

Federal Court



Cour fédérale

Date: 20211115

Docket: IMM-335-21

Citation: 2021 FC 1233

Ottawa, Ontario, November 15, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

BASIT KHAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Basit Khan, a 24-year-old Pakistani man, challenges by way of judicial review the decision of the Refugee Appeal Division [RAD] which confirmed an earlier Refugee Protection Division [RPD] decision dismissing his claim for refugee protection on account of Mr. Khan not having established, on a balance of probability, that he is either gay or bisexual. The RPD had serious credibility concerns regarding Mr. Khan's story – both the RPD and the RAD found Mr. Khan's testimony to be vague and evasive; the RAD determined that there were

“significant and central contradictions and omissions” surrounding, in particular, Mr. Khan’s same-sex experiences.

[2] The parties agree that the standard of review in the matter before me is one of reasonableness.

[3] The determinative issue before the RPD and the RAD was Mr. Khan’s sexual orientation, whether he is actually gay or bisexual. The RAD found that Mr. Khan “was not credible in testifying about his same-sex experiences” and presented no persuasive relevant documentary evidence that could be given any significant weight in support of his claim that he is gay or bisexual.

[4] Mr. Khan does not challenge the negative credibility findings made by the RAD. Rather, he cites the decision of *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 1993 CanLII 105 (SCC) [*Ward*], for the proposition that 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); Mr. Khan argues that both the RPD and the RAD failed to consider the matter from the perspective of the agent of persecution, i.e., whether he was perceived to be gay or bisexual, irrespective of his actual sexual orientation.

[5] I should mention that as the negative credibility findings of the RAD were not challenged before me, they must therefore be presumed to be true (*Quintero Cienfuegos v Canada (Citizenship and Immigration)*, 2009 FC 1262 at para 26).

[6] I cannot accept the proposition put forward by Mr. Khan and I find that he is misconstruing the Supreme Court decision in *Ward*. In *Ward*, the Supreme Court determined that in situations of well-founded fear of persecution based upon imputed membership in a particular social group – for example in situations where the fear stems from the simple perception that the claimant holds certain political opinions – whether the claimant is actually a member of that social group, i.e., whether he/she holds such political opinions, is immaterial; risk is to be assessed from the perspective and perception of the agents of persecution. The decision in *Ward* involved circumstances where the applicant was otherwise found to be credible.

[7] Here, Mr. Khan was found not to be credible, and the proposition that the RAD is required to engage in an analysis of whether he would be perceived to be gay or bisexual by the agent of persecution after finding that no credible evidence exists that he is actually gay or bisexual cannot be supported by *Ward*. In fact, the argument was already made, without success, in *Adams v Canada (Citizenship and Immigration)*, 2021 FC 1128. The proposition was also explicitly rejected by Madam Justice Pallotta in *Ameh v Canada (Citizenship and Immigration)*, 2020 FC 875 at paragraph 19 [*Ameh*], where Justice Pallotta stated:

. . . The RAD reasonably found that the applicant was not being pursued by an anti-bisexuality group or by the police, that her sexuality was not exposed, and that she did not flee Nigeria because her sexuality was exposed. In my view, the RAD's findings addressed not only the applicant's alleged bisexuality, but also the agents' perception of her sexuality.

[8] Here, after determining that Mr. Khan had not established, on a balance of probability, that he is in fact gay or bisexual on account of a lack of credibility, the RAD was not required to also assess the risks inherent in him being perceived to be gay or bisexual. As stated by Madam

Justice Strickland in *Abolupe v Canada (Citizenship and Immigration)*, 2020 FC 90 at paragraph 50:

As to the Applicant's argument that the evidence establishes that he will be perceived as bisexual in Nigeria, the RAD found that the Applicant's narrative about what happened to him in Nigeria – being sought by the police because of his orientation – was not credible. In so finding, the RAD dispensed with any issues related to his bisexual identity and any perception of his sexual identity. Put otherwise, the RAD did not believe the central element of the Applicant's claim that the police in Nigeria were pursuing him because of his sexual orientation and therefore the RAD afforded the affidavit evidence little weight . . .

[Emphasis added.]

[9] In any event, to support a claim of risk of persecution on account of imputed membership in a particular group, such a claim must be grounded in evidence (*Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760); no such evidence exists here. The record in this case includes no reason for Mr. Khan to be perceived as being gay or bisexual other than his claim that he purportedly is. Once that claim was found to lack credibility, any claim of risk on the basis that Mr. Khan may be perceived to be gay or bisexual had no foundation. In other words, once the RAD made negative credibility findings relating to the central story underlying Mr. Khan's claim that he is a gay man whose same-sex relationship was discovered by his family, no separate assessment of his perceived sexual orientation was necessary.

[10] In any event, Mr. Khan did not specifically raise the issue of risk associated with him being perceived as being gay or bisexual before the RAD and, after reviewing the record, I am not convinced that his submissions before the RAD were extensive enough to have suggested

that such risk existed or to be independently assessed; the decision of the RAD must be assessed in the context of how Mr. Khan framed his appeal before that tribunal (*Ameb* at paras 17-18).

[11] Mr. Khan argues that it was not necessary to specifically raise the issue before the RAD because the error was general in nature and not specific, i.e., the error went to the approach taken by the RPD (and also the RAD) in the assessment of Mr. Khan's risk. There is no support for this proposition, which flies in the face of paragraph 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257, requiring appellants to include in their appeal the errors that are the grounds of the appeal.

[12] As stated by Mr. Justice Lafrenière in *Adams v Canada (Citizenship and Immigration)*, 2018 FC 524 at paragraph 28: "The RAD cannot be faulted for failing to consider arguments that were never raised." The argument as to any risk of persecution associated with Mr. Khan being perceived as being gay or bisexual seems to be an afterthought raised for the first time before me and therefore the issue is not properly before this Court (*Canada (Citizenship and Immigration) v RK*, 2016 FCA 272 at para 6; *Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102 at para 35).

[13] I would therefore dismiss the present application for judicial review.

JUDGMENT in IMM-335-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question for certification.

“Peter G. Pamel”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-335-21

STYLE OF CAUSE: BASIT KHAN v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: NOVEMBER 8, 2021

JUDGMENT AND REASONS: PAMEL J.

DATED: NOVEMBER 15, 2021

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