

Federal Court



Cour fédérale

**Date: 20221205**

**Docket: IMM-1047-22**

**Citation: 2022 FC 1674**

**Ottawa, Ontario, December 5, 2022**

**PRESENT: The Honourable Madam Justice Furlanetto**

**BETWEEN:**

**GLADYS WAMBUI MWANIKI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, Gladys Wambui Mwaniki, is a refugee claimant from Kenya who seeks judicial review of a decision [Decision] of the Refugee Appeal Division [RAD] finding that she is 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. The determinative issue before the RAD was credibility.

[2] For the reasons that follow, I find that the Applicant has not raised a reviewable error and that the application should be dismissed.

I. Background

[3] The Applicant is seeking refugee status in Canada on the basis that she will be persecuted in her home country because of her sexual orientation, as she identifies as a lesbian.

[4] The Applicant claims that she was attracted to her own sex early in life, but did not act on these feelings as she was from a conservative family and for fear of Kenya's laws that prohibit same-sex relationships. The Applicant claims to have had a same-sex relationship in her youth and a second longer relationship that began in 2018.

[5] In May 2019, the Applicant was allegedly approached by masked men while she was returning home from work. The men identified themselves as members of the Mungiki, a criminal organization devoted to traditional indigenous African beliefs. The Mungiki members allegedly assaulted the Applicant and told her that they would kill her if she did not pay 300,000 Kenyan Shillings and renounce her relationship with her girlfriend by the next day.

[6] The Applicant reported the incident to the police, but was allegedly informed that several reports had been made with the police about her sexual orientation. The police told the Applicant they would be following up with her to inquire about her sexual activities.

[7] The Applicant fled to her uncle's home, located six hours from her home city. She stayed with her uncle until October 2019 when she received a call from her uncle informing her that two men with machetes had come to his home and inquired about her whereabouts. The Applicant then fled to the home of her friend.

[8] In December 2019, the Applicant allegedly received a phone call from the police officer she had spoken to in May. He informed her that there was a warrant out for her arrest for homosexuality and immoral behaviour. The Applicant left Kenya for Canada and in January 2020 made a refugee claim.

[9] On April 8, 2021, the Refugee Protection Division [RPD] rejected the claim. The determinative issue was credibility. The RPD found the Applicant's testimony about her same-sex relationships to be vague and evasive. The RPD noted various inconsistencies in the Applicant's evidence, including with respect to the May 2019 incident with the Mungiki. The RPD also found that supporting evidence, including a letter from the Applicant's uncle was not genuine.

[10] On January 10, 2022, the RAD rejected the Applicant's appeal. The RAD agreed with the RPD that there were significant credibility concerns arising from the Applicant's evidence. The RAD was unpersuaded by the Applicant's submissions that her psychological state and cultural background affected her testimony about her past relationships.

II. Issues and Standard of Review

[11] The following issues are raised by this application:

- A. Did the RAD err by failing to conduct its own independent analysis?
- B. Did the RAD err in its assessment of the Applicant's testimony relating to her relationships by failing to apply *Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics* [SOGIE] and consider the psychological report?
- C. Did the RAD err in impugning the Applicant's credibility because of her inconsistent accounts of her attack?
- D. Did the RAD err in assessing evidence filed in support of the Applicant's claim?

[12] The Respondent also raises as a concern as to whether some of the Applicant's arguments are properly before the Court. It asserts that arguments that were not raised before the RAD cannot be raised by the Applicant. I will deal with this argument under the analysis of the issues below, as it does not relate to all issues.

[13] As the parties assert, the standard of review of the Decision is that of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov]. None of the situations that would rebut the presumption of reasonableness review for administrative decisions is present: *Vavilov* at paras 16-17.

[14] In conducting a reasonableness review, the Court must determine whether the Decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A reasonable decision, when

read as a whole and taking into account the administrative setting, bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

III. Analysis

A. *Did the RAD err by failing to conduct their own independent analysis?*

[15] The Applicant argues that the RAD did not conduct an independent analysis of the issues, but merely confirmed and relied on the RPD's findings. She argues that the RAD did not express its own findings in a way that would allow the parties to understand where the RAD stands on the key issues and the chain of analysis that led to its determination: *Gomes v Canada (Citizenship and Immigration)*, 2020 FC 506 at para 52.

[16] I do not agree with this criticism of the Decision. While the RAD states its agreement with the RPD, it is clear that an independent analysis and findings were made.

[17] As stated in the RAD's overview and introduction to its analysis:

Based on my review of the evidence and arguments, I find that the RPD did not err in its credibility findings, agree that there are significant credibility concerns arising from the Applicant's evidence, and agree that she has not established that she is a Convention refugee or a person in need of protection.

[...]

In this case, I have reviewed the RPD's decision on a correctness standard, as I find that the RPD was not in an advantageous position regarding the assessment of the Appellant's oral evidence, as I was able to review and clearly understand the recording of the hearing.

[18] With respect to areas of the RPD decision that were not contested by the Applicant before the RAD, the RAD reviews the RPD's findings. However, where the Applicant challenged a finding made by the RPD, the RAD summarizes the challenge made, goes on to conduct its own review of the evidence, and then comes to its own conclusions. The Decision is replete with statements of the RAD's independent findings, prefaced by the phrase "I find that".

[19] This is not a case like *Ajaj v Canada (Citizenship and Immigration)*, 2015 FC 928 at paragraphs 34-35, where the RAD deferred to the RPD's findings and carried out a review of the decision rather than an independent analysis. In this case, it is abundantly clear from the Decision that an independent analysis was conducted and that the RAD came to its own findings based on its own independent review of the evidence. As exemplified by paragraph 16 of the Decision:

[16] Based on my review I find that the RPD did not err in its analysis of her evidence of her alleged same-sex relationships, and that her evidence was vague and lacking in detail, which reduced its credibility. I find that she was unable to give almost any information about her alleged first relationship with Jane. In fact, when asked the name of her first same sex partner, I note that the Appellant paused before providing the name of Jane and was unable to provide her last name. She was vague when asked how old she was when she started the relationship, first stating only that she was a "youth", and then when asked again by the RPD, said that she was 20 years old. This was the extent of the details provided about her relationship with Jane. When asked to tell the panel about her, she only stated that she was just a friend.

[Footnotes omitted]

[20] In my view, the Applicant's argument on this first issue cannot succeed.

B. *Did the RAD err in assessing the Applicant's relationships in light of SOGIE and her psychological report?*

[21] The Applicant further argues that the RAD erred in finding the testimony about her relationships vague. The Applicant asserts that under SOGIE, the RAD ought to have considered whether there were cultural, psychological, or other barriers affecting her testimony and should have considered her psychological assessment.

[22] SOGIE provides the following guidance on vagueness at paragraph 7.6.1:

7.6.1 Testimony about same-sex relationships that is vague and lacking in detail may support a negative credibility inference; however, members should examine whether there are cultural, psychological or other barriers that may explain the manner in which the testimony is delivered. When making a vagueness finding in a case involving a SOGIESC individual, a member must, as in other cases, provide specific reasons to support a finding that the testimony is not comprehensive or fulsome

[23] In the Decision, the RAD expressly acknowledges the Applicant's argument that cultural factors may have impeded her ability to testify about her same-sex relationships. The RAD considers the Applicant's conservative family background and notes that "Guideline 9 reminds members to consider whether cultural or psychological barriers may explain testimony about same-sex relationships that is vague and lacking in detail." However, the RAD finds that the questions asked were not sensitive or intimate in nature, but rather related to basic personal information about the name and hobbies of the Applicant's partners and what the Applicant liked about those partners. I do not find this analysis unreasonable.

[24] As noted by the Respondent, although SOGIE instructs the RAD to be sensitive in evaluating an applicant's evidence, it does not provide a cure for all deficiencies.

[25] While the Applicant asserts the RAD erred in its characterization of the questions as not being sensitive or intimate in nature, in my view it was open to the RAD to characterize the evidence in this manner in view of the nature of the questions asked. Further, by referring to "Guideline 9", the reasons expressly indicate that the RAD considered SOGIE.

[26] Similarly, I do not agree that the RAD erred in failing to give more weight to the psychotherapy assessment of the Applicant when evaluating the Applicant's testimony.

[27] The RAD considered the psychotherapist's report but gave it limited weight as it was based on a one-time assessment and was not carried out by the Applicant's treating therapist. As noted by the RAD, the report stated that the Applicant was "fully-oriented" and "alert", that she "showed no abnormality in her thought process", and that her thoughts were clear. The RAD reasonably found that these observations diminished any claim that the Applicant's mental state affected her ability to provide details about her claimed relationships. While the report stated that the Applicant had severe scores on a depression index, the RAD noted this was based on self-reported figures. As reasonably highlighted by the RAD, the Applicant did not request accommodation or request to be deemed a vulnerable person under the RPD's procedures.



[28] In my view, the Applicant has not demonstrated that the RAD did not consider SOGIE or the Applicant's psychological report or that the RAD was not live to the cultural and psychological factors at play when arriving at its conclusions.

C. *Did the RAD err in impugning the Applicant's credibility because of her inconsistent accounts of her attack?*

[29] I am also not persuaded that the RAD erred by impugning the Applicant's credibility because of her inconsistent accounts of the attack.

[30] As noted by the RAD, the Applicant did not challenge these credibility findings made by the RPD before the RAD. While the RAD did not need to comment further on this evidence in the absence of an argument by the Applicant, I do not consider it fatal that they went on to do so; nor do I consider the RAD's analysis to be erroneous.

[31] As noted by the RAD, the attack by the Mungiki was central to the Applicant's claim. In the Applicant's narrative, she testified that four men from the Mungiki sect attacked her; however, in testimony before the RPD, the Applicant stated twice that it was two men. When asked if she could explain the inconsistency, the Applicant denied having said that it was two men and stated "I said four".

[32] Similarly, as explained by the RAD, the Applicant showed extreme inconsistency in her testimony and in statements made for her psychological assessment regarding whether or not she had received injuries from the attack. In her testimony, she stated she had no injuries, but later said that she was unconscious and had not received any treatment. The psychological

assessment stated that the Applicant was bleeding from the attack, had broken teeth, but no head injury, and was treated for her injuries in the hospital. Her proposed explanation that she had confused the incident with another occasion when she was attacked by criminals did not follow from other statements made in the report.

[33] The Applicant argues that the RAD failed to consider that the inconsistencies in the testimony were due to the Applicant's mental state and nerves at the hearing. However, this argument was not raised before the RAD.

[34] The RAD is to review decisions of the RPD on a correctness standard: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 78. This does not mean that RAD appeals constitute *de novo* hearings. The RAD cannot be faulted on judicial review for not having considered or addressed arguments not raised before it: *Cruz v Canada (Citizenship and Immigration)*, 2020 FC 22 at paras 30-32.

[35] Further, in my view it was open for the RAD to find that the inconsistencies were critical to the Applicant's credibility in view of their connection to the central incident of the claim.

[36] I see no error in the RAD's consideration of the evidence or in its affirmation of the RPD's finding, particularly in view of the arguments raised before it.

D. *Did the RAD err in assessing evidence supporting the Applicant's claim?*

[37] Similarly, I see no error in the RAD's assessment of the evidence supporting the Applicant's claim.

[38] The RAD notes that the RPD found that the letter from the Applicant's uncle was not genuine due to a discrepancy between the birthdate listed on the back of the identity card provided with the letter and the date of birth listed on the front of the card. The Applicant could not provide an explanation for the inconsistency and therefore the RPD found that the letter was not genuine and made a negative credibility finding.

[39] As noted by the RAD, the Applicant did not challenge this finding and as such, the RAD found no basis to conclude that the RPD erred. I see no error in this analysis. Nor was there any basis on the arguments raised before the RAD for the RAD to go on to consider the content of the evidence.

[40] I similarly do not find there to be any error in the RAD's comments on the remainder of the evidence, which merely notes that the findings made by the RPD were not contested on appeal and affirms the RAD's agreement with those findings. The RAD was not obliged to do more, particularly in view of the arguments raised.

[41] In my view, the Applicant has failed to identify a reviewable error in the RAD's analysis.

[42] For all of these reasons, the application is dismissed.

[43] No question for certification was raised by the parties and I agree, none arises in this case.

**JUDGMENT IN IMM-1047-22**

**THIS COURT'S JUDGMENT is that**

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

"Angela Furlanetto"

---

Judge

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

**DOCKET:** IMM-1047-22

**STYLE OF CAUSE:** GLADYS WAMBUI MWANIKI v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HEARD BY VIDEOCONFERENCE

**DATE OF HEARING:** NOVEMBER 28, 2022

**JUDGMENT AND REASONS:** FURLANETTO J.

**DATED:** DECEMBER 5, 2022

**APPEARANCES:**

Alexander Fomcenco FOR THE APPLICANT

Allison Grandish FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Fomcenco Law FOR THE APPLICANT  
Barristers and Solicitors  
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT  
Toronto, Ontario