his study permit expired. His statement about his bisexuality arose when he was asked what the current status of his marriage was, and he provided information about its breakdown. Even having referred to it, however, Mr. Diallo responded to the very next question from the RPD, about his fears in Guinea, by referring to his risks based on his father's political situation. As counsel notes in submissions, while Mr. Diallo could have used his sexual orientation as a fear of return, he did not, specifically saying that it was not a part of his refugee claim.

[22] As the RPD and RAD noted, when Mr. Diallo was asked why he *hadn't* referred to his bisexuality in his basis of claim narrative, he said that it was not related to the basis for his claim, namely his father's political situation. When asked why he *had* referred to it during the hearing, he said it was because the RPD had asked questions about his marriage.

[23] The RAD stated that Mr. Diallo's explanations were neither convincing nor sufficient. As the RAD did not explain why it found this to be the case, the Court must assume that it adopted the RPD's reasons for this finding. However, the RPD's reasons are, with respect to why Mr. Diallo hadn't referred to his bisexuality in his claim, contrary to the evidence, and, with respect to why he did refer to it during the hearing, difficult to comprehend.

[24] With respect to the first issue—why Mr. Diallo did not refer to his bisexuality in his basis of claim narrative—the RPD did not accept Mr. Diallo's explanation that he considered his

sexual orientation was unrelated to the basis for his claim. It found Mr. Diallo would have known that he could raise multiple grounds for a refugee claim, given that he was represented by counsel. However, the RPD made this inference without asking Mr. Diallo whether he knew that he could raise multiple grounds for a refugee claim, whether his lawyer had told him this, or whether he knew that his sexual orientation could be asserted as a ground. Indeed, the inference that the RPD drew, *i.e.*, that Mr. Diallo would know this because he was represented by counsel, was contrary to Mr. Diallo's evidence that he had not discussed his bisexuality with his lawyer. While the RPD was entitled to draw inferences from the evidence, and to draw adverse credibility findings based on those inferences, it is not reasonable to draw inferences that do not have a factual footing and are, indeed, contrary to the evidence on the record.

[25] With respect to the second issue—why Mr. Diallo referred to his sexual orientation during the hearing—Mr. Diallo's evidence as to why he had done so is found in the following passage in the transcript of the hearing:

[TRANSLATION]

MEMBER: OK. So why did you mention your sexual orientation today, if you think that it is not related to your claim?

CLAIMANT: It's because you asked me the question about my marriage. I mentioned that I was married. When you asked me the question about my marriage, it was at that moment that I provided the details about my separation from my partner.

MEMBER: But why did you provide details?

CLAIMANT: You asked me.

MEMBER: What did I ask you?

CLAIMANT: You asked me about my marriage. So it was at that moment that I gave the details of my separation from my partner.

[26] On my review of the transcript, Mr. Diallo's recollection of the circumstances in which he referred to his bisexuality was correct. The RPD, however, rejected this explanation [TRANSLATION] "because the claimant did not have any difficulty expressing himself on the subject during the hearing." The Court is unable to see the logic in this finding. Mr. Diallo's ease or difficulty in expressing himself on the subject of his bisexuality in no way affects his explanation that he referred to it because he was asked about his marriage, which broke down because of his bisexuality. Again, while credibility findings are subject to deference, they must be coherent if they are to justify this deference and be found reasonable: *Vavilov* at paras 85, 102–104, 126.

[27] This latter point is particularly important given the RAD's reliance on the fact that Mr. Diallo spontaneously raised the new allegation without difficulty in expressing himself. The fact that Mr. Diallo referred to his bisexuality at the hearing was central to the credibility finding. If he did so in response to questions from the RPD, this could explain why he was referring to something that was not in his basis of claim narrative. Rejecting this explanation on the basis that Mr. Diallo did not have difficulty speaking of the subject does not reasonably justify discounting his explanation. Notably, neither the RAD nor the RPD gave any other reason for dismissing this explanation.

[28] I therefore conclude that the RAD's adverse credibility conclusion based on Mr. Diallo's evidence regarding his sexual orientation was unreasonable.

E. *This Unreasonable Finding is Sufficient to Render the Decision Unreasonable*

[29] It is not every unreasonable finding in a decision that will necessarily render a decision as a whole unreasonable: *Vavilov* at para 100. In the present case, however, the sole determinative issue for the RAD was Mr. Diallo's credibility, and its adverse credibility finding based on his evidence of bisexuality was both the first of its credibility conclusions and a central one that was interrelated with other aspects of the RAD's credibility findings, including its assessment of a letter from Mr. Diallo's mother and its findings regarding the absence of corroborative witnesses in respect of his bisexuality.

[30] I conclude that I need not address Mr. Diallo's challenges to the RAD's other credibility findings as I find that the unreasonableness of its conclusion in respect of the sexual orientation issue was sufficient to render the decision as a whole unreasonable. The RAD's decision must therefore be set aside and the matter sent back to the RAD for redetermination.

[31] Given this, I also do not need to address Mr. Diallo's argument that his former counsel's representation before the RAD amounted to incompetence giving rise to a procedural unfairness, an argument that the RAD rejected on Mr. Diallo's application to reopen his appeal.

IV. Conclusion

[32] The application for judicial review is therefore allowed. The decision of the RAD rejecting Mr. Diallo's appeal of the refusal of his application for refugee protection is set aside and the matter is sent back for redetermination by a different panel of the RAD.

[33] Neither party proposed a question for certification, and I agree that none arises in the matter.

JUDGMENT IN IMM-5061-24

THIS COURT’S JUDGMENT is that

1. The application for judicial review is granted.
2. The decision of the Refugee Appeal Division dated February 25, 2024, rejecting the applicant’s appeal is set aside and the matter remitted back for redetermination by a different panel of the Refugee Appeal Division.

“Nicholas McHaffie”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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