

Federal Court



Cour fédérale

Date: 20210125

Docket: IMM-5560-19

Citation: 2021 FC 77

Ottawa, Ontario, January 25, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

FARUK ALI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Faruk Ali, is a citizen of Ghana who alleges a fear of persecution from his community and the government due to his sexual orientation as a bisexual man. He seeks judicial review of a decision of the Refugee Appeal Division (RAD), affirming the Refugee Protection Division's (RPD) decision to reject his refugee claim. Both the RPD and the RAD determined that Mr. Ali was neither a Convention refugee nor a person in need of protection

pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Mr. Ali alleged that he was forced to flee Ghana after he and his same-sex partner were discovered in his home and threatened by community members. Mr. Ali escaped to the shelter of a friend's home until he was able to leave the country for Canada. Upon arriving in Canada, Mr. Ali sought refugee protection.

[3] The RPD rejected Mr. Ali's refugee claim on the basis that his evidence was not credible and that Mr. Ali failed to establish he is bisexual. On appeal to the RAD, the main question was whether the RPD erred in assessing Mr. Ali's credibility. The RAD found the RPD's assessment was correct.

[4] Mr. Ali submits the RAD's negative credibility findings, which mirrored those of the RPD, unreasonably fixated on minor and tangential inconsistencies, such as discrepancies in dates. He submits the RAD failed to examine the evidence with sensitivity to his condition, as he suffered from memory and speech difficulties and had been diagnosed with post-traumatic stress disorder (PTSD). In addition, Mr. Ali submits the RAD breached procedural fairness by unfairly criticizing the absence of corroborative evidence, without affording him an opportunity to address the RAD's concerns. Furthermore, Mr. Ali submits that the RAD failed to conduct a proper section 97 analysis.

[5] For the reasons below, I find the RAD's decision is reasonable, and there was no breach of procedural fairness. This application for judicial review is dismissed.

II. Issues and Standard of Review

[6] The issues on this application for judicial review are:

- A. Did the RAD err in its credibility findings?
- B. Did the RAD breach procedural fairness by failing to afford an opportunity to respond to concerns about the lack of corroborative evidence?
- C. Did the RAD err by failing to conduct a proper section 97 analysis?

[7] The applicable standard of review for the first and third issues is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. I note that although Mr. Ali frames the third issue as one of a procedural fairness due to the RAD's failure to conduct a "thorough analysis" under s. 97, the substance of his argument relates to the reasonableness of the decision.

[8] A standard of review that is akin to correctness applies to the second issue, regarding whether the RAD breached procedural fairness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Vavilov* at para 23.

III. Analysis

A. *Did the RAD err in its credibility findings?*

[9] Mr. Ali submits the RAD's analysis was overly microscopic, and the RAD impugned his credibility by fixating on issues that were peripheral, irrelevant, or tangential to his claim:

Lubana v Canada (Minister of Citizenship and Immigration), 2003 FCT 116 [*Lubana*] at para 11; *Cooper v Canada (Citizenship and Immigration)*, 2012 FC 118 at para 3. In particular, he submits the RAD was overly fixated on the accuracy of the dates of his same-sex relationships, despite his explanation that he was not good with dates and that he had memory issues. Mr. Ali submits the RAD made the same reviewable error described in *Adegbola v Canada (Minister of Citizenship and Immigration)*, 2007 FC 511 [*Adegbola*] at paragraph 31, where the Court held that the applicant's credibility was tenuously connected to her inability to recall the date of an assault that took place several years prior.

[10] Mr. Ali submits the RAD failed to consider the lack of coherence in his evidence with due sensitivity to his cultural background, psychological condition, and mental limitations:

Lubana at para 12; *John v Canada (Minister of Citizenship and Immigration)*, 2011 FC 387 [*John*] at para 6. He also submits the RAD failed to properly consider the *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* [SOGIE Guidelines], and paid "lip service" by including a boilerplate statement that the SOGIE Guidelines were considered.

[11] Mr. Ali had testified that he struggled in school, spending 10 years in elementary school because he was required to repeat classes, and he had tendered a report from a psychodynamic

consultant, which explained his problems with speech and memory, and his difficulty concentrating due to the distraction of hyper-aroused thoughts caused by PTSD. He argues the RAD minimized the significance of the report, and failed to take his symptoms and diagnosis into consideration in assessing his evidence. Overall, Mr. Ali contends his evidence was credible, particularly viewed in light of his background, previous experiences, speech impediment, weak memory, limited education, and the psychodynamic consultant's report. Mr. Ali argues that a lack of coherency or consistency in a claimant's testimony should be viewed in light of the claimant's psychological condition, especially where that condition has been medically documented: *Lubana* at para 12. Mr. Ali cites *Romiluyi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1194 at paragraphs 3-5 for the proposition that all evidence with respect to an applicant's claim must be considered before a global credibility finding is made. He argues the RAD gave insufficient weight to the psychodynamic consultant's report that was tendered to support his state of mind, and failed to realistically and fairly consider his state of mind in assessing credibility: *John* at para 7.

[12] In my view, the RAD did not err in its credibility findings. The RAD was not fixated on peripheral, irrelevant, or tangential issues in finding that Mr. Ali had not established his claims of having been involved in two same-sex relationships in Ghana. As the respondent correctly notes, Mr. Ali claimed to have reason to fear community members due to his alleged bisexuality, and whether Mr. Ali was involved in same-sex relationships in Ghana was central to his claim. The RAD referenced numerous inconsistencies and contradictions in the evidence regarding the central aspects of Mr. Ali's claim.

[13] The RAD noted significant discrepancies in Mr. Ali's testimony regarding when and how he met his first same-sex partner, and how long the relationship lasted, ranging from one to six years. At various times during the RPD hearing, Mr. Ali testified that his first same-sex relationship began when he was 18 or 19 or 20 years old. Mr. Ali also testified that he met his first partner when he entered secondary school in 2001. On the other hand, Mr. Ali's Basis of Claim (BOC) and application forms indicated that he entered secondary school in 1999, and became attracted to his first same-sex partner after graduating in 2002. These inconsistencies were put to Mr. Ali and the RAD agreed with the RPD that Mr. Ali did not provide satisfactory explanations. Ultimately, the inconsistencies led the RAD to find that, on a balance of probabilities, Mr. Ali was not in a same-sex relationship with his first alleged partner.

[14] With regard to the second relationship, the RAD did not find it credible that Mr. Ali had a relationship with a high-ranking government employee. Mr. Ali did not provide consistent testimony on when this relationship began, made no efforts to contact the individual, and did not provide any evidence to corroborate the identity of his second partner, despite having claimed that he was a public figure who would appear on television.

[15] The RAD also rejected Mr. Ali's account of a violent incident at his home by anti-gay community members—the incident that caused him to flee Ghana. Mr. Ali's BOC narrative stated that anti-gay community members went to Mr. Ali's home when he and his partner were there and started beating them with sticks. Mr. Ali's oral testimony at the RPD hearing introduced a different narrative, where the mob hit the door with sticks, but never had the

opportunity to assault him or his partner because they had heard the mob and escaped through the back window.

[16] I am not persuaded by Mr. Ali's submission that the contradiction regarding whether the mob beat the door with sticks or beat him with sticks arose from interpretation issues. In support of this argument, Mr. Ali's counsel noted that Mr. Ali never reported any injuries from the incident. However, as the respondent correctly points out, Mr. Ali amended his BOC twice. Any issues arising out of faulty interpretation could have been rectified. Additionally, although Mr. Ali testified before the RPD that his sister was not present at the incident, he had tendered a letter from his sister, who not only stated that she was present when the mob arrived, but that she saw her brother and his partner being beaten.

[17] The RAD reasonably held that Mr. Ali's explanation of hiding in his friend's home after the violent incident was not credible, as the identity of this friend was in question. In the weeks leading up to the RPD hearing, Mr. Ali corrected the identity of the friend and submitted a new letter, in a new name, accompanied by a poor quality copy of a Voter Card. The RAD did not accept Mr. Ali's explanation that he had provided different names for his friend because his friend had several names and it was a part of Ghanaian culture to hold multiple names. In addition, the RAD noted that the friend, who allegedly grew up with Mr. Ali, was at least 13 years younger.

[18] While Mr. Ali testified that he participated in meetings at a support centre for LGBTQI+ persons, the RAD found this insufficient to overcome other credibility concerns on Mr. Ali's sexual orientation and assigned low weight to evidence from this centre.

[19] Mr. Ali explains that the discrepancies in his evidence and his failure to correct the BOC were due to memory issues and "low intelligence", and some discrepancies were due to problems with interpretation. However, the RAD agreed with the RPD that when the inconsistencies and contradictions were put to Mr. Ali, his explanations of "low intelligence", poor memory and interpretation errors were not satisfactory explanations for material contradictions about facts that were integrally linked within Mr. Ali's own narrative. This is distinguishable from the circumstances of *Adegbola*, where the applicant could not recall the exact date of an assault that had taken place seven years earlier in 1999, and the Court noted there was other evidence (a letter from the hospital) confirming that she had been treated for injuries inflicted on April 4, 1999.

[20] While Mr. Ali submits the RAD failed to consider his speech impediment, poor or weak memory, low level of education, and the cognitive limitations identified in the psychodynamic consultant's report, in my view the RAD considered these alleged limitations and reasonably found Mr. Ali's psychological and cognitive challenges did not provide a sufficient explanation for the credibility concerns. Having considered the SOGIE Guidelines and the caution that mental health challenges can impact an individual's ability to testify, the RAD considered it was plausible that Mr. Ali confused the dates of the alleged attack that occurred either in December 2016 or in January 2017 and the RAD did not fault him for this. However, the RAD was not

persuaded by the argument that Mr. Ali's psychological and cognitive challenges could explain the numerous credibility concerns. The RAD determined that the contradictions in Mr. Ali's evidence went beyond the symptoms described by the psychodynamic consultant and included Mr. Ali's decisions about how to present his claim, outside the pressure of the hearing room.

[21] The statements in the psychodynamic consultant's report that Mr. Ali was experiencing "ongoing difficulties concentrating due to the distraction of hyperaroused thought patterns, and that he often misplaces things or forgets where he puts them" did not address the RAD's concerns with inconsistencies about key aspects of his claim—such as when his same-sex relationships began, the nature of those relationships, whether he graduated from secondary school, and whether he was beaten during a violent incident at his home. The RAD reasonably found that Mr. Ali's mental health challenges did not offer a reasonable explanation for the many contradictions in his evidence.

[22] Beyond the assertion that "it is very clear" the RAD's credibility assessments did not consider the SOGIE Guidelines, Mr. Ali has not pointed to specific examples in the RAD's reasons to support his argument that the RAD effectively ignored the SOGIE Guidelines. In my view, the RAD's reasons demonstrate that while the RAD was sensitive to Mr. Ali's mental health and cognitive challenges in its assessment of the evidence, it found these challenges could not account for the contradictions in his testimony. I find no error in the RAD's conclusion.

[23] Overall, the RAD reasonably concluded the RPD was correct in finding that Mr. Ali did not establish his sexual orientation as a bisexual man.

B. *Did the RAD breach procedural fairness by failing to afford an opportunity to respond to concerns about the lack of corroborative evidence?*

[24] Mr. Ali submits the RAD breached procedural fairness by relying on the absence of corroborative evidence regarding the identity and profile of his second same-sex partner, as he was not provided an opportunity to respond to the RAD's concerns. Due to the public profile of Mr. Ali's former partner, the RAD noted Mr. Ali should have been able to provide a picture or news clipping to corroborate the partner's identity and profile. Apart from being asked questions about whether he attempted to contact his second partner at the RPD hearing—to which he had answered that he had not—Mr. Ali argues the RAD failed to provide an opportunity to respond to concerns.

[25] In my view, Mr. Ali has not established that the RAD breached procedural fairness, or otherwise erred, by referring to the lack of corroborative evidence regarding Mr. Ali's second same-sex partner. I agree with the respondent that the lack of corroborative evidence was not a new finding. It was raised by the RPD, and Mr. Ali was questioned before the RPD on why he had not made attempts to contact his partner since the incident at the house. In its reasons, the RPD acknowledged the difficulty in obtaining corroborative documentation to establish a same-sex relationship, but found that Mr. Ali's failure to make any effort to contact his partner undermined credibility. Mr. Ali did not challenge that finding on appeal.

[26] The RAD's finding was similar. The RAD did not believe Mr. Ali was in a same-sex relationship with a high ranking government worker when the incident at the house occurred because Mr. Ali: (a) gave inconsistent testimony as to when this relationship began (whether in

2006, 2012 or 2014); (b) made no attempts to contact this person, who allegedly helped him secure his Canadian visa; and (c) failed to provide corroborative evidence of this person's alleged public profile. The RAD provided ample justification for concluding that Mr. Ali had not established his involvement in the second same-sex relationship.

C. *Did the RAD err by failing to conduct a thorough section 97 analysis?*

[27] Mr. Ali submits the RAD erred by failing to conduct a thorough analysis of section 97 of the *IRPA*. Notwithstanding the credibility issues, Mr. Ali submits there were grounds to find that he required protection under section 97 due to his sexual orientation. Mr. Ali relies on *Odetoyinbo v Canada (Citizenship and Immigration)*, 2009 FC 501 [*Odetoyinbo*] at paragraph 7, where the Court found, "It is well settled that an adverse credibility finding, though it may be conclusive of a refugee claim under section 96 of the [*IRPA*], is not necessarily conclusive of a claim under subsection 97(1)."

[28] I agree with the respondent that the RAD was not required to conduct a separate section 97 analysis in this matter. In *Odetoyinbo*, the tribunal did not explicitly find that the applicant was not bisexual, and accordingly, the tribunal could not ignore objective evidence of gay men being subjected to abuse in Nigeria. In the present case, the RAD specifically found Mr. Ali had not proven his bisexuality, and *Odetoyinbo* can be distinguished on this basis. Therefore, there was no obligation on the RAD to address general country condition evidence regarding the treatment of bisexuals in Ghana.

[29] Furthermore, the Federal Court of Appeal has held that a general negative credibility finding is sufficient to dispose of a claim under both sections 96 and 97, barring independent and credible documentary evidence capable of supporting a positive determination: *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at para 3. Mr. Ali argues there was independent credible evidence before the RPD that was capable of supporting a positive determination. While the RAD referred only to his participation in meetings at a support centre for LGBTQI+ persons, Mr. Ali submits he had also testified to having been in a “casual relationship” with a man in Canada. However, I am not convinced this constitutes independent and credible documentary evidence capable of supporting a positive determination of Mr. Ali’s claim. Moreover, Mr. Ali raises this alleged error for the first time before this Court. It was not raised as an issue on appeal before the RAD. Overall, I find the RAD did not err in its section 97 analysis.

IV. **Conclusion**

[30] I find that the RAD’s decision is reasonable. This application for judicial review is dismissed.

[31] Neither party raised a question for certification, and none arises.

JUDGMENT in IMM-5560-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. There is no question to certify.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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