

Federal Court



Cour fédérale

Date: 20240130

Docket: IMM-1993-22

Citation: 2024 FC 153

Ottawa, Ontario, January 30, 2024

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

KASHIF MUNIR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Kashif Munir [Applicant], who is a citizen of Pakistan, seeks judicial review of a February 8, 2022 decision of the Immigration and Refugee Board of Canada’s Refugee Appeal Division [RAD], dismissing his appeal and confirming the refusal of his refugee claim [Decision] by the Refugee Protection Division [RPD]. The RAD found the Applicant did not credibly establish that he is bisexual or that he was ever in a same-sex relationship, that he was

threatened in Pakistan because of his sexual orientation, or that he is perceived to be a bisexual in Pakistan. Accordingly, the RAD concluded that the Applicant has not established that he faces a serious possibility of persecution on the basis of his sexual orientation or any other Convention ground, or that, on a balance of probabilities, he faces a risk as defined in section 97 of the *Immigration and Refugee Protection Act, SC 2001, c. 27* [IRPA]. The determinative issue for both the RPD and the RAD was credibility.

[2] The Applicant submits that the RAD's Decision is unreasonable in that:

1. The Panel committed a reviewable error in their credibility assessment of the Applicant's testimony by selectively ignoring country condition evidence directly on point with respect to the cultural norms of sexuality in Pakistan.
2. The Panel committed a reviewable error in their credibility assessment of the Applicant's testimony by failing to consider the objective country evidence regarding his risk of persecution.

[3] The Respondent argues that the RPD member's questions about men in same-sex relationships clearly encompassed both homosexuals and men who have sex with men. Moreover, the Respondent argues that the Applicant's arguments about categories are irrelevant as the Applicant's Basis of Claim [BOC] references his relationships with men without categorization.

[4] For the reasons that follow, the application for judicial review is allowed.

II. Analysis

A. *Standard of Review*

[5] Both parties agree that the standard of review is reasonableness that requires that a reviewing court defer to a decision that is based on “an internally coherent and rational chain of analysis” and be “justified in relation to the facts and law that constrain the decision maker” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 85 and 99). In assessing whether the RAD’s Decision is reasonable, the Court will assess whether the Decision is appropriately justified, transparent and intelligible.

[6] A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker. It is “an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers” (*Vavilov* at para 13).

B. *Credibility*

[7] In the present matter, the determinative issue is credibility. As far as the RPD and the RAD's assessment of the Applicant’s credibility and the evidence is concerned, case law has already determined that the reasonableness standard applies (see *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 13 [*Lawani*]; see also *Huang v Canada (Citizenship and Immigration)*, 2017 FC 762 at 24).

[8] Credibility determinations are part of the fact-finding process, and are afforded significant deference upon review (*Fageir v Canada (Citizenship and Immigration)*, 2021 FC 966 at para 29; *Tran v Canada (Citizenship and Immigration)*, 2021 FC 721 at para 35; *Azenabor v Canada (Citizenship and Immigration)*, 2020 FC 1160 at para 6). Such determinations by the RPD and the RAD demand a high level of judicial deference and should only be overturned “in the clearest of cases” (*Liang v Canada (Citizenship and Immigration)*, 2020 FC 720 at para 12).

[9] Concerning credibility questions, a reviewing court can neither substitute its own view of preferable outcome, nor can it reweigh the evidence and the court must not intervene with the RAD’s Decision, so long as the panel came to a conclusion that is transparent, justifiable, intelligible and within the range of possible acceptable outcomes that are defensible in respect of the facts and the law (*Lawani* at para 16).

[10] This Court has previously held that reviewable errors surrounding a negative finding of credibility should be based on whether the finding was drawn “from a clear evidentiary basis” (*Aliserro v Canada (Citizenship and Immigration)*, 2022 FC 412 [*Aliserro*] at para 30).

C. *Decision Under Review*

[11] The RAD’s conclusions in its section entitled “Inconsistencies in testimony about same sex relationships in Pakistan” rely on the inference that the terms “homosexual”, “same-sex relationships”, or “being engaged in same-sex relations” are synonymous with “men who have sex with men” (MSM).

[12] The RAD stated at para 28 of its Decision that the “RPD's specific query of the [Applicant] was whether the [Applicant] knew any men, other than [NG], who were either homosexual or engaged in same sex relations” and that this query is not about sexual orientation or gender identity but rather whether the Applicant knew “any men who had sex with men, aside from NG”.

[13] The RAD also concluded at para 28 of its Decision that “it is reasonable to expect that when the RPD asked the [Applicant] if he knew any men who had sex with men, aside from NG, that he would indicate that he knew [BZ] and that they had had a relationship. He did not do so, and did not provide a reasonable explanation for this.”

[14] These were significant findings, as the RAD concluded at para 29 of its Decision that the Applicant’s inconsistencies regarding his same-sex relationships were a “material discrepancy” that was not reasonably explained and thus undermined the Applicant’s credibility about having been involved in *any* same-sex relationships in Pakistan. For the reasons mentioned below, the related portions of the RAD’s Decision were not internally rational.

- (1) *The RAD generalized that the RPD’s queries were about MSM without providing a justification for doing so*

[15] The RPD Member never asked whether the Applicant knew any men who had sex with men (albeit, never directly) before 2014. There are no instances in the Transcript where the RPD Member asked the Applicant if he knew “any men who had sex with men.” Rather, the RPD Member did ask the following:

- if the Applicant knew men or boys in Pakistan who had same sex relationships
- if the Applicant knew someone engaged in same sex relationships in Pakistan
- if the Applicant knew anyone in Pakistan who was homosexual or who engaged in same sex relationships
- in response to the Applicant testifying that he first met a person who was homosexual or engaged in same sex relationships, NG, in 2014, how the Applicant learned this person was interested in same sex relationships or had same sex attraction
- how many same sex relationships the Applicant has ever had
- why the Applicant, when asked two times about when he first met someone he had same sex relationships with in Pakistan, testified that this was in 2014
- if the Applicant can explain why he testified that he did not have any other friend with whom he had [same sex] relations [prior to 2014], but his Basis of Claim form indicates otherwise

[16] However, the RAD characterised the RPD’s question about “whether the [Applicant] knew any men, other than NG, who were either homosexual or engaged in same sex relations” as being about whether the Applicant “knew any men who had sex with men prior to meeting NG” (at para 28). The RAD then concluded that the RPD’s inquiry was about whether the Applicant knew any MSM (at para 28). A justification for the RAD’s generalization is not expressly stated nor clearly implied in light of the record (*Vavilov* at para 97; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 61).

- (2) *The RAD described the Applicant’s explanation as “nearly incomprehensible” without engaging with material distinctions made by the Applicant and the Record*

[17] The RAD inferred that the Applicant’s evidence in his BOC, that BZ was a man and the Applicant was in a relationship with him, falls under the category of “same-sex relations”. Thus, when the RPD Member asked the Applicant whether he knew of anyone in Pakistan who was

"homosexual or who engaged in same-sex relationships", the RAD assumed that the Applicant reasonably should have identified BZ (Decision, para 24):

However, in this case, it is the Applicant's evidence that BZ is a man, and that the [Applicant] was in a relationship of several years with him. Regardless of how BZ identifies in terms of his sexual orientation, it is reasonable to expect the [Applicant] to identify BZ and his relationship with BZ when asked by the RPD Member if he knew anyone who "engaged in same-sex relations". Moreover, this does not explain why the [Applicant] later confirmed in his testimony that he never had another relationship in Pakistan except with NG.

[18] However, as the Court noted in the hearing, the Applicant's BOC uses the word "relationships" to describe his past relationships with BZ and NG and does not use the term "same-sex" or "homosexual" to qualify these relationships. The RAD's reasons do not address this distinction, which goes to the heart of the Applicant's explanation as to why he did not identify BZ when the RPD asked:

MEMBER: Okay, excuse me, so earlier today I asked you when you first met someone who had same sex relationships in Pakistan, you testified approximately in 2014, when you were about 35 years old, then I confirmed that I correctly understood this testimony that you had given about first meeting someone who had same sex relationships in Pakistan in 2014, sorry, Mr. Interpreter, and you testified that prior to 2014 you did not know anyone, sir you have to wait for my question. In your Basis of Claim form, I am in paragraph nine, you state that the first relationship that you were in was in 2000 with a man called [BZ], and that you became friends and then that you had a relationship with him for a period of years before he moved to Saudi Arabia, can you tell me when I asked two times about when you first met someone you had same sex relationships in Pakistan, you testified 2014.

(...)

CLAIMANT: I did not understand the question. The question was that when you had a meeting with the same-sex person, so I had a difficulty understanding the question, in 2014, it was the same-sex person or same-sex relationship, the one in 2000 he was not a same-sex guy. He was a man, but I used to have sex with him.

[Our emphasis]

[19] The RAD described the claimant's response as "nearly incomprehensible" and found that it did not constitute a reasonable explanation for the Applicant's inconsistencies in his testimony on same-sex relationships (Decision at paras 23, 28). However, the RAD's conclusion appears to be based on the assumption that "same-sex relations" and "same-sex relationships" are categories that include all non-heterosexual interactions and people in spite of cultural differences or sexual orientation. The RAD's conclusion that the Applicant's response is "nearly incomprehensible" did not engage with material distinctions made by the Applicant and the Record. In its written submissions before the RAD, the Applicant argued that the RPD did not consider the Applicant's "specific evidence on the different sexual preferences within the homosexual community". During the RPD hearing, the Applicant's testimony distinguished between BZ (who was a man he had sex with) and NG (who was a same-sex guy he had sex with). The Applicant cannot be faulted for answering the question that was actually asked of him (when he first had "same-sex relationships") and not the one the RAD incorrectly indicated was asked of him ("if he knew any men who had sex with men, aside from NG" at para 28 of Decision). The RAD's conclusion is based, at least in part, on a mischaracterized question.

[20] Also, it is important to consider whether the RAD's Decision demonstrates a lack of consideration of different cultural frameworks as set out in *Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics*

[Guideline 9]. Section 2.6 of Guideline 9 provides the following:

2.6 There is no standard terminology that adequately captures the diversity within and between the evolving concepts of sexuality, sexual orientation and gender identity and expression across cultures and societies. Terms which are most familiar in a Canadian context are based on a Western framework, and may not

be familiar, or even easily comprehensible, to people from a different cultural framework.

It is not sufficient to merely mention the Guideline, as the RAD did when it stated: “I am mindful of Guideline 9”, without demonstrating its application (*Del Carmen Aguirre Perez v. Canada (Citizenship and Immigration)*, 2019 FC 1269 at para 17).

[21] I agree with the Applicant that they were speaking from a unique cultural framework when discussing their past relationships and that the National Documentary Package (NDP) “for the country of Pakistan that was available to the Panel on the date the negative decision was made notes that there is a difference between men who identify as being homosexual, and [MSM]”. The Applicant has cited, *inter alia*, the following sections in the NDP for Pakistan reproduced below:

National Documentation Package: Pakistan, Item 6.8 at para 5.2.3

5.2.3 DFAT noted in February 2019 ‘While sex between males is common, homosexual identity is not. Strong and widespread cultural, religious and social intolerance of homosexuality means it is not widely discussed or acknowledged in Pakistan.’

National Documentation Package: Pakistan, Item 6.8 at para 5.2.5 and Item 6.1 at section 2.1

5.2.5 The IRB January 2019 report cited sources referring to MSM:

‘AFP reports that, according to the president of NAZ, an LGBT organization in Pakistan, [translation] “90% of Pakistani men are MSM [...] simply because women are not easily accessible”. Without providing further details, the CGRS [Office of the Belgian Commissioner General for Refugees and Stateless Persons] researcher cited in the [2017] EASO meeting report on Pakistan, indicated that “[s]ources stated that it is common for straight men to indulge in Male to Male sex (MSM) and there is general acceptance within [Pakistani] society for this particular act”.’

2.1 Sexual Minorities

AFP reports that, according to the president of NAZ, an LGBT organization in Pakistan, [translation] "90% of Pakistani men are MSM [...] simply because women are not easily accessible" (AFP 29 Oct. 2018). Without providing further details, the CGRS researcher cited in the EASO meeting report on Pakistan, indicated that "[s]ources stated that it is common for straight men to indulge in Male to Male sex (MSM) and there is general acceptance within [Pakistani] society for this particular act" (EU Feb. 2018, 45). For information about MSM in Pakistan, see Response to Information Request PAK104712 of January 2014.

However, AFP reports that homosexuality is [translation] "strictly ignored" (...)

A Pakistani actor, who made an appearance as a crossdresser on a very popular talk show, is cited by AFP as stating the following: [translation] "'[w]e live in a culture of hypocrisy. In Pakistan, you can do whatever you want behind closed doors. ... But if you want to let it be known, there will be no tolerance. You will be persecuted'" (AFP 29 Oct. 2018). A country report on Pakistan by the Department of Foreign Affairs and Trade (DFAT) of Australia similarly states that "[s]ame-sex attracted people are highly constrained by cultural, religious and social intolerance of homosexuality" (Australia 1 Sept. 2017, para. 3.134).

[Our emphasis]

[22] As argued by the Applicant, the RAD's Decision did not consider cultural terminology differences, such as those discussed in the NDP, when it described the Applicant's following response as "nearly incomprehensible":

"I did not understand the question. The question was that when you had a meeting with the same-sex person, so I had a difficulty understanding the question, in 2014, it was the same-sex person, or same-sex relationship, the one is 2000 he was not a same-sex guy. He was a man but I used to have sex with him."

[Our emphasis]

The RAD's Decision iterates that the Applicant should have identified BZ as a person he had a "same-sex relationship" with before meeting NG without addressing the Applicant's distinction between a "same-sex" person and relationship and a MSM.

[23] Another relevant exchange from the RPD hearing is reproduced below:

MEMBER: (...) earlier today, I also asked you how many same sex relationships you have had in your life that you testified that you had a relationship with [NG] for some time, but other than that you do not have any other friends with whom you have had such relations, in your Basis of Claim form at paragraph nine still you stated that you and a man called [BZ] became friends before having a sexual relationship for a period of several years.

INTERPRETER: Before?

MEMBER: Before, so can you explain why you testified that you did not have any other friend with whom you had relations, but your Basis of Claim form indicates otherwise?

(...)

CLAIMANT: So, [NG] is the same as myself, so the [BZ] is the one who gets... who likes to get sex, he doesn't do it like it is not a both way, when you ask someone similar to you or same as you, so that is why I told you [NG] is like the one who is same as me.

MEMBER: Is there anything else you wanted to say?

CLAIMANT: So, my first relationship was with [BZ] in 2000 (...)

[24] Again, the question asked was about "same-sex relationships" and "same-sex relations" and the Applicant's response differentiates a same-sex person (NG and the Applicant) from a man he had sex with (BZ) and explains the difference. However, the RAD conflates MSM and men who are either homosexual or engaged in "same-sex relations". After indicating it is mindful of Guideline 9, the RAD sees discrepancies in the testimony and concludes at para 24:

However, in this case, it is the [Applicant]’s evidence that BZ is a man, and that the [Applicant] was in a relationship of several years with him. Regardless of how BZ identifies in terms of his sexual orientation, it is reasonable to expect the [Applicant] to identify BZ and his relationship with BZ when asked by the RPD Member if he knew anyone who “engaged in same-sex relations”. Moreover, this does not explain why the [Applicant] later confirmed in his testimony that he never had another relationship in Pakistan except with NG. Thus, even if he did not consider BZ to be a “same-sex guy,” his evidence (in his BOC) is that they had a years-long relationship starting in 2000, yet in his testimony he indicated that he had not had any same-sex relationship before meeting NG in 2014.

[25] Again, the RAD’s conclusion at para 24 is materially incorrect. The testimony of the Applicant was that he did not have another same-sex relationship in Pakistan except with NG. The Applicant’s BOC only spoke of relationships with both BZ and NG.

[26] The RAD’s conclusion that the Applicant did not reasonably justify his answers when questioned about whether he knew anyone who was homosexual or anyone that had same-sex relations is flawed. From the documentary evidence available, in Pakistan, someone who is homosexual or has same-sex relations is different from MSM. The RAD was not sensitive to the reality that the Applicant, who is new to Canada, may not be aware that homosexuality is viewed differently here in Canada, and that a person here may well put all the persons mentioned above in the same category. The decision does not reflect that the RAD applied Guideline 9 or considered the relevant information regarding the country conditions in Pakistan that was available to them at the time of its Decision. It is well settled that if a panel makes a finding of fact having misconstrued or ignored relevant evidence before it and relies on those findings when making an adverse determination as to credibility, the decision is unreasonable and warrants

intervention (*Toth v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1133 at para 25).

[27] At the hearing, the Respondent's counsel argued that the real question is whether the different terms used caused a misunderstanding and submitted that the Applicant has not shown that was the case. Upon review of the record, there are instances that show that the Applicant did not ask for further clarification on the term "same-sex relationship" or express confusion as to what the term meant. However, the RAD's Decision does not use these instances to justify its conclusions and it is not appropriate for this Court to do so in its stead. Where even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision (*Vavilov* at para 96).

[28] The identified flaws in the RAD's Decision are not merely superficial or peripheral (*Vavilov* at para 100). They are significant as they bear directly on the central issue of the Applicant's credibility.

[29] For all the above reasons, this Court finds that the RAD's reasons exhibit clear logical fallacies, including false dilemmas and unfounded generalizations (*Vavilov* at para 104), and therefore the RAD's Decision is unreasonable. As a result, it is unnecessary to deal with the other issues raised by the Applicant.

III. Conclusion

[30] In summary, I would conclude that the RAD's Decision was unreasonable because it: (1) generalized that the inquiries at the RPD hearing were about MSM without providing a justification for doing so; and (2) concluded that the Applicant's explanation was "nearly incomprehensible" without engaging with the material distinctions made by the Applicant and the documentary evidence. While I am aware of the significant deference owed to decision makers upon review of their credibility findings, these are reviewable errors surrounding a negative finding of credibility that are not drawn "from a clear evidentiary basis" (*Aliserro* at para 30).

[31] For the reasons set forth above, this Application for judicial review is allowed. The Decision is set aside and the matter is referred back to the RAD for redetermination by a differently constituted panel not previously involved in this matter. No question of general importance for certification was proposed by the parties and I agree that none arises.

JUDGMENT in IMM-1993-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is allowed.
2. The Decision is set aside and the matter is referred back to the Refugee Appeal Division for redetermination by a differently constituted panel not previously involved in this matter.
3. No question of general importance is certified.

"Ekaterina Tsimberis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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