

Federal Court



Cour fédérale

Date: 20220916

Docket: IMM-2687-19

Citation: 2022 FC 1302

Ottawa, Ontario, September 16, 2022

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

ADIL YOUSUF

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Adil Yousuf, seeks judicial review of the Refugee Protection Division (RPD) decision that dismissed his refugee claim. He claimed refugee status because of the risk of persecution he faces in Pakistan based on his sexual orientation. The Applicant argues that the RPD decision is unreasonable because its credibility findings are based on unsupported and unjustified findings that his evidence was not plausible.

[2] For the reasons that follow, the application for judicial review will be granted. The Officer's decision relies on unjustified plausibility findings that are not supported in the evidence

and which do not meet the standards for such analysis set out in a consistent line of cases from the Court.

I. Background

[3] The Applicant is a citizen of Pakistan who was born and lived in Dubai in the United Arab Emirates (UAE) until March 2017. He identifies as gay, and had a relationship with a man in Dubai, but his partner's father discovered their relationship and threatened to report the Applicant to the police and to have him and his family deported if he did not leave the UAE. He fled to Pakistan.

[4] In Pakistan, the Applicant began a relationship with a man, and they were found together in September 2017, at a guesthouse where the Applicant was living. The manager reported this to the police, who arrested and detained the Applicant. He says the police released him only after a friend paid a bribe.

[5] The Applicant then went to the United States, and from there he came to Canada. He claimed refugee status, claiming that he faced a personalized risk of persecution, as well as a risk to his life and security if returned to Pakistan because he was previously arrested and jailed for being gay. The RPD dismissed his claim, due to issues with his credibility and because he failed to establish his identity as a gay man.

[6] The RPD found five elements of the Applicant's narrative undermined his credibility:

- A. **Discovery at the Guesthouse:** the RPD questioned the Applicant's explanation about how he and his partner were caught:

The claimant testified that they put the TV volume on high so they would not be heard having sex. Having the TV on at a high volume may have prevented someone from overhearing them, but it left them vulnerable of not hearing someone entering the room, as staff have a master key... In addition, since it was only a few months earlier that the claimant had been discovered having sex with his male partner in Dubai, I find it reasonable to expect that the claimant would have taken extra precautions to avoid being discovered again; for example, blocking the door with furniture and listening for anyone passing by (RPD Decision at p. 4).

- B. **Remaining at the Guesthouse after being discovered:** the Applicant said that he and his partner did not immediately leave the guesthouse because they did not think the staff member who found them would report the incident to the police. The RPD held: "I find that the reasonable thing would have been for the [Applicant] and his partner to leave the premises, instead of simply believing the staff member would not report them. As it is, the police came and arrested the claimant." (RPD Decision at para 13).

- C. **Fleeing through the bathroom window:** the Applicant said that after the police entered the room, his partner said he needed to use the washroom and then escaped through the window. The RPD found: "It is also not credible that the police were so incompetent that they allowed the claimant's partner to go to the bathroom without checking first that he could not escape through the bathroom." (RPD Decision at par 14)

- D. **Remaining in Pakistan:** On this, the RPD found:

I also find it not credible that the [Applicant] went to Pakistan and stayed there for more than six months, until he was caught and arrested for having homosexual relations. He must have known that homosexual activity is illegal in Pakistan. The claimant has had a valid visa for the US since 2013, and presumably, he could have gone to the US directly, instead of going to Pakistan where he knew he would be prosecuted if caught engaging in homosexual activities (RPD Decision at para 12).

E. **The Falsified Police Report:** the Applicant produced a copy of a First Information Report (FIR) that he said was falsified by the police and was given to his brother's friend. He said the police gave the report to the friend to let the Applicant know that they were looking for him. The RPD found the Applicant "gave no reasonable explanation for why" the police would prepare such a report and give it to the brother's friend, in particular because:

...the author of the report incriminated himself... The report indicates that the policeman admits that he was guilty of dereliction of duty because he fell asleep while [guarding the Applicant at the hospital], and thus, allegedly allowed the [Applicant] to escape. It is not credible that the policeman would put himself in a position to be disciplined by his superiors, by creating this report (RPD Decision at para 15).

In addition, the RPD found the FIR carried little weight because it was an emailed copy, not an original, and it referred to the incident occurring on November 6, 2017 whereas the Applicant's evidence was that it happened on September 2, 2017.

[7] The RPD found the Applicant failed to meet his burden to establish his sexual orientation as a gay man, based on the negative credibility findings listed above and because he "did not submit the best evidence he could have to support his sexual identity." (RPD Decision at para

17). The RPD noted that the Applicant did not produce evidence from his current Canadian partner or his sister with whom he lived and whom he said knew about his sexual orientation. The RPD also commented negatively on his failure to file any evidence from his former partners in the UAE or Pakistan. The RPD also found that two photographs the Applicant submitted showing him with his current Canadian partner “do not establish his sexual identity” and gave them little weight. The RPD also assigned no weight to the evidence regarding the 519 Community Centre because of the lack of detail it provided about his participation or membership.

[8] Based on this, the RPD dismissed the Applicant’s refugee claim. The RAD dismissed his appeal because it lacked jurisdiction due to the provisions barring appeals to the RAD by refugee claimants who arrived in Canada via the United States. The Applicant’s case was held in abeyance pending the determination in a separate case challenging that provision (*Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223, leave to appeal to S.C.C. denied, SCC Docket No. 38864). Once that litigation ended, the parties were granted time to file further submissions and this matter was set down for hearing.

II. Issues and Standard of Review

[9] The only issue in this case is whether the RPD decision is reasonable, which in turn involves two questions:

1. did the RPD make unreasonable implausibility findings not supported by the evidence; and

2. was the RPD's treatment of the Applicant's supporting evidence reasonable?

[10] This issue is to be determined by applying the analytical framework for reasonableness review set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov]. Under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [Canada Post] at para 2). The burden is on the Applicant to satisfy the Court "that any shortcomings or flaws relied on... are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33).

III. Analysis

A. *The RPD made unreasonable implausibility findings not supported by the evidence*

[11] The Applicant argues that the RPD's decision is unreasonable because it made several implausibility findings that were not supported by the evidence. He says this is contrary to this Court's jurisprudence, citing *Jele v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 24, *Ansar v Canada (Citizenship and Immigration)*, 2011 FC 1152, and *Gjelaj v Canada (Citizenship and Immigration)*, 2010 FC 37 [Gjelaj]. The Applicant asserts that the RPD erred by failing to provide an evidentiary standard against which the plausibility of his account could be judged, instead basing its findings on speculation about what might have happened (*Gjelaj* at para 4).

[12] In addition, the Applicant contends that the RPD's implausibility findings demonstrates its failure to apply *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression (SOGIE Guidelines)*.

[13] I agree with part of the Applicant's argument on this point. This Court has repeatedly cautioned that plausibility findings must only be made when certain conditions are met. The relevant jurisprudence was recently summarized by Justice Fuhrer in *YZ v Canada (Citizenship and Immigration)*, 2021 FC 232 [YZ], at paragraph 12:

Plausibility findings should only be made in the clearest of cases such as where the alleged facts are 'outside the realm of what reasonably could be expected or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant'... Implausibility determinations demand a more rigorous review than credibility findings which are accorded considerable deference... Absent a reliable and verifiable evidentiary base against which to assess alleged facts, implausibility findings may amount to little more than impermissible unfounded speculation (citations omitted).

[14] In this case, there is no basis in the record supporting the Member's suggestion that it was implausible for the Applicant to have had sex with a man in Pakistan, having locked the door to his private room, without taking extra precautions such as blocking the door with furniture. This is also contrary to the *SOGIE Guidelines*, which state at section 7.5.1: "it may also be plausible that an individual with diverse SOGIE has engaged in activity that might put them at risk in their country of reference."

[15] There is no evidence in the record regarding the length of time between the Applicant and his partner being interrupted and the arrival of the police, or supporting the Member's assertion that it was unreasonable for the Applicant to believe the staff member would not report them. There is no evidence contradicting the Applicant's account of his partner fleeing through the bathroom window, and no evidentiary basis to support the Member's assumption that the police would have checked to make sure that could not happen.

[16] Regarding the Applicant's choice to go to Pakistan rather than the US, the hearing transcript reveals some confusion. It appears the Applicant thought the Member was asking him why he did not go to the US immediately on obtaining his visa in 2013, whereas the Member wanted to know why the Applicant went gone there after being discovered and threatened in the UAE. The RPD did not explain why it questioned the Applicant's evidence that the discovery at the guesthouse and his subsequent arrest and detention constituted a culminating incident that convinced him that he had to flee Pakistan.

[17] In summary, the law is clear that implausibility findings must be grounded in the record, and be supported by a clear reasoning process. In this case, that required the RPD to demonstrate both that it took into account the relevant evidence regarding country conditions (for example, the evidence about the quality and effectiveness of police in Pakistan), and that it was sensitive to the private nature of one's sexual orientation and that it applied the guidance set out in the SOGIE Guidelines (see *Yahaya v Canada (Citizenship and Immigration)*, 2019 FC 1570 at para 15). The RPD's analysis on these points is absent, and thus it is unreasonable.

B. *The RPD's treatment of some of the corroborating evidence is unreasonable*

[18] The Applicant argues that the RPD erred by failing to give due weight to the supporting evidence he produced, including the photographs showing him with his Canadian partner, the 519 Community Centre evidence, as well as the FIR. He also submits that the RPD erred by requiring corroborative evidence to prove his sexual orientation.

[19] I agree with the Respondent that some of the Applicant's arguments on this question amount to simply asking the Court to re-weigh the evidence. It is not the role of a reviewing Court to conduct its own weighing exercise. However, I find that some of the Applicant's points are well founded.

[20] For example, the RPD criticized the Applicant for failing to bring forward the best available evidence to support his claim, pointing to the failure to call his current partner or his sister as witnesses. That is not unreasonable. However, the RPD fails to mention that the Applicant produced sworn affidavits from his brother and his brother's friends, and their evidence supports key elements of his narrative.

[21] In addition, the RPD erred when it stated, "the police report [the FIR] is also suspect" and thus gave it little weight, without making an explicit finding as to its authenticity. The case-law has consistently required an explicit finding that a document is not genuine before a decision maker may determine that it holds little weight (*El Sayed v Canada (Citizenship and Immigration)*, 2021 FC 1246 at para 28; *Mabirizi v Canada (Citizenship and Immigration)*, 2021 FC 1354 at para 19).

[22] I am not persuaded that the RPD's treatment of the photographs or the 519 Community Centre evidence is unreasonable. The assessment of this evidence reflects the RPD's consideration of the probative value of the documents, and my review of the record indicates that the RPD's conclusions were open to it.

IV. Conclusion

[23] For the reasons set out above, the application for judicial review will be granted. The RPD's plausibility findings are not supported by the evidence nor by the type of careful analysis required by the jurisprudence of this Court. As Justice Mosley explained in *Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937 at para 15:

[P]lausibility findings involve a distinct reasoning process from findings of credibility and can be influenced by cultural assumptions or misunderstandings. Therefore, implausibility determinations must be based on clear evidence, as well as a clear rationalization process supporting the Board's inferences, and should refer to relevant evidence which could potentially refute such conclusions.

[24] In this case, the RPD's analysis fell short; instead of the careful contextual analysis that is required, the RPD engaged in speculation – in particular, regarding the motivations and actions of police. This is contrary to the jurisprudence (see *Sanchez v Canada (Citizenship and Immigration)*, 2018 FC 665 and the cases cited therein). This decision was recently followed in *Al Dya v Canada (Citizenship and Immigration)*, 2020 FC 901 (para 29), where Justice McHaffie emphasized the importance of acknowledging that improbable things do happen, which underlines the importance of grounding implausibility findings in the evidence (at para 35). This

same point was also recently made by Justice Norris in *Zaiter v Canada (Citizenship and Immigration)*, 2019 FC 908 at paras 8-9.

[25] The RPD's analysis is unreasonable, and because the analysis was central to its decision, these flaws are sufficiently serious to warrant overturning the decision. The decision will be quashed and the case will be sent back for reconsideration by a different Panel of the RPD.

[26] There is no question of general importance for certification.

JUDGMENT in IMM-2687-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The matter is remitted back to the Refugee Protection Division for reconsideration by a different Panel.
3. There is no question of general importance for certification.

“William F. Pentney”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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