

Federal Court



Cour fédérale

Date: 20230713

Docket: IMM-9319-21

Citation: 2023 FC 956

Ottawa, Ontario, July 13, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

HAMZAH MOHAMMED

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a citizen of Ghana. In March 2018, he made a claim for refugee protection on the basis of his fear of persecution as a bisexual man. In July 2019, the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB) rejected the claim because the applicant had failed to establish his identity as a national of Ghana. After the

applicant produced a recently obtained Ghanaian passport, the Refugee Appeal Division (RAD) of the IRB allowed his appeal and referred the matter back to the RPD for redetermination.

[2] In July 2021, the RPD rejected the applicant's claim again, this time on credibility grounds. The applicant appealed this decision to the RAD.

[3] In a decision dated November 29, 2021, the RAD dismissed the applicant's appeal and confirmed the RPD's determination that the applicant is neither a Convention refugee nor a person in need of protection.

[4] The applicant now applies for judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA)*.

[5] As I explain in the reasons that follow, I am persuaded that the RAD's decision suffers from fundamental flaws that call its overall reasonableness into question. This application must, therefore, be allowed and the matter remitted for redetermination.

II. BACKGROUND

A. *The Applicant's Narrative*

[6] The applicant's claim for refugee protection was based on the following narrative.

[7] The applicant was born in Accra, Ghana, in November 1985. In 2003, when he was 18 years old, the applicant fled to Germany because the brothers of his then girlfriend objected to their sister dating a Muslim man and had threatened to kill him. The applicant travelled to Germany using a fraudulent Burkina Faso passport in the name of Baba Yaro. He then used this passport to make a claim for refugee protection in Germany.

[8] In 2014, with his claim for protection in Germany still unresolved, the applicant decided to move to the Netherlands. While in the Netherlands, the applicant became aware of his sexual attraction to men as well as women. For three months, he was in a romantic and sexual relationship with a man named Tanko. The two broke up when Tanko began seeing another man. This was the applicant's first and (still) only same sex relationship. After his relationship with Tanko ended, the applicant began a one-and-a-half year relationship with a woman in the Netherlands.

[9] The applicant returned to Ghana in February 2017 because he missed his family. Since his former girlfriend had died, the applicant no longer feared her brothers.

[10] After he had settled in Accra, the applicant befriended a gay man named Dan Ofori. According to his Basis of Claim (BOC) narrative, the applicant knew Dan was gay "because of the way he dressed and he had effeminate gestures." When the applicant's father, an influential Imam, learned of this friendship, he confronted the applicant at the latter's home and told him not to associate with Dan. The applicant then disclosed his bisexuality to his father. The applicant was reluctant to do so because his father had been physically abusive towards his

mother and used to beat the applicant as punishment when he was growing up. The applicant was also concerned that his father was an influential member of the community. At the same time, the applicant wanted to educate his father about the freedom he had experienced living in Europe. The applicant's father told him that he did not approve and that this lifestyle is not permitted in the Islamic faith. The two spoke about this, then the applicant's father left.

[11] In May 2017, the applicant was summoned to a meeting of community elders. The applicant's father was also present. The applicant was told that he had adopted a lifestyle they disapproved of and this would not be tolerated. The applicant maintained that he was a grown man and what he did with his life had nothing to do with them. This angered the elders and the applicant left the meeting.

[12] A short time later, youths in the community began threatening the applicant and telling him to leave. Then, on June 10, 2017, the applicant arrived home to find that his apartment had been broken into and vandalized and his pet cat had been killed. As the applicant was discussing what had happened with a neighbour, a group of youths arrived and assaulted the applicant.

[13] The applicant reported these incidents to the police the same day, alleging that he had been attacked for being bisexual.

[14] When the threats against him continued, the applicant returned to the Netherlands in December 2017 using a friend's Dutch passport. The applicant then travelled to Canada using a

fraudulent Dutch passport, arriving here on January 28, 2018. He submitted a claim for refugee protection two months later.

B. *The RPD Decision*

[15] The RPD rejected the applicant's claim because of the cumulative impact of concerns with the credibility of key elements of the applicant's narrative. Specifically:

- The RPD found that the applicant was unable to provide a spontaneous account of the meeting with his father when he allegedly disclosed his sexuality or of the events on June 10, 2017, when his apartment was allegedly vandalized and he was attacked. Instead, the applicant's testimony "closely mirrored" the information in his BOC narrative. The RPD therefore found that the applicant had not provided credible evidence that these events took place.
- The applicant testified that, after the events on June 10, 2017, youths in the community had threatened to kill him but this fact was not mentioned in the BOC narrative. The RPD found that the applicant had embellished his claim in his testimony and that this further undermined his credibility.
- The RPD found that the applicant's delay in leaving Ghana after allegedly being targeted for being bisexual demonstrates a lack of subjective fear and, as such, further diminished the applicant's credibility.
- The RPD found that the applicant gave inconsistent accounts of how he first determined that Tanko was gay. Given that this was the applicant's first and only same sex

relationship, it would have been memorable and the applicant should have been able to keep his story straight. That he did not do so compromised his credibility.

- The RPD found that the applicant did not give a satisfactory explanation for why he did not seek refugee protection when he returned to the Netherlands in late 2017. His conduct was inconsistent with that of someone genuinely fearing persecution in his home country. This further compromised his credibility.
- The RPD found that corroborative evidence provided by the applicant (an extract from a police station diary containing the applicant's report of the June 10, 2017, incident; a medical form issued by the police on June 10, 2017; a statutory declaration from the applicant's neighbour Randall Owusu, who witnessed the June 10th incident; a statutory declaration from the applicant's mother; and a statutory declaration from Dan Ofori) was entitled to little weight. The applicant had shown that he is able to obtain and willing to use fraudulent documents. The RPD found that two documents in particular – the applicant's Ghanaian driver's licence and a Ghanaian driver's licence in the name of Dan Ofori – are likely fraudulent. By submitting such documents, the applicant has demonstrated that he is “an untrustworthy witness.”
- The RPD found that a letter from The 519 dated April 2, 2019, simply confirmed that the applicant had completed a Newcomer Orientation for LGBQ refugee claimants and had attended the program 10 times. It had little probative value in establishing the applicant's sexual identity.

[16] On the basis of the cumulative effect of these credibility concerns, the RPD concluded that the applicant had not presented sufficient credible and trustworthy evidence on which to find that he is a Convention refugee or a person in need of protection. The RPD therefore rejected the applicant's claim.

C. *The Applicant's Appeal to the RAD*

[17] In his appeal to the RAD, the applicant challenged the RPD's determination on six grounds relating to its assessment of his credibility and the probative value of the documentary evidence he provided in support of his claim: (a) the comparison of the applicant's testimony with his BOC narrative; (b) the significance of the applicant's delay in leaving Ghana in 2017; (c) the assessment of the applicant's account of his relationship with his same sex partner in the Netherlands; (d) the failure to consider all of the documentary evidence; (e) the finding that the driver's licences were fraudulent; and (f) the finding that the letter from The 519 had little probative value concerning the applicant's bisexuality.

[18] The applicant also provided as new evidence a statutory declaration from his mother dated August 24, 2021, stating that she had not signed the statutory declaration that the applicant had submitted in support of his claim. The earlier statutory declaration bore a signature by the declarant (allegedly the applicant's mother) despite the fact that the applicant's mother's passport (a copy of which was submitted with the statutory declaration) had the words "Cannot sign" on the signature line. The RPD had relied on this discrepancy in finding that the mother's statutory declaration should be given little weight.

III. DECISION UNDER REVIEW

[19] The RAD first determined that the August 24, 2021, statutory declaration from the applicant's mother was admissible as new evidence. The RAD was satisfied that the evidence arose after the RPD's decision and was relevant to the RPD's assessment of the probative value of the earlier statutory declaration. The RAD also found that the new statutory declaration was credible "on its face" because it was issued by the Superior Court of Judicature in the High Court of Justice, Accra, Ghana.

[20] Turning to the merits of the appeal, the RAD rejected all of the grounds of appeal advanced by the applicant. It concluded that the RPD was correct in its adverse credibility findings. The RAD endorsed the RPD's analysis in support of these findings. It also provided additional reasons of its own for finding that the applicant's account – including the central claim that he is bisexual – is not credible. Despite admitting the more recent statutory declaration from the applicant's mother, the RAD found that it did not overcome the credibility concerns relating to the applicant's account or the frailties of the other corroborative evidence.

[21] The RAD therefore dismissed the appeal and confirmed the RPD's determination that the applicant is neither a Convention refugee nor a person in need of protection.

IV. STANDARD OF REVIEW

[22] The parties agree, as do I, that the substance of the RAD's decision is to be reviewed on a reasonableness standard.

[23] A reasonable decision “is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). For a decision to be reasonable, a reviewing court “must be able to trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived” (*Vavilov* at para 102, internal quotation marks and citation omitted). On the other hand, “where reasons are provided but they fail to provide a transparent and intelligible justification [. . .], the decision will be unreasonable” (*Vavilov* at para 136).

[24] The onus is on the applicant to demonstrate that the RAD’s decision is unreasonable. To set aside a decision on this basis, “the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (*Vavilov* at para 100).

V. ANALYSIS

[25] As I will explain, I am satisfied that the RAD’s decision suffers from three fundamental flaws.

[26] First, among the grounds on which the RAD finds that the applicant’s claim that he is bisexual is not credible is that the absence of evidence of his having experienced feelings of difference, stigma, shame, or harm (apart from the harms alleged in his narrative) “point[s]” to

the applicant “not demonstrating his sexual orientation.” The applicant’s evidence did not “provide any insight of him feeling different because of his sexual orientation or other insight when he realized he was bisexual and how that impacted him.” Similarly, for the RAD, the applicant’s evidence “does not raise any feeling of shame or stigma that is often associated in claims for sexual orientation in countries where being bisexual is illegal and the Muslim faith in Ghana would not support it.” The RAD found that this is “an indicator” that the applicant is not bisexual.

[27] The RAD purports to rest this inference on an application of the Difference, Stigma, Shame, and Harm (DSSH) Model. The RAD states: “When applying the DSSH Model and assessing whether the RPD erred in finding the Appellant had not established his basis of claim, namely that he is bisexual and because of his sexual orientation could face persecution in Ghana, I agree with the RPD that the Appellant has not credibly demonstrated he is bisexual or faces persecution based on his sexual orientation.”

[28] The DSSH Model was not mentioned in the proceedings before the RPD or in the applicant’s appeal to the RAD. The RAD does not explain what it is or how it is to be used. This alone is a serious problem, leaving a fundamental gap in the RAD’s reasoning. As *Vavilov* holds, it is “unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party” (at para 95).

[29] Even assuming for the sake of argument that the DSSH Model is a subject within the institutional expertise of the RAD or is a publicly available policy or guideline that could properly inform the decision maker's work (c.f. *Vavilov* at paras 93 and 94), this does not relieve the RAD of the obligation to explain what the model is and how it was used.

[30] Moreover, to the extent that the DSSH Model can be understood from publicly available sources, it is clear that the RAD has misused it.

[31] To put the issue in context, in May 2017, the IRB adopted *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* to assist decision-making in asylum claims based on these grounds. The purpose of the guideline was "to promote greater understanding of cases involving sexual orientation, gender identity and expression (SOGIE) and the harm individuals face due to their non-conformity with socially accepted SOGIE norms" (at para 1.1). It "addresses the particular challenges individuals with diverse SOGIE may face in presenting their cases before the Immigration and Refugee Board of Canada (IRB) and establishes guiding principles for decision-makers in adjudicating cases involving SOGIE" (*ibid.*). (The guideline was revised in December 2021 to add sex characteristics and make some other changes. All of my references are to the May 2017 version, which is the version that was in effect when the decision under review was made.)

[32] *Chairperson's Guideline 9* shares many of the same goals and advocates many of the same practices as *Guidelines on International Protection No. 9* for refugee protection claims by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) individuals adopted by the

United Nations High Commissioner for Refugees (UNHCR) in October 2012 [online: <https://www.unhcr.org/media/unhcr-guidelines-international-protection-no-9-claims-refugee-status-based-sexual-orientation>]. As the UNHCR guideline states (at para 4), the experiences of LGBTI persons “vary greatly and are strongly influenced by their cultural, economic, family, political, religious and social environment.” A claimant’s background “may impact the way he or she expresses his or her sexual orientation and/or gender identity, or may explain the reasons why he or she does not live openly as LGBTI” (*ibid.*). Consequently, “It is important that decisions on LGBTI refugee claims are not based on superficial understandings of the experiences of LGBTI persons, or on erroneous, culturally inappropriate or stereotypical assumptions” (*ibid.*).

[33] Similarly, the version of IRB *Chairperson’s Guideline 9* in effect at the time of the RAD’s decision stated the following under the heading “Understanding the challenges faced by individuals with diverse SOGIE in establishing their SOGIE”:

3.1 Depending on factors such as race, ethnicity, religion, faith or belief system, age, disability, health status, social class and education, individuals with diverse SOGIE recognize and act on their SOGIE differently. [footnote omitted] An individual’s self-awareness and self-acceptance of their SOGIE may present as a gradual or non-linear process. There is no standard set of criteria that can be relied upon to establish an individual’s identification as an individual with diverse SOGIE.

...

3.3 Many individuals with diverse SOGIE conceal their SOGIE in their country of reference out of mistrust or fear of repercussion by state and non-state actors, or due to previous experiences of stigmatization and violence. These circumstances may manifest themselves as an individual being reluctant to discuss, or having difficulty discussing, their SOGIE with a decision-maker based on a fear or general mistrust of authority figures, particularly where

intolerance or punishment of individuals with diverse SOGIE are sanctioned by state officials in an individual's country of reference.

[34] Likewise, the UNHCR guideline states (at para 62):

Ascertaining the applicant's LGBTI background is essentially an issue of credibility. The assessment of credibility in such cases needs to be undertaken in an individualized and sensitive way. Exploring elements around the applicant's personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant's sexual orientation or gender identity, rather than a focus on sexual practices.

[35] In support of these statements, a footnote to paragraph 62 of the UNHCR guideline cites paragraph 32 of the Summary Report of an Informal Meeting of Experts on Refugee Claims relating to Sexual Orientation and Gender Identity (10 September 2011) convened by the UNHCR, the International Association of Refugee Law Judges and the European Legal Network on Asylum (ELENA) [online: <https://www.refworld.org/docid/4fa910f92.html>]. Citing the work of S Chelvan, a UK barrister, the Summary Report states:

32. There is no fixed template questionnaire or list of questions which can determine an applicant's sexual orientation. However, there are common themes which arise in the majority of claims, i.e. difference, stigma, shame and harm ("DSSH"), which can serve as a useful identity checklist in claims made by LGBTI individuals.

This paragraph then goes on to explain what is meant by each of these terms.

[36] The DSSH Model has not been specifically endorsed or adopted by the IRB. A review of the implementation of the original version of *Chairperson's Guideline 9* published by the IRB in

November 2020 [online: <https://irb.gc.ca/en/transparency/reviews-audit-evaluations/Pages/sogie-guideline-implementation-review.aspx>] observed that some countries (the United Kingdom, New Zealand, Finland, Sweden, and Ireland are mentioned) have adopted this model. The review also notes that the DSSH Model has been endorsed by the UNHCR, as we have just seen. Despite this, the DSSH Model is not mentioned in the December 2021 revision of *Chairperson's Guideline 9*.

[37] The November 2020 review of *Chairperson's Guideline 9* explains that the DSSH Model “helps the claimant provide a detailed narrative and guides decision-makers on sensitive and appropriate ways of assessing credibility in SOGIE-related asylum claims.” More particularly, as described in Moira Dustin and Nuno Ferreira, “Improving SOGI Asylum Adjudication: Putting Persecution Ahead of Identity” (2021), 40 *Refugee Survey Quarterly* 315 at 328-35 [online: <https://doi.org/10.1093/rsq/hdab005>], the model relies on “trigger” questions relating to the claimant’s experiences of difference, stigma, shame, and harm – common themes in the lives of individuals needing protection on SOGIE grounds. The questions, which should be open-ended and non-judgmental, aim to elicit a more detailed narrative from the claimant about these particular experiences in order to shed light on their identity as a person with a diverse SOGIE. Questioning claimants along these lines is fairer to them and more respectful of their dignity than, for example, intrusive questions about their sexual practices. Answers provided to this line of questioning can, in turn, ground credibility assessments that are more sensitive to the specific experiences of particular claimants and that are, as a result, more reliable.

[38] Even so, it is the case that “many SOGI claimants may not feel ‘shame’ or may not have suffered any harm in the past and simply fear future harm” (Dustin and Ferreira at 329).

Consequently, S Chelvan, the UK barrister who first developed the DSSH Model, has recognized that it will not apply to every claimant and that it does not provide a “one-size-fits all recipe equally applicable to all relevant cases” (*ibid.*). Furthermore, Dustin and Ferreira observed that, while the DSSH Model has much to be said for it, “the risk of asylum authorities applying it in a simplistic and damaging way has also materialized” and it “may have the unfortunate effect of narrowing the mind-set of decision-makers” (at 332).

[39] Viewed against this backdrop, the RAD’s reliance on the DSSH Model is clearly erroneous. The applicant was not questioned in accordance with the model about his experiences of difference, shame, stigma, or harm relating to his bisexuality so it is unclear how the model is even relevant. The RAD points to the absence of evidence touching on these matters but this may be due simply to the fact that it was never elicited from the applicant. More fundamentally, the model is not meant to be used as a diagnostic tool or, as the RAD puts it, as an “indicator” of a diverse SOGIE, where the absence of the elements on which it focuses weighs against a claimant’s credibility. In short, there is no foundation for the RAD’s repeated inference that the absence of evidence of experiences of difference, stigma or shame on the applicant’s part undermines his claim to be bisexual. Indeed, the manner in which the RAD purports to use the DSSH Model is contrary to *Chairperson’s Guideline 9*, which counsels that there is “no standard set of criteria that can be relied upon to establish an individual’s identification as an individual with diverse SOGIE” (at para 3.1).

[40] The second fundamental flaw in the RAD's reasoning is its inference that the applicant's account of disclosing his bisexuality to his father and, later, to the meeting of community elders (including his father) is not credible. The RAD does not find the applicant's claim that he disclosed his bisexuality to his father credible because the father's "calm reaction" to learning his son is bisexual "does not follow the expected reaction of a Muslim leader in a country where being bisexual would be illegal." Similarly, the RAD does not find it credible that the applicant's disclosure to the "Muslim leaders" did not elicit "a different reaction, such as a mob attack then and there."

[41] The RAD purports to rest its understanding of how the applicant's father and other community elders would be expected to react to the applicant's disclosure of his bisexuality on "evidence of cultural and country response generally seen in Ghana against homosexuals or bisexuals." However, this inference from general trends in the country to how particular individuals would be expected to act in a given situation is nothing but stereotypical reasoning. The RAD's reliance on these unfounded generalizations about how Muslim men are likely to behave calls into serious question the internal rationality of the decision (*Vavilov* at para 104).

[42] Finally, the RAD does not "find credible" the applicant's evidence that he has not had any other same sex relationships since his alleged relationship with Tanko in the Netherlands in 2014. According to the RAD, the fact that, on his own account, the applicant has had only one same sex relationship "is an indicator that he is not bisexual." The unstated premise behind the RAD's reasoning is that persons who are bisexual are likely to have had more than one same sex

relationship. It hardly seems necessary to point out that there is no support whatsoever for the truth of this premise in the record before the RAD or in the RAD's reasons.

[43] The applicant's claim for protection is not without its difficulties. There may well have been a reasonable basis for the RAD to dismiss the applicant's appeal and uphold the RPD's findings. However, as *Vavilov* holds, "an otherwise reasonable outcome . . . cannot stand if it was reached on an improper basis" (at para 86). The flaws I have identified in the RAD's decision are not minor or peripheral; they are serious and they bear directly on the central issue, the applicant's credibility. They are such as to render the decision as a whole unreasonable.

VI. CONCLUSION

[44] For these reasons, the application for judicial review must be allowed. The decision of the RAD dated November 29, 2021, is set aside and the matter is remitted for redetermination by a different decision maker.

[45] The parties did not propose any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

JUDGMENT IN IMM-9319-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Appeal Division dated November 29, 2021, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

“John Norris”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9319-21

STYLE OF CAUSE: HAMZAH MOHAMMED v THE MINISTER OF
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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 23, 2023

JUDGMENT AND REASONS: NORRIS J.

DATED: JULY 13, 2023

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