

Federal Court



Cour fédérale

**Date: 20190226**

**Docket: IMM-4268-18**

**Citation: 2019 FC 233**

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

**Montréal, Quebec, February 26, 2019**

**Present: The Honourable Madam Justice Roussel**

**BETWEEN:**

**AHMED MADANI BA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Background**

[1] The applicant, Ahmed Madani Ba, is a citizen of Burkina Faso. He entered Canada in December 2009 on a student visa. On January 4, 2016, his application for a study permit extension was refused, and the applicant was told he had to leave Canada. On June 4, 2016, the applicant was arrested by Canadian law enforcement as a result of being a passenger in a car

parked on private property. The police authorities found that the applicant did not have status in Canada, so they informed the Canada Border Services Agency, which took charge of the applicant. The applicant then filed a refugee protection claim in which he alleged being [TRANSLATION] “victim of prosecution by [his] former comrades-in-arms who have become his persecutors”. In a second account filed two (2) months later, the applicant alleged that he feared returning to Burkina Faso because of his sexual orientation.

[2] On February 2, 2018, the Refugee Protection Division [RPD] dismissed the applicant’s claim due to lack of credibility. The applicant appealed this decision to the Refugee Appeal Division [RAD]. In a decision rendered on August 10, 2018, the RAD dismissed the appeal, agreeing with the RPD that the applicant was not credible.

[3] The applicant seeks judicial review of that decision. For the following reasons, the Court is of the opinion that some the RAD’s conclusions lack intelligibility, transparency and justification and justify the Court’s intervention.

## II. Analysis

[4] The standard of review applicable to RAD decisions on credibility and assessment of evidence is that of reasonableness (Canada (Citizenship and Immigration) v Huruglica, 2016 FCA 93 at para 35; Ali v Canada (Citizenship and Immigration), 2018 FC 688 at para 5; Acikgoz v Canada (Citizenship and Immigration), 2018 FC 149 at para 21).

[5] Where the reasonableness standard applies, the Court's role is to determine whether the decision falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and the law". If "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility", it is not for this Court to substitute its own view of a preferable outcome (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[6] Before the RAD, the applicant argued in particular that the RPD erred in its credibility assessment for not taking into account the difficulties he had in asserting his sexual orientation and in seeking psychological assistance for his alleged trauma. According to the applicant, these difficulties would explain such events as his delay in claiming refugee protection, his failure to refer to his sexual orientation in his first account and the exchange of kisses when he was attending a military school, as well as the reasons for not having further sexual relations with men and not having received psychological assistance in Canada.

[7] In response to this argument, the RAD states the following:

[32] The memorandum also argues that the RPD did not consider the fact that the appellant could have had difficulty asserting himself and wanting to find assistance. By his own admission, he had only one sexual encounter with a man. He has not had any other relationships since then and it has been a number of years. Consequently, the RAD finds it very difficult to reconcile his allegations with his actions.

[8] The RAD continues its analysis as follows:

[33] Consequently, the RPD correctly analyzed this matter.

[9] Further on in its reasons, the RAD reiterates that the applicant has not had any further sexual relations with a man since that time, stating the following:

[36] . . . However, he arrived in Canada in December 2009 and has dated girls since and is actually living with a female. Having declared himself bisexual, and without wanting to extrapolate, the panel would have assumed that the [applicant] has had, or did have, even short-term relationships with a man and sporadic and spontaneous sexual encounters with men. That is not the case. The RAD is simply interpreting his testimony that he has had only one kiss with a classmate and that, since then, he has not had any sexual relationship or particular friendship. Consequently, the facts lead the panel to believe that the [applicant] is not bisexual, but is actually heterosexual. In conclusion, the account is based on a kiss in the woods that led to the [applicant] being hit and injured, however, since the panel does not believe that the [applicant] is bisexual, his account is seriously undermined.

[10] The Court recognizes that it must defer to the RAD's credibility findings and consider the reasons as a whole in light of the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53; *Odia v Canada (Citizenship and Immigration)*, 2018 FC 363 at para 6). It is also well established that a decision maker is not required to refer to all the arguments or other details that the reviewing judge would have liked to have read, or to make an explicit finding on each constituent element of his or her reasoning that led to his or her final conclusion (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Newfoundland Nurses*]).

[11] However, this deference does not allow the Court to guess or speculate on what the RAD might have thought if its reasons are not intelligible and do not allow the Court to understand the basis for its conclusion and determine whether it is one of the possible and acceptable outcomes

*(Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 para 11; *Newfoundland Nurses* para 16).

[12] In this case, the RAD decided to address the argument raised by the applicant. In analyzing the RAD's reasons, however, the Court fails to understand its analysis. The Court has difficulty seeing the connection between the applicant's allegation that he had difficulty asserting his sexual orientation because of the trauma he suffered and the RAD's assertion that the applicant did not have further sexual relations with men.

[13] The Court acknowledges, as the applicant claims, that other elements relating to the applicant's credibility could support the RAD's conclusion. However, in the absence of intelligible reasons, the Court cannot determine whether the RAD reasonably concluded that the applicant was not credible regarding his bisexuality. Nor can the Court assess the significance of this conclusion with regard to the final decision. The RAD refers to the allegation of bisexuality as an "important element" and a "key element". In addition, the RAD states that the applicant's story "is seriously undermined", noting that it does not believe that the applicant is bisexual. In the presence of such language and considering the general conclusion of the RAD that the applicant is not bisexual, it is entirely reasonable to believe that the applicant's lack of credibility relating to his sexual orientation is the central element of the decision.

[14] The Court notes that the RAD states twice that it applies Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression [Guideline]. In addition to recognizing that some people may have difficulty externalizing their

sexual orientation, the Guideline also specifies that the decision maker must avoid certain prejudices and stereotypes when establishing the facts. Among the prejudices and stereotypes mentioned are those that “individuals with diverse [sexual orientations and gender identities and expressions [SOGIE]] have had same-sex sexual experiences or relations” and that “individuals with diverse SOGIE would not have had heterosexual sexual experiences or relations” (section 6.1 of the Guideline). However, as already mentioned, the RAD emphasizes in its reasons that the applicant alleges that he had “only one sexual encounter with a man”. It also states that the applicant “dated girls” and that “the panel would have assumed that [the applicant] has had, or did have, even short-term relationships with a man and had sporadic and spontaneous sexual encounters with men”. Without further explanation, this reasoning suggests that the RAD based its decision on stereotypes, which should be avoided in decision-making, according to the Guideline.

[15] For these reasons, the Court concludes that the decision is unreasonable because it lacks intelligibility, transparency and justification according to the criteria set out in *Dunsmuir*. As a result, the application for judicial review is allowed, the decision is set aside, and the case is referred to a different RAD panel for reconsideration.

[16] No question of general importance was submitted for certification, and the Court is of the opinion that this case does not raise any.

**JUDGMENT in docket IMM-4268-18**

**THIS COURT’S JUDGMENT is that:**

1. The application for judicial review is allowed;
2. The decision of the Refugee Appeal Division is set aside, and the case is referred to another panel for reconsideration;
3. No question of general importance is certified.

“Sylvie E. Roussel”

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Judge

Certified true translation  
This 15th day of April, 2019.

Michael Palles, Translator

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4268-18

**STYLE OF CAUSE:** AHMED MADANI BA v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** FEBRUARY 19, 2019

**JUDGMENT AND REASONS:** ROUSSEL J.

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