

Federal Court



Cour fédérale

Date: 20230426

Docket: IMM-5634-22

Citation: 2023 FC 609

Ottawa, Ontario, April 26, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

DAMARIS WANGARI BURUGU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Damaris Wangari Burugu, seeks judicial review of the decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada which confirmed the decision of the Refugee Protection Division [RPD] and found that the Applicant is not a Convention refugee or person in need of protection under s 96 or s 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA].

Background

[2] The Applicant is a citizen of Kenya. She claims that she fears persecution by the Mungiki gang, the Kenyan authorities, and the public at large due to her bisexuality.

[3] More specifically, she claims that she was caught kissing J, a woman with whom she was in a long-term relationship, at a bar. As a result of this incident, her community became aware of her sexual orientation. She alleges that she began receiving threats from a man who was part of the Mungiki gang, who threatened to kill her and her family members. The Applicant left Kenya on January 13, 2021, for Canada, where she made her refugee claim.

[4] The RPD refused the Applicant's claim; the determinative issue was credibility. The Applicant appealed to the RAD. The RAD refused to accept her new evidence and dismissed her appeal. The RAD stated that it had conducted an independent assessment of all of the evidence, including the Applicant's record in its entirety and the oral testimony. The RAD concluded that the Applicant was not credible, based on five inconsistencies and contradictions in her evidence, and that her remaining evidence did not overcome its credibility concerns. The RAD also found that the Applicant had not established a *sur place* claim.

Issues and Standard of Review

[5] The parties agree on the issues, which can be framed as follows:

- i. Did the RAD reasonably refuse to accept the Applicant's evidence submitted on appeal;

- ii. Were the RAD's credibility findings reasonable; and
- iii. Did the RAD err in its *sur place* claim assessment?

[6] The parties submit, and I agree, that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 23 and 25). On judicial review, the Court “asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99).

The RAD Reasonably Refused to Admit the New Evidence

[7] On appeal to the RAD, the Applicant sought to submit her own personal affidavit, a letter from her alleged current same-sex partner [A] in Canada, which was accompanied by A's identity card.

[8] The RAD noted, pursuant to s 110(4) of the *IRPA*, that it could only accept new evidence if: (a) it arose after the RPD decision; (b) it was not reasonably available at the time of the decision; or (c) the Applicant could not reasonably have been expected, in the circumstances, to have brought the evidence to the RPD before its decision. And, even if the evidence met one or more of those requirements, the Federal Court of Appeal's decisions in *Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 [Singh] and *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 required the RAD to additionally then decide if the evidence is new, credible and relevant.

[9] The RAD noted that the Applicant's new affidavit stated that she and A have been together for more than a year but they became closer and began a relationship in December 2021. A's letter indicated that she ended a relationship with her previous partner in December 2021 and began a relationship with the Applicant that same month. The RAD noted that while the affidavit and letter both postdated the RPD's January 4, 2022 decision, they also both indicated that the relationship began in December 2021, which was before the RPD made its decision. The RAD acknowledged the written submission of the Applicant's counsel that "the letter could not be expected to have been provided earlier because the Appellant's same-sex relationship was at a very incipient stage when the RPD was deliberating and deciding the claim" and that "the partner was not likely to be persuaded to issue such a letter during the very first days of the relationship". The RAD rejected this explanation because it did not explain why the Applicant herself could not have submitted her own personal affidavit to the RPD indicating that she was then in a relationship with A.

[10] The RAD also noted that in her affidavit, which the Applicant sought to submit as new evidence, the Applicant herself did not explain why she did not obtain a letter from A before the RPD made its decision. The RAD found that her counsel's submission on this point was just that, a submission; it was not evidence. The Applicant had made only the vague statement that her partner "was persuaded to issue the support letter only now that our relationship is more consolidated" but did not indicate that the Applicant had tried but was unable to obtain such a letter before the RPD issued its decision. The RAD found that the Applicant had not demonstrated that the affidavit and letter were not reasonably available at the time of the RPD

decision or that the Applicant could not have been expected to bring this evidence before the RPD. The RAD therefore rejected the new evidence.

[11] On judicial review, the Applicant argues that the RAD failed to give due consideration to her explanations regarding the new evidence and erred by refusing to admit it. She asserts that her explanation was not vague and that A's letter also explained why it was not provided sooner. Counsel submits that "the Applicant should not have been expected to present evidence regarding a relationship in which she was unsure existed". Further, that the RAD erred by unreasonably assuming that the Applicant should have anticipated all specific findings and assessments by the RPD prior to the reasons being rendered and "while the Applicant, as any Applicant may introduce hundreds of documents in anticipation of what an unknown Board member with an undisclosed list of concerns and specific issues may consider significant, this is especially unintelligible given that credibility is ubiquitous and often credibility concerns arise only after questioning and neither counsel nor the claimant would know what the Board member considers to be a reasonable explanation or not. That is why new evidence to address credibility concerns is indeed acceptable".

[12] First, I agree with the Respondent that while Applicant argues she reasonably explained why she did not submit A's letter to the RPD, namely, because it was too early in their relationship to ask A to provide such a document, this does not respond to the RAD's finding that the Applicant failed to reasonably explain why she herself could not have provided her own affidavit explaining the situation and informing the RPD about the relationship – even if it was in its infancy – before the decision was rendered. Further, and contrary to the Applicant's

submissions, in her letter, A does not confirm that she had declined to provide a letter of support before the RPD made its decision. She merely confirms that the relationship began in December 2021.

[13] In my view, the RAD did not fail to consider the Applicant's explanation for why she did not submit the proposed new evidence to the RPD. Further, based on the limited content of her affidavit and A's letter, the RAD's finding that the Applicant's explanation was vague is not unreasonable.

[14] Second, as to the Applicant's submissions, which seem to suggest that she could not have known that credibility was at issue before the RPD, these are of no merit. Credibility is always at issue at a refugee hearing [*Benavides v Canada (Citizenship and Immigration)*, 2021 FC 43 at para 55; *El Haddad v Canada (Citizenship and Immigration)*, 2020 FC 487 at para 24; *Santillan v Canada (Citizenship and Immigration)*, 2011 FC 1297 at para 26]. The central issue in the Applicant's claim is that she is bisexual and at risk in Kenya because of this. The RPD reasonably expected the Applicant to meet her burden of providing sufficient evidence to establish that she is bisexual – the sole basis upon which she claimed to be at risk. To the extent that the Applicant argues she could not have anticipated the RPD's adverse credibility findings prior to its decision and, on this basis, the RAD should have accepted her new evidence, I do not agree.

[15] The onus was on the Applicant to put forward her best case before the RPD and to present all evidence that was available to her. It is difficult to see how, in her circumstances, the

Applicant could have failed to anticipate that if she did not adequately support her claim of being bisexual that an adverse credibility finding by the RPD could follow. And, as the Respondent submits, an appeal before the RAD is not an opportunity to remedy evidentiary deficiencies (*Digaf v Canada (Citizenship and Immigration)*, 2019 FC 1255 at paras 25-26; *Abdullahi v Canada (Citizenship and Immigration)*, 2016 FC 260 at paras 13-15).

[16] Finally, to the extent that the Applicant is suggesting that the RAD was required to admit the evidence because it did not question its credibility, this fails to appreciate that the test for admission of proposed new evidence is determined, as the RAD found, by s 110(4) of the *IRPA*. If that test is not met, then the RAD need not go further and consider whether or not the evidence is also credible and relevant (see *Figueroa v Canada (Citizenship and Immigration)*, 2016 FC 521 at paras 39-45).

[17] In sum, the RAD did not err in refusing to admit the new evidence.

The RAD's Credibility Findings

[18] The Applicant submits that the RPD, "by focusing on some minor differences between the Applicant's narrative and her testimony, found some discrepancies in the Applicant's testimony throughout its written decision". Further, that the RAD, in concurring with the RPD's analysis, determined that the alleged discrepancies were central, rather than peripheral, thus drawing its negative credibility inferences. However, when faced with these discrepancies, the Applicant provided reasonable explanations and it is not clear why the RAD did not accept her

reasonable explanations, particularly in light of the psychotherapy assessment establishing that she suffers from post-traumatic stress disorder [PTSD].

Analysis

[19] As held by Justice Gascon in *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*], credibility findings of the RPD (or in this case the RAD) are to be afforded deference:

[15] This deferential approach is particularly required when, as in this case, the impugned findings relate to the credibility and plausibility of a refugee claimant's story. It is well established that RPD's conclusions in that regard command a high degree of judicial deference upon judicial review, considering the role of trier of fact conferred to the administrative tribunal (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at paras 59, 89; *Lawal v Canada (Citizenship and Immigration)*, 2015 FC 155 at para 9). Credibility findings go to the very core of the RPD's expertise and have indeed been described as the "heartland" of the RPD's jurisdiction (*Siad v Canada (Secretary of State)*, [1997] 1 FC 608 (FCA) at para 24; *Gomez Florez* at para 19; *Soorasingam* at para 16; *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 [*Lubana*] at paras 7-8). The RPD is better placed to assess the credibility of a refugee claimant as the panel members see the witness at the hearing, observe the witness's demeanour and hear his or her testimony. The panel members thus have the opportunity and ability to assess the witness in respect of frankness, readiness to answer, coherence and consistency of oral testimony before them (*Navaratnam v Canada (Citizenship and Immigration)*, 2011 FC 856 at para 23). In addition, the RPD benefits from the specialized knowledge of its members to assess evidence relating to facts stemming from their field of expertise (*El-Khatib v Canada (Citizenship and Immigration)*, 2016 FC 471 at para 6).

(see also: *Pham v Canada (Citizenship and Immigration)*, 2023 FC 470 at para 19; *Nguyen v Canada (Citizenship and Immigration)*, 2023 FC 251 at para 26.)

[20] The RAD addressed five inconsistencies in the Applicant's evidence which the RAD found to pertain to material aspects of her claim. Because the Applicant continues to rely heavily on the psychoanalyst's assessment to explain the inconsistencies identified in her evidence, I will address that issue first.

i. Psychotherapist's Assessment Report

[21] The RPD noted that the Applicant testified that she had told the psychotherapist about what had happened to her in Kenya but that the version of events recorded by the psychotherapist in the report were inconsistent with the events as set out in the Applicant's narrative and in her testimony. The RPD identified five such discrepancies and found that they went to central events of the Applicant's claim and that her explanations for the discrepancies were not satisfactory. The RPD considered the submission made by the Applicant's counsel that the purpose of the psychotherapy report was not to corroborate the Applicant's allegations but to alert the RPD to her mental health challenges. The RPD acknowledged that the primary purpose of the report was to assess the Applicant's mental health condition and its possible impact on her testimony, but stated that it could not ignore the many inconsistencies that the Applicant appeared to have reported to the psychotherapist. Based on this, the RPD drew another negative credibility inference with respect to the alleged events that transpired in Kenya.

[22] The RAD agreed with the RPD that the Applicant had not adequately explained the discrepancies and that this further undermined her credibility. The RAD found that the Applicant submitted the report in support of her claim. As such, even though its primary purpose was to provide insight into the psychological condition of the Applicant, if she knew the report to

contain information that conflicted with her own understanding of events, she could be expected to have this corrected or to have brought the errors to the attention of the RPD before being confronted with them at the hearing.

[23] The RAD also addressed the Applicant's argument that the RPD erred in assessing her credibility in view of the Chairperson's Guidelines 8 and 9. However, the Applicant has not raised the application of the Chairperson's Guidelines as an issue in this judicial review so it is not necessary to address that point. The RAD stated that it conducted its own independent assessment of the psychotherapist's report and did not agree with the Applicant's submission that it "Offers invaluable insight as to why the Appellant's testimony appeared inconsistent and incoherent". Further, that it was the Applicant's burden to establish if any mental or other conditions affected her ability to provide testimony; it was not the role of the decision maker to speculate about this.

[24] The RAD accepted that the Applicant exhibited or is exhibiting the symptoms described by the psychotherapist but did not find that the report was probative in establishing the facts alleged – the Applicant's sexual orientation or the incidents she alleges to have experienced in Kenya. And, importantly, while the psychotherapist's report listed several symptoms, it did not indicate that the Applicant suffers from any appreciable memory or cognitive problems. The RAD found that the psychotherapist's report did not serve to explain the significant and pervasive difficulties in the Applicant's testimony and evidence, including with respect to the core issue of her sexual orientation.

[25] In her submissions in support of this judicial review, the Applicant asserts that to further impugn her credibility, the RAD displayed a zeal to find contradictions between her evidence and the psychotherapist's report. And that "where the Applicant is suffering from cognitive problems and memory issues, it is quite reasonable for her to give some inconsistent information before a psychotherapist and the RAD, at the very least should have turned its mind to this issue". Further, that the RAD lost sight of the purpose of the psychotherapist's report. And, while acknowledging the PTSD findings, the RAD did not properly consider the potential impact of the findings on the Applicant's defective testimony. According to the Applicant, the report explains why she could not remember specific dates and had difficulties remembering certain timelines and that the report "clearly demonstrates that she has more likely been suffering from **cognitive and memory problems** after the traumatizing incidents she suffered in Kenya" (emphasis original). The Applicant submits that her credibility should not be impugned based on what is effectively minor/peripheral discrepancies between her evidence and oral testimony given her mental health.

[26] The Respondent submits that, contrary to the Applicant's argument, the RAD did not display unwarranted "zeal" to find contradictions between the psychotherapist's assessment and her evidence. Rather, the Applicant was unable to provide adequate explanations for her inconsistent evidence. As to the Applicant's efforts explain the deficiencies in her evidence by relying on the psychotherapist's assessment, the Respondent submits that the assessment does not appear to diagnose the Applicant with PTSD; rather, it found she "demonstrates the symptoms associated with PTSD". Further, the RAD explicitly acknowledged the list of

symptoms provided in the report, however, it reasonably noted the report did not indicate the Applicant suffers from any appreciable memory or cognitive problems.

[27] Moreover, the Respondent submits that the report indicated that the Applicant may be subject to a number of symptoms, including avoidance of memories and inability to recall parts of the event, particularly if exposed to high stress situations. However, absent evidence establishing she was suffering from cognitive or memory issues at the time of the hearing, the RAD could not reasonably conclude that any of those issues arose or affected her ability to testify at the RPD. While the RAD accepted the Applicant suffered trauma in her life, it reasonably concluded the report did not serve to explain the significant inconsistencies and difficulties in her testimony and evidence, including with respect to the central aspect of her claim – her sexual orientation. In any event, a psychotherapist report is not a “cure-all” for any and all deficiencies in the Applicant’s testimony.

Analysis

[28] Many significant factual aspects of the Applicant’s version of the events as recorded in the psychotherapist’s report do not, as the RPD and RAD pointed out, align with the Applicant’s claim made to the RPD. For example, the report states that in 2014 the Applicant was involved in a romantic relationship with a woman. One day they were observed when they kissed outdoors. This was reported to the Applicant’s family and to the Mungiki gang who began threatening the Applicant’s mother by text messages. The Applicant and her girlfriend then broke up but reconciled in April 2020. Threats from the Mungiki gang resumed in October 2020. As will be

seen below, this is not consistent with her Basis of Claim [BOC] narrative or her testimony given at the RPD hearing.

[29] It is also of note that the psychotherapy assessment states that the Applicant was referred for psychotherapy assessment by Dr. Aditi Lakhani to investigate the Applicant's symptoms of depression and anxiety disorders as well as PTSD. The referring physician's letter is not found in the record before me.

[30] Further, although the assessment states that the referring physician sent the Applicant to the psychotherapist "to investigate her symptoms", the assessment later states that the Applicant was "diagnosed with the symptoms" of PTSD as well as depression and anxiety and later still states that the Applicant was referred for assessment "following her physician's diagnosis of Depression and Anxiety Disorders, as well as PTSD" and that the assessment "supports her physician's diagnoses and reveals her to be a vulnerable person in need of help". In my view, this conflicting reporting, in the absence of the referring letter from Dr. Lakhani, fails to establish that a physician diagnosed the Applicant with PTSD or Depression and Anxiety Disorders. Nor did the psychotherapist make that diagnosis.

[31] The assessment then describes the testing conducted and the Applicant's self-reported symptoms. Having done so, the report states, "it is apparent that Ms. Burugu *may also* experience side effects and symptoms of Depression Disorder including, but not limited to, feelings of inadequacy, worthlessness, self-loathing, trouble with memory and decisions, fatigue, irritability, hopelessness, troubles with sleep patterns and consequences that ensure lack of

adequate sleep. These symptoms may intensify if she is exposed to additional emotional stress”.

The assessment discusses the Applicant’s “symptoms associated with” PTSD and then states “The patient *may also* be subject to side effects and symptoms of PTSD such as flashbacks, dissociative reactions, distressing memories of the trauma, avoidance of memories, thought and feelings associated with the event, inability to recall parts of the event, distortion of thoughts about the trauma, especially when and if exposed to high stress and other triggering objects of events”.

[32] The assessment concludes that the Applicant feels threatened and petrified by the thought of returning to Kenya, as she faced “numerous psycho-social problems there that caused her significant psychological disturbance” and that it was apparent that if forced to return to Kenya, “the patient’s symptoms and level of distress can get adversely affected”. It recommended ten sessions of cognitive behavioural psychotherapy.

[33] Having reviewed the psychotherapy assessment, I see little to support the Applicant’s claim that it clearly demonstrates that she suffers from “cognitive problems and memory issues” reasonably explaining her inconsistent evidence, and, therefore, that the RAD erred in failing to appreciate her particular circumstances, including her psychological condition.

[34] Rather, the RAD considered the assessment and reasonably did not agree with the Applicant’s submission that it offers valuable insight as to why her testimony appeared inconsistent and incoherent. Indeed, as noted by the RAD, the behavioural observation portion of the assessment states that the Applicant did not show “indications of any abnormalities in the

thought process; her thought content was clear and organized”. And, while her mood appeared anxious and apprehensive, the Applicant “was still able to remain focused and responded in a rational manner to all questions”. The report makes no finding that the Applicant suffers from memory problems nor does it suggest that resultant accommodations should be made during her testimony.

[35] Thus, this is not a situation like *Gurses v Canada (Citizenship and Immigration)*, 2021 FC 83, relied upon by the Applicant. There the RAD acknowledged a psychiatric report and agreed with its diagnosis of severe and chronic PTSD resulting in a variety of symptoms, including memory issues, difficulty focusing, and disorganization of memories resulting in an inability to recall dates and chronology of past events but erred by discounting the report. The psychiatrist described the difficulty the applicant had in recalling information, including examples of this, and opined that the applicant’s testimony at his hearing would have to be assessed through the lens of trauma and made several recommendations for accommodations. This Court found that the RAD erred by discounting the psychiatric report and therefore unreasonably failed to consider whether severe and chronic PTSD could account for the gaps and inconsistencies in the applicant’s evidence. Further:

[10] I find it unintelligible that the RAD would accept the psychiatrist’s diagnosis of severe and chronic PTSD, and the resulting symptoms of memory issues, difficulty focusing, and disorganization of memories resulting in an inability to recall dates and chronology of past events, but then essentially reject the psychiatrist’s urging to assess Mr. Gurses’ hearing presentation through the lens of trauma. In particular, I find it unreasonable that the RAD seemed to expect the psychiatrist to anticipate the trajectory of the hearing, including when and how Mr. Gurses’ PTSD might affect his testimony, in addition to the guidance she provided in her report.

[36] In this matter, there is no medical report and no diagnosis. More significantly, the psychotherapist's assessment does not find that the Applicant actually suffers from cognitive impairment that would affect her memory at the hearing, or at all. Accordingly, I do not agree with the Applicant that the RAD failed to have due regard to "the central findings in the objective evidence regarding the function of the Applicant's memory and recollection of events". Unlike *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 393, also relied upon by the Applicant, here there was no "connection between the inconsistencies or omissions identified by the RPD and the cognitive errors referred to in a medical or psychological report" (para 33).

[37] Finally, I would add, as the RAD also pointed out, that the Applicant was represented by counsel at the RPD hearing and there was no indication that any request had been made for accommodation due to her mental health or to designate the Applicant as a vulnerable person. Further, a review of the transcript makes it clear that the RPD was conscious and considerate of the Applicant throughout the hearing.

[38] In my view, the RAD did not err in its treatment of the psychotherapist's assessment and reasonably found that the report did not account for the discrepancies in the Applicant's evidence.

ii. Timeline of relationship with J

[39] The RAD noted that the RPD found that there were inconsistencies between the Applicant's BOC narrative and her testimony about the timeline of her relationship with J, a central aspect of her claim. While the Applicant had not specifically contested that finding on

appeal, the RAD stated that it conducted an independent assessment and agreed with the RPD that the Applicant had not reasonably explained the discrepancies in her evidence. The RAD found that when questioned by the RPD, the Applicant was evasive, did not explain the discrepancies, and later offered a convoluted explanation in which her testimony evolved. The RAD found that these explanations did not address the inconsistencies or offer any substantive explanation for them. These material discrepancies significantly undermined the Applicant's allegation of having been in a same-sex relationship in Kenya. Given that this was the only relationship the Applicant claimed to have been in Kenya, and that the discovery of her relationship with J was alleged to have been the catalyst for the Applicant's departure from Kenya, this significantly undermined her general credibility.

[40] The Applicant submits that she reasonably explained that she was in a long-distance relationship with J from 2014 to 2018, that they decided to take a break in 2018 and reconnected in 2019. The Applicant submits that the RPD's line of questioning and the Applicant's poor ability to express herself caused a discrepancy that in fact does not exist and that her inability to express herself should not impugn the credibility of her testimony.

[41] I note that the Applicant's narrative indicates that she and J began their relationship on the eve of their last day at university, which was in 2014. Shortly thereafter, the two returned to their respective parents and then to different geographic locations to pursue their careers but they agreed to maintain a long-distance relationship. However, this began to die off. In 2017, the Applicant was lonely and went on a date with a former classmate, and as a result of that one-night stand, she became pregnant. She told J what happened and J confessed that she was

now married. The two remained friends after that conversation. J separated from her husband in 2019 and she transferred to the town where the Applicant was living and they reunited. In early August of 2020, they were caught kissing in the washroom of a bar, which ultimately led to the Applicant fleeing Kenya.

[42] The narrative is vague about when the relationship ended, when the Applicant told J about the pregnancy, when J told the Applicant about J's marriage, when J moved to Nakuru and when they rekindled their relationship.

[43] When testifying before the RPD, the Applicant stated that between 2014 and 2018, she and J had never actually met in person, but spoke daily by phone and text message, they talked about their love, getting a place together, their lives, careers and families. She stated that the relationship continued to about 2018. When asked when the dynamic of the relationship started to change, the Applicant replied that it started to change when it was too much for them to be separated for a very long time and J decided to marry another person, which "broke" the Applicant. This would seem to suggest that J's marriage contributed to the break up.

[44] However, when asked, the Applicant testified that J got married in 2018 but they did not talk about it until later on. When asked why not, her answer was that she did not know why J did not tell her about the marriage. However, when asked about the dynamic of relationship after J got married, said she had the one-night stand with a friend leading to her pregnancy in July 2017. And, that in July 2017 there was too much for her to handle and she and J did not talk about their

problems of J moving on and the Applicant being pregnant. They broke up “at this point”, which appears to suggest a break up in 2017.

[45] The RPD noted that in her narrative, the Applicant stated that after she told J about her pregnancy and J confessed to her marriage they remained good friends, however, in her testimony she stated that after they broke up they did not speak for a long time. The Applicant testified that the conversation about J’s marriage and the Applicant’s pregnancy occurred in 2019, and it was after that conversation that they remained good friends. The relationship did not continue after 2018 as she and J decided to take a break. In 2019, the Applicant reached out to J and it was then that she learned about J’s marriage.

[46] Later the RPD asked the Applicant why the psychotherapist’s assessment indicated that it was in April 2020 that the Applicant and J reconciled while her testimony had been that they reconciled when J moved to Nakuru in January 2019 or March 2019. The Applicant said that she and J had talked about getting back together but “had not completely said that we’ll get the relationship back together fully in March, that’s when the decision was fully made in April” of 2020. The RPD noted that J had moved to Nakuru in March 2019 and asked about the status of the relationship between then and April 2020. The Applicant said that they were taking things one step at a time and were not in a hurry. The RPD pointed out that she had previously testified that when J moved to Nakuru in March 2019 they decided to continue the relationship and saw each other frequently, which differed from her current testimony. The Applicant then said that she and J rekindled their relationship in March 2019, and that she should have said they got back together in April 2019, not 2020.

[47] In my view, the Applicant's testimony as to when she and J broke up, when they discussed the pregnancy and the marriage and when they reconciled was not clear, but does not appear to be inconsistent with her narrative, as found by the RPD and RAD. Her narrative suggests a break up in 2017 while her testimony suggests a break up in 2017 or possibly 2018. Otherwise, however, given the vagueness of her narrative, in particular, the absence of dates as to when various events occurred, her testimony about the relationship timeline was not inconsistent with her narrative. Contrary to the RPD's findings, the transcript of the hearing indicates that the Applicant did address what the RPD viewed as inconsistencies and that she did offer explanations. The RAD stated that, upon its independent assessment, it agreed with and adopted the findings of the RPD for the same reasons articulated by the RPD, being that the Applicant had not reasonably explained the irregularities in the evidence. In my view, based on the transcript, the RPD appears to have misapprehended the Applicant's evidence with respect to the existence of irregularities between the narrative and the Applicant's testimony. In turn, the RAD erred by unreasonably adopting the RPD's flawed reasoning, suggesting a lack of an independent analysis. While the RAD could have provided its own analysis and determined that the Applicant's testimony was internally inconsistent or not credible for other specified reasons, it did not do so (*Harerimana v Canada (Citizenship and Immigration)*, 2022 FC 347 at paras 19-20). In other words, the RAD's decision in this regard is not justified, transparent, and intelligible in light of the evidence before it (*Vavilov* at para 99). Accordingly, the RAD erred in its adverse credibility finding arising from the purported inconsistencies between the Applicant's narrative and testimony and in finding that this significantly undermined the Applicant's credibility.

iii. Timing of death threats

[48] The RAD agreed with the RPD that the Applicant's testimony about the threats that she alleged to have led her to flee Kenya were vague and lacking in detail. The Applicant did not specifically contest that finding on appeal, other than in the context of her psychological evidence. The RAD stated that despite being asked numerous questions about the threats, her testimony was consistently vague, for instance, as to when the threats began, what was said, how she responded to them and whether J also received any threats. The RAD found that, as the threats were central to the Applicant's claim, she could be expected to provide adequately detailed testimony in that regard. Her failure to do so undermined her credibility as to why she left Kenya and that the RPD had been correct in its finding. Further, the Applicant's psychological conditions did not explain her failure to provide details pertaining to the threats.

[49] The Applicant submits that before the RPD, she clearly stated that she could not remember the details of the death threats from the Mungiki and that she would let the RPD know if she did remember. The Applicant submits that it is not clear why the RAD did not accept this reasonable explanation "where she supported her personal circumstances and mental state of mind with documentary evidence", namely the psychotherapy report showing she is suffering from PTSD. Moreover, that the RAD failed to take into account the stress of the oral hearing and that it had been quite a while since her arrival in Canada and that the passage of time can impact a person's recollection of an event. She submits that "[a] a refugee going through a traumatic experience is not expected to recall the precise sequence of events or the precise wording of a

threat. This is far beyond the evidentiary burden expected of the Applicant in the circumstances” and that the RAD degraded the credibility assessment to a memory test.

[50] A review of the transcript of the RPD hearing confirms that the RAD did not err in finding that the Applicant’s evidence about the threats was vague.

[51] She testified that she could not remember when she received the first threat because they kept “coming on and on” and that she lost or had to change her phone and SIM card so she did not have a record of the calls or messages. She then was asked if she remembered roughly how long after she was caught kissing J that she began receiving threats. She could not say, but thought around two weeks later. When asked how she responded to the threats, she said she was scared and did not know how to respond. When asked, she testified that she did not know if J had received threats. She testified that she cut communications with J because of the threats and concern with J’s safety and then later testified that she did not know if J received threats because she could not find her. The RPD noted that the Applicant had testified that she had continued to speak with J up until the Applicant had left Nakuru and had to change her phone and asked if during that time she spoke with J about whether she had received any threats. The Applicant testified that “[r]ight now I won’t remember if I do I will sure inform”. She had the same response when asked how long after she was caught kissing J that she moved. When it was pointed out to her that, in her claim, she listed that she was living in Nairobi as of August 2020, the same month she was caught, but now said she could not remember when she went to Nairobi, the Applicant said that she was really trying to remember. The transcript also confirms that the Applicant’s testimony as to threats alleged to have been received by her brother while she stayed

with him Nairobi were vague, being limited to the statement that they were received by phone. Her testimony was similarly vague about threats received when she then stayed with her cousin in Machakos.

[52] I agree with the Respondent that the RAD did not conduct a “memory test” when assessing the Applicant’s credibility. The RAD reviewed the transcript of the RPD’s hearing and agreed with the RPD that the Applicant’s testimony about the threats was vague. The Mungiki threats were a central element of her claim, yet she was unable to provide even basic details about those threats. And, as the Respondent points out, the passage of time is not a reasonable explanation for why she could not remember salient details about the Mungiki threats, as the threats allegedly occurred around August 2020, and the RPD hearing was in November 2021. It was reasonable to expect the Applicant to provide adequate details to support her claim, as the onus was on her to do so. And, as discussed above, the RAD reasonably found that the psychotherapy assessment does not support that that Applicant’s mental health was the reason for her lapses in memory.

[53] Accordingly, the RAD did not err in making this negative credibility finding.

iv. Who in Kenya knew about the Applicant’s bisexuality?

[54] The RAD agreed with the RPD that the Applicant’s evidence contained a material discrepancy as the Applicant had provided internally inconsistent testimony about who in Kenya was aware of her sexual orientation. She initially testified that only her mother, father, brothers and cousin knew, but later testified that many people knew about her sexuality. The RAD stated

that when the RPD asked the Applicant to explain this internal discrepancy, her answer was evasive, indicating that her family members knew but the other group came to know later on. The RAD found that the Applicant had not provided a substantive explanation for the discrepancy, drew a further negative credibility inference and also found that the RPD was correct.

[55] I agree with the Applicant that the RAD erred in its assessment of her evidence. In her BOC narrative, the Applicant explained that while in high school she told another girl that she had romantic feelings for her. The girl was offended and reported the Applicant to the school principal who suspended her for a month. She told her parents about the reason for her suspension. It was not until she met J in her last year of college that she had a romantic relationship with a woman. When they were caught kissing in 2020, people in the bar knew of the incident, including her cousin and his friends who witnessed what happened. Within three days, the Applicant's cousin had told almost everyone who knew the Applicant about the incident.

[56] Before the RPD, the Applicant was asked, at the beginning of the hearing, who in Kenya knew about her sexual orientation. She responded her mother, father, brothers and cousin, no one else. She then was asked about the school incident and confirmed that at that time the school and her parents found out about her sexuality. She also testified that after this incident people treated her differently "most of them were very abusive because of my sexuality and they did not accept me as I am a bisexual lady and was so much abused by most of the ladies and it flawed my self esteem so much". When asked how it impacted her to have to deal with people giving her a

difficult time about her sexual orientation during those years, she said it was a difficult part of her life because she was “abused every now and then by the ladies” she had a lot of fear and she did not accept herself.

[57] When asked how the Mungiki got her phone number, she said she did not know, maybe because it was stated on her social media: “I won’t have a specific – I won’t have a specific platform or a specific – anyone specific who could have given them my number because so many people know about – so many people knew about my sexuality”. The RPD then noted that at the beginning of the hearing the Applicant stated that only her parents, brothers and her cousin knew about her sexuality, she agreed and stated that “this other group came to know later on and when my relationship with J... became public”. When asked how her family had reacted when they heard about the incident in the bar, she said her mother was still disappointed but had mercy for her, her father was already disappointed from the high school incident and did not support her sexual orientation so the incident created a rift between them.

[58] Viewed in whole, the Applicant’s evidence as to who in Kenya knew of her sexual orientation is certainly not crystal clear. However, her explanation when confronted with the apparent discrepancy is generally consistent with her BOC narrative in that a larger group of people came to know of her sexual orientation after the bar incident. While it was open to the RAD to draw a negative credibility finding from the Applicant’s testimony, the difficulty here is that the RAD failed to provide reasons for why it was not satisfied with the Applicant’s explanation for the internal inconsistency, especially given that her explanation is generally consistent with the Applicant’s BOC narrative. Accordingly, the RAD erred in its assessment of

the evidence and its resultant negativity finding as it does not appear to be justified, transparent or intelligible in light of the evidence before it.

v. *Efforts to seek protection*

[59] The RPD noted that the Applicant's narrative made no mention of the October 24, 2021 letter from the Ministry of Interior and Coordination of National Government [Ministry Letter]. When asked about the letter, the Applicant testified that it was from a chief in her area who wrote it "to confirm that me as a bisexual that I – they're willing to be any help for me if I go – if I did go to the authorities because of the stigmatization and I will be imprisoned". When asked how she got the document, she stated that she spoke to her mother to speak to the chief to write the letter. She confirmed that while she was in Kenya, she did not approach any authorities, government offices or departments for help. When asked to explain why the Ministry Letter states that the Applicant filed complaints of death threats by the Mungiki gang in May 2020 while the Applicant had testified that she did not go to the police but that she talked to the chief, she stated that the chief's role was to assist with any community issues which affect the community.

[60] When asked to explain why she had testified that she had not gone to the government for help, given that the Ministry Letter was a government letter, she testified that even if the chief is "part of the government he will advocate and give information based on the community". Asked if she knew why the Ministry Letter would say that she went to report death threats in May 2020 when the Applicant was not caught with J until August 2020, the Applicant stated that she did not, then stated that she thought it was a miscommunication, and she did not know how he made

the mistake. She stated that it could also be she mentioned the wrong date when she was explaining it to her mother. Asked why she went to this chief, she said it was to see if she could get any help and that she could not. She was asked why, when in her BOC narrative she stated that she did not go to the police because of the risks, she felt comfortable going to the chief who is connected with government, she responded that she thought “he would find the best help I could get as a bisexual and I tried my luck if I could – if he could assist in any point that I will not receive any threats but there was – he didn’t have any threats. He – I couldn’t get any – there’s no way he could have helped me to not receive the threats”. Asked why she did not mention the Ministry Letter in her BOC narrative, she testified that she did not remember it at that time.

[61] The RPD was not satisfied with these responses and set out its multiple reasons for this, including that while the Applicant testified that the purpose of obtaining the letter was to confirm that she is a bisexual, nowhere in the letter does it make any reference to her sexual orientation. The RPD found that the inconsistencies and omissions further served to damage her credibility with respect to the allegations about her being caught with J and threatened by the Mungiki.

[62] The RAD agreed with the RPD’s findings and was not satisfied with the Applicant’s explanations. The RAD stated that the Applicant submitted the Ministry Letter in support of her claim and was expected to know its content. If there was a mistake in the chief’s letter, it was expected that she would seek to have it corrected or to bring the error to the attention of the RPD before being confronted with it at her refugee hearing. It was also unclear why the Applicant would request the help of the chief, considering her evidence that she did not report the Mungiki

threats to the authorities because she was concerned that she would be at risk of arrest for same-sex activities. The RAD found that the discrepancies undermined the Applicant's credibility.

[63] The Applicant submits that this is a minor or peripheral inconsistency and should not lead to a negative credibility finding. Other documentary evidence supports the plausibility of the Applicant's evidence, specifically four supporting affidavits. Further, that the RAD engaged in a microscopic examination of the Applicant's narrative to find inconsistencies where there were none, thereby committing a reviewable error.

[64] I do not agree with the Applicant. As the Respondent submits, these were not minor or peripheral inconsistencies. The Ministry Letter provided a date inconsistent with her narrative about when the Applicant was threatened, which is an essential part of her claim. Further, the Applicant claimed she could not report the Mungiki threats to authorities because of the risk that she would be arrested for same-sex activities but also claims to have reported the threats to a government agency. The explanation offered for this inconsistency is unintelligible. I would also note that while the Applicant testified that her mother spoke to the chief, she also testified that she spoke to him – and in either case, it is difficult to see how either she or her mother would have provided May 2020 date for the threats when the incident with J did not occur until August 2020. In my view, given all of the concerns that arose from the Ministry Letter and the Applicant's evidence concerning it, the RAD's finding that the discrepancies further undermined the Applicant's credibility is justified.

vi. *The totality of the evidence*

[65] The Applicant submits that the RAD conducted an insular analysis of the “many incidents” by merely relying on the RPD’s analysis and missed the full picture that the totality of the evidence offered. In this regard, the Applicant refers to the Ministry Letter and four supporting affidavits and submits that the RAD did not impugn any of these documents and unreasonably asserted that they were not sufficient to overcome the significant credibility findings.

[66] First, as discussed above, in its reasons the RAD addressed the Ministry Letter in the context of its consideration of the Applicant’s efforts to seek protection and her credibility. The RAD agreed with the RPD’s findings as to the discrepancies raised by the letter, which included that it indicated that the death threats occurred in May 2020 while the Applicant claimed that she and J were caught together in August 2020. The RAD also separately addressed the Ministry Letter in the context of the Applicant’s remaining evidence. The RAD noted that the RPD also found that the letter does not make reference to the Applicant’s sexual orientation and, therefore, did not serve to corroborate her claim. The RAD agreed with and adopted the reasoning of the RPD and afforded the letter minimal weight in establishing the Applicant’s allegations. I see no error in this approach.

[67] The RAD also addressed the four supporting affidavits, three of which were from the Applicant’s family members and the fourth was from the visa agent who assisted the Applicant in obtaining her Canadian visa. The RAD stated that it had assessed each of these affidavits

independently and, while they referred to the Applicant's sexual orientation and her need to leave Kenya as a result, found that they were not sufficient to overcome its significant credibility concerns. The RAD also addressed the Applicant's submission that the RPD erred by rejecting the affidavits on this basis and also on the basis that the RPD erred by ignoring the affidavits. The RAD stated, based on its independent assessment, that it did not find this to accurately represent the RPD's findings. The RPD could not reject and ignore the affidavits at the same time and had done neither. Instead, the RPD explicitly found that they were insufficient to overcome the credibility concerns the RPD had previously identified. The RAD stated that it found no error in the RPD's reasoning.

[68] The RAD also stated that it had considered all of the Applicant's testimony. While it had identified problems with that testimony, it noted that the Applicant was also able to provide some consistent testimony, however, this, in conjunction with her other evidence, was not sufficient to overcome the credibility concerns and that the RPD's finding in this regard was correct.

[69] In my view, the RAD did assess the affidavits and did not "turn a blind eye" to this evidence or rely on the RPD's analysis in a vacuum as the Applicant asserts. The RAD explained that this affidavit evidence was simply not enough to overcome the credibility concerns that it had identified (*Lawani* at para 24).

[70] The problem here is that, as I have found above, two of the RAD's credibility findings were unreasonable. The Court cannot know whether or not the affidavit evidence would still be insufficient to overcome the remaining reasonable credibility findings and it is not the role of this

Court to reweigh the evidence (*Vavilov* at para 125). Accordingly, the matter must be remitted back to the RAD for redetermination.

Sur Place Claim

[71] Given my finding as to credibility, it is not necessary to address the *sur place* claim.

JUDGMENT IN IMM-5634-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;
2. The decision is set aside and the matter shall be remitted to another officer for redetermination;
3. There shall be no order as to costs; and
4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5634-22

STYLE OF CAUSE: DAMARIS WANGARI BURUGU v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 12, 2023

JUDGMENT AND REASONS: STRICKLAND J.

DATED: APRIL 26, 2023

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