

Federal Court



Cour fédérale

**Date: 20220131**

**Docket: IMM-3837-20**

**Citation: 2022 FC 109**

**Ottawa, Ontario, January 31, 2022**

**PRESENT: The Honourable Mr. Justice Gleeson**

**BETWEEN:**

**NASH SHAIBU**

**Applicant**

**and**

**THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, Mr. Nash Shaibu, a citizen of Ghana, brings an Application pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the August 5, 2020 decision of the Refugee Appeal Division [RAD]. In its decision, the RAD confirmed the finding of the Refugee Protection Division [RPD] that Mr. Shaibu is neither a Convention refugee nor a person in need of protection.

[2] In seeking protection, Mr. Shaibu reported he feared persecution in Ghana based on his sexuality. The RAD found the determinative issue to be credibility. The RAD identified a series of inconsistencies in Mr. Shaibu's evidence relating to his reported sexuality. As a result of these inconsistencies, the RAD made a series of negative credibility findings and expressly stated that certain inconsistencies resulted "in a negative credibility finding regarding the Appellant's overall credibility and allegations."

[3] In the matter before me, Mr. Shaibu does not take issue with the RAD's credibility findings. The findings not being challenged, they must be presumed to be true (*Khan v Canada (Citizenship and Immigration)*, 2021 FC 1233 at para 5 [*Khan*] citing *Quintero Cienfuegos v Canada (Citizenship and Immigration)*, 2009 FC 1262 at para 26).

[4] Instead, Mr. Shaibu argues the RAD erred by focusing on the issue of his actual sexual orientation and thereby failed to assess his risk arising from the perspective of the feared agents of persecution, who may have perceived him to be gay or bisexual.

[5] He relies on *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 1993 CanLII 105 (SCC) [*Ward*], where the Supreme Court of Canada stated the "examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution." (*Ward* at p 747.)

[6] The Respondent first argues the Application should be dismissed because the failure of the RPD to address Mr. Shaibu's perceived sexuality was not identified as an issue before the

RAD. The issue is therefore not properly before the Court on judicial review. Mr. Shaibu counters that he need not have raised this issue before the RAD. He submits the issue raised is not a specific error but rather one of a general nature reflecting the decision maker's misunderstanding of its obligation to assess perceived risk.

[7] This argument has been previously rejected, most recently by Justice Peter Pamel in *Khan*. At paragraph 11 of *Khan*, Justice Pamel states there is no support for this position, noting it is contrary to the obligations imposed on an appellant by paragraph 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257:

(3) The appellant's record must contain the following documents, on consecutively numbered pages, in the following order:

[...]

(g) a memorandum that includes full and detailed submissions regarding

(i) the errors that are the grounds of the appeal,

(ii) where the errors are located in the written reasons for the Refugee Protection Division's decision that the appellant is appealing or in the transcript or in any audio or other electronic recording of the Refugee Protection Division hearing,

[...]

(3) Le dossier de l'appelant comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :

[...]

g) un mémoire qui inclut des observations complètes et détaillées concernant :

(i) les erreurs commises qui constituent les motifs d'appel,

(ii) l'endroit où se trouvent ces erreurs dans les motifs écrits de la décision de la Section de la protection des réfugiés portée en appel ou dans la transcription ou dans tout enregistrement audio ou électronique de l'audience tenue devant cette dernière,

[...]

[8] Paragraph 3(3)(g) is intended to require appellants to identify errors that ground an appeal. To accept Mr. Shaibu's argument would have the effect of largely vitiating the purpose of the rule (*Dahal v Canada (Citizenship & Immigration)*, 2017 FC 1102 at para 37). The RAD cannot be faulted on judicial review for failing to consider and address arguments not raised on appeal (see *Canada (Citizenship and Immigration) v RK*, 2016 FCA 272 at para 6; *Adams v Canada (Citizenship and Immigration)*, 2021 FC 1128 at para 28 [*Adams 2021*] citing *Adams v Canada (Minister of Citizenship & Immigration)*, 2018 FC 524 at paras 28 and 29; *Ghauri v Canada (Citizenship and Immigration)*, 2016 FC 548 at para 34. Also see *Khan* at para 12 and *Amev v Canada (Citizenship and Immigration)*, 2020 FC 875 at paras 17 and 18).

[9] In summary, the jurisprudence is clear – an appellant's failure to raise an issue before the RAD will normally prevent the issue from being raised for the first time on judicial review.

[10] Mr. Shaibu argues that, in any event, he did raise the issue of perceived sexual orientation in his written arguments before the RAD. In those submissions, he posed the question: "[is] being gay an objective reality with objective criteria or is it a subjective appreciation?" He submits that in questioning the subjective nature of one's sexual orientation, the issue of perceived sexual orientation was raised. I disagree.

[11] The question was posed in the context of submissions relating to the RPD's credibility concerns arising from Mr. Shaibu's contradictory evidence as to when he recognized he was either gay or bisexual. The perception of others was not argued or identified as an issue. In this respect, Justice Paul Favel's observations in *Adams 2021* are applicable:

[23] After reviewing the record, I find that the Applicant's submissions before the RAD did not explicitly raise the issue of the Applicant's perceived sexuality (*Chekroun v Canada (Minister of Citizenship and Immigration)*, 2013 FC 737 at paras 55-57 [*Chekroun*]). If the Applicant wished to rely on arguments related to his perceived sexuality, then he should have made those submissions to the RAD with clarity. The Applicant asks this Court to make a leap and assume what his submissions intended to convey rather than rely on his literal submissions. The Applicant must bear the consequences of his submissions. [Emphasis added.]

[12] The Application must fail for this reason alone. However, for the sake of completeness, I also find that the RAD was not required to expressly address the issue of perceived sexuality in this circumstance.

[13] In finding Mr. Shaibu's narrative and supporting documentation not to be credible, the RAD dispensed with the issue of perceived orientation (*Abolupe v Canada (Citizenship and Immigration)*, 2020 FC 90 at para 50). As was noted by Justice Pamel in *Khan*, Mr. Shaibu's reliance on *Ward* is misplaced. This is not a case where there was credible evidence upon which to consider the issue of perceived sexual orientation (*Khan* at paras 6 and 7).

[14] Mr. Shaibu has proposed the following question for certification:

Does the Refugee Appeal Division have a duty, when considering an appeal from the Refugee Protection Division of a negative decision made on a claim based on sexual orientation, to approach the appeal from the perspective of the feared agent of persecution, whether that perspective is raised by the appellant on appeal or not?

[15] In *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, the Federal Court of Appeal described the test for a certified question under paragraph 74(d) of the IRPA at para 9:

It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 (C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraphs 28, 29 and 32).

[16] I am not convinced the proposed question raises an issue of broad significance or general importance. The jurisprudence is not split on the issues raised. As set out above, matters raised for the first time on judicial review have been consistently found to be improper. The jurisprudence has also consistently held that there is no requirement to assess an applicant's perceived sexuality in the absence of credible evidence relating to sexuality.

[17] The proposed question does not meet the test for certification.

**JUDGMENT IN IMM-3837-20**

**THIS COURT'S JUDGMENT is that:**

1. The Application is dismissed.
2. No question is certified.

**"Patrick Gleeson"**  

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**Judge**

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

**DOCKET:** IMM-3837-20

**STYLE OF CAUSE:** NASH SHAIBU v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** BY VIDEOCONFERENCE

**DATE OF HEARING:** JANUARY 27, 2022

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