

Federal Court



Cour fédérale

**Date: 20190501**

**Docket: IMM-4862-17**

**Citation: 2019 FC 555**

**Ottawa, Ontario, May 1, 2019**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**VINCENT AZARIAH MCKENZIE  
BENJAMIN NATHANIEL MCKENZIE  
JOSEPH MICHAEL MCKENZIE  
JOSHUA HOSEA MCKENZIE**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Nature of the Matter**

[1] The Applicants, a father and his three minor children, seek judicial review of a decision of the Refugee Appeal Division [RAD] dismissing their appeal of a decision by the Refugee Protection Division [RPD] refusing their claim for refugee protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*].

[2] Mr. McKenzie is the father and principal applicant. His three minor children relied on his narrative to establish their claims. For simplicity and ease of reference, I will refer only to Mr. McKenzie throughout these reasons for judgment on the understanding that his evidence was accepted by both the RPD and the RAD to apply equally to the three minor children. Where appropriate, given the context, references to Mr. McKenzie include references to the three minor applicants.

[3] Mr. McKenzie was the pastor of a rural church in Jamaica. He came to Canada in September 2014 on a visitor's visa which authorized him to stay and work in Canada until September 2017. In November 2015, when he was in Jamaica attending to Church business, Mr. McKenzie felt threatened by a man outside his Church who was screaming in a very intense way. During that same time, Mr. McKenzie learned that his fellow pastor and former intimate partner, Bishop Courtney Manning [Courtney], had been killed when he returned to Jamaica. He felt that was a turning point in his concern about his own safety in Jamaica.

[4] Mr. McKenzie returned to Canada and made a refugee claim in August 2016. His claim was based on his sexual identity as a gay man and his religious views in support of the lesbian, gay, bisexual and transgender [LGBT] community in Jamaica.

## II. **The RAD Decision**

[5] The role of the RAD is to intervene when the RPD is wrong in law, in fact, or in fact and law. The RAD is required to review the decision of the RPD by applying the correctness standard: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 78 [Huruglica].

[6] The Chairperson’s Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression [*SOGIE Guidelines*] was introduced on May 1, 2017 approximately one week before Mr. McKenzie filed his RAD appeal and three days after the RPD decision was released.

[7] The RAD reviewed the *SOGIE Guidelines* and each of the other pieces of new evidence. Only the *SOGIE Guidelines* were admitted into evidence by the RAD. In rejecting all the letters put forward by Mr. McKenzie as new evidence, the RAD found issues of reliability, timeliness or a lack of probative value with respect to each of them.

[8] After reviewing the RPD decision and its reasons and, considering the evidence and submissions put forward by Mr. McKenzie at the RPD and to the RAD, the RAD upheld the RPD’s decision and dismissed the appeal. The RAD specifically found that Mr. McKenzie was “not an LGBT person” and, that no probative evidence had been submitted that would allow the RAD to make a positive determination.

### III. Issues and Standard of Review

[9] Mr. McKenzie alleges the decision is not reasonable because the RAD made two errors:

1. It did not follow the *SOGIE Guidelines*; and
2. It erred in refusing to admit Mr. McKenzie’s new evidence in support of his appeal.

[10] At the hearing of this matter, Mr. McKenzie narrowed his argument concerning the refusal to admit new evidence to two letters. One letter was from Mr. Hugh-Roy Hanson, a

former sexual partner of Mr. McKenzie's. The other letter was from the Manager of Direct Services at the 519 Community Centre in Toronto.

[11] The RAD decision will be assessed for reasonableness with respect to the issues: *Huruglica*, at para 35.

[12] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

[13] If the reasons, when read as a whole, “allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met”: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Nfld Nurses*].

[14] The RAD is not required to consider and comment in its reasons upon every issue raised by the parties. The issue for the reviewing court is whether the decision, when viewed as a whole in the context of the record, is reasonable: *Nfld Nurses* at para 16.

#### IV. **The SOGIE Guidelines**

[15] The stated purpose of the *SOGIE Guidelines* is found at section 1.1:

The purpose of this Guideline is to promote greater understanding of cases involving sexual orientation and gender identity and expression (SOGIE) and the harm individuals may face due to their non-conformity with socially accepted SOGIE norms. This

Guideline 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.

[16] At the time of this judgment, the *SOGIE Guidelines* may be found on the Internet at:

<https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx>

[17] The *SOGIE Guidelines* cover a broad range of topics. Two sections of particular relevance in this matter are section 3 “[u]nderstanding the challenges faced by individuals with diverse SOGIE in establishing their SOGIE” and section 7 “[e]stablishing principles for assessing credibility and evidence pertaining to SOGIE.”

[18] Mr. McKenzie challenges the following three findings of the RAD on the grounds of failure to reasonably apply the *SOGIE Guidelines*:

1. Mr. McKenzie’s failure to list prior sexual partners in his original Basis of Claim form [BOC];
2. Mr. McKenzie provided no documentation to support his stated relationship with Courtney in the period 1994 – 1998; and
3. The absence of Mr. Hugh-Roy Hanson at the RPD hearing undermined his letter of support for Mr. McKenzie.

[19] For the reasons that follow, I have found that the RAD did not reasonably apply the *SOGIE Guidelines*. That failure is sufficient to allow the application and it is not necessary to determine whether the RAD’s refusal to admit the new evidence was reasonable.

A. *Mr. McKenzie's Failure to List Prior Sexual Partners in his Original BOC*

[20] The RPD found that the determinative issue was Mr. McKenzie's lack of credibility which it based on a number of contradictions and omissions in his evidence. The RAD noted that the RPD found that Mr. McKenzie did not refer to any homosexual partners, other than Courtney, in his original BOC.

[21] The original BOC was submitted on August 30, 2016. In it, Mr. McKenzie made reference to one previous sexual partner – Courtney – from 1994 until 1998. He amended the BOC on October 13, 2016 to add Hugh-Roy Hanson's name, whom he described as a friend at whose home he would stay overnight in Jamaica when he was fearful of attack. The BOC was further amended on November 18, 2016 to add the name of another friend – Pierre Zacca – and to add the fact that at times Mr. McKenzie had engaged in intimate relationships with each of these two friends.

[22] The RAD reviewed the explanation given by Mr. McKenzie to the RPD for the amendments to the BOC. Mr. McKenzie in his affidavit on appeal provided several reasons to the RAD for having omitted reference to Mr. Hanson and Mr. Zacca in his original BOC. The reasons included that (1) they were casual sexual relationships that were not significant to his identity as a gay man whereas his relationship with Courtney was a committed and long-term relationship; (2) he was more comfortable including Courtney in the BOC as he was no longer alive to suffer any repercussions from the disclosure; (3) he had repressed his sexual orientation for decades while living in Jamaica and continues to struggle with his identity as a gay man; and (4) a vocal supporter of the LGBT community is very different than being a member of the LGBT community.

[23] The RAD found that the omission by Mr. McKenzie of these two previous sexual partners from his original BOC was significant and that not including that information was not credible. The RAD noted that Mr. McKenzie had allegedly been intimate with these men and had asked Mr. Hanson to provide a letter of support to that effect. It found that asking for the letter “negates his allegations that he was reticent to talk about his sexuality and previous partners.”

[24] The RAD then found that there was no documentation to support Mr. McKenzie’s allegation of a homosexual relationship with a man between 1994 and 1998.

[25] Regarding Mr. McKenzie’s statement that Mr. Hanson and Mr. Zacca were casual same-sex relationships, which were not important, the RAD found that answer not credible:

The basis of his claim is that he is a homosexual man, and it would be credible and reasonable to expect that all relationships related to this issue would be presented in the original documentation.

[26] Mr. McKenzie submits that the RAD did not apply the *SOGIE Guidelines*. He relies on *Enam v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1117 in which Mr. Justice Brown considered the *SOGIE Guidelines* in reviewing a decision of the RAD, even though the guidelines had not been released at the time of the decision. In allowing the application for judicial review, Justice Brown held that the decision under review was not reasonable. Failure to reasonably assess the report of a registered clinical social worker and the failure of the RAD to provide the benefit of the *SOGIE Guidelines* to the applicant were found to be matters of central importance and the RAD decision was set aside.

[27] The Minister distinguishes *Enam* on the basis that the *SOGIE Guidelines* were not applied because they had not been released. Justice Brown did not make such a distinction; at

paragraph 33 he said “the *SOGIE Guidelines*, although not released at the time of the RAD’s decision, require the RPD [*sic*] to be cognizant of the particular issues facing the LGBTQ community.” The *SOGIE Guidelines* were definitely in place when the RAD considered Mr. McKenzie’s appeal.

[28] *Enam* strongly supports the argument that the RAD was required to be cognizant of and benefit from the *SOGIE Guidelines* and a failure to do that is unreasonable.

[29] Mr. McKenzie submits that the RPD and the RAD both focussed on his sexual history. He says that they, in effect, put the onus on him to list every same-sex sexual encounter, no matter how casual they were. The RAD did not address his explanation that he only listed his serious relationship with Courtney and not his casual relationships.

[30] There are three problems with the RAD’s insistence that failure of Mr. McKenzie to list Mr. Hanson and Mr. Zacca as previous same-sex partners in his BOC was a significant omission that affected his credibility.

[31] First, in *Strugar v Canada (Citizenship and Immigration)*, 2013 FC 880, [*Strugar*] Mr. Justice Zinn held that it was unreasonable for the Board to require a lesbian woman who was married to a man to list and name her lovers in her BOC because the form has nothing to do with the identities of her lovers but only with her sexual orientation. Justice Zinn noted that “the mere omission from her PIF of this information is not a reasonable basis to bring her credibility into question”: *Strugar*, at para 7.



[32] I agree. The RAD considered Mr. McKenzie's "omission" to be significant and that by not including it, he was not credible. The RAD decision is unreasonable on this basis alone.

[33] Second, Mr. McKenzie did include Mr. Hanson and Mr. Zacca in his BOC amendments, ten days prior to the RPD hearing.

[34] It has been held that a distinction must be made between an amendment to a PIF to add a different statement than in the original and one that simply provides more details to information already on the record: *Diaz Puentes v Canada (Citizenship and Immigration)*, 2007 FC 1335 at para 17. Following the logic of *Strugar*, the story on the record, as stated by the RAD, was "his claim is that he is a homosexual man." The amendments did not change that story. They simply provided more details. For the RAD to turn the amendments from being the provision of additional detail into an omission is, on the facts of this case and considering *Strugar*, unreasonable.

[35] Third, the RAD did not consider the *SOGIE Guidelines* in the context of Mr. McKenzie's life story and personal profile. In particular, his sworn evidence to the RAD was that he grew up in an extremely homophobic country, he was a prominent religious pastor in his community and he had repressed his sexual orientation for decades while living in Jamaica. He indicated that he continues to struggle with his identity as a gay man.

[36] In terms of the *SOGIE Guidelines*, Mr. McKenzie in his appeal to the RAD submitted that sections 3.1 and 3.7 were relevant in providing context as to why his level of acceptance with his own sexual orientation and, the details of his same-sex activity, were not initially included in his BOC.

[37] Section 3.1 includes the statement that “[t]here is no standard set of criteria that can be relied upon to establish an individual's identification as an individual with diverse SOGIE” and that “[a]n individual's self-awareness and self-acceptance of their SOGIE may present as a gradual or non-linear process.” Mr. McKenzie’s life story and personal profile fit that description but the RAD did not refer to it or analyze how the SOGIE Guidelines apply to Mr. McKenzie.

[38] The RAD acknowledged the two sections of the *SOGIE Guidelines* and said that it “agree[d] with the concept but it finds that its [own] reasons above are compelling in regard to the Appellant not relating his alleged same-sex relationships in his BOC narrative” on the basis that Mr. McKenzie had started the same-sex relationship in 1994 and had continued same-sex relationships in Jamaica prior to May 2014.

[39] The RAD found on a balance of probabilities “that the Appellant, in this case, does not meet the profile of what is suggested in section 3.1 of the *SOGIE Guidelines*.”

[40] With respect, it is unclear what profile the RAD is referring to given that Mr. McKenzie had articulated several profiles in his life story.

[41] Section 3.1 addresses that self-acceptance may be gradual or non-linear. Mr. McKenzie’s affidavit indicated he was having issues with self-acceptance. Section 3.1 also states there is no standard set of criteria to establish an individual’s identification. In the case of Mr. McKenzie, he identifies as a homosexual man. Without a fulsome analysis by the RAD, it is not possible to understand why having a same-sex relationship in 1994 and same-sex relationships prior to May 2014, means Mr. McKenzie does not fit the profile.

[42] Section 3.1 identifies a number of factors which can cause people to act on their sexual orientation differently. Included are factors such as “ethnicity, religion, faith or belief system” all of which apply to Mr. McKenzie. Again, without an analysis by the RAD of how section 3.1 does or does not apply to Mr. McKenzie, the finding that he does not fit the profile is unintelligible and unreasonable.

[43] The reference, however, to “its reasons above” could be to the last paragraph before the *SOGIE Guidelines* discussion. In that paragraph, the RAD noted that the BOC instructions asked Mr. McKenzie to provide documentation to support his claim of being gay and his first amendment did not include his homosexual relationships with Mr. Hanson and Mr. Zacca. If that was the intended reference of “its reasons above,” then it has already been found to be unreasonable in point one with the application of *Strugar*. If it was not the intended reference then the reasons are not transparent, unintelligible and without justification.

[44] Relying on *LA v Canada (Citizenship and Immigration)*, 2016 FC 1334 at paragraph 13 [LA], the Minister says that the *SOGIE Guidelines* are not binding. LA had cited *Ahmed v Canada (Citizenship and Immigration)*, 2012 FC 1494 at paragraph 34 [Ahmed] as authority. The reference to paragraph 34 of *Ahmed* is a typographical error; it is only 15 paragraphs in length. Nor does *Ahmed* state that the Guidelines, which in that case were the *Gender Guidelines*, are either non-binding or binding.

[45] The Minister nonetheless is correct that the Guidelines are non-binding. The effect of the issuance of Chairperson’s Guidelines is set out in the Immigration and Refugee Board [IRB] of

Canada Policy Instrument entitled “Chairperson’s Guidelines.” The opening paragraph explains the purpose and proper use of the guidelines:

The Chairperson's Guidelines provide guiding principles for adjudicating and managing cases. They serve primarily as source [*sic*] of guidance for decision-makers, but also for the personnel supporting adjudicative functions. They may have an adjudicative or an operational content. While they are not mandatory, decision-makers are expected to apply them or provide a reasoned justification for not doing so. Within the IRB, Guidelines have generally been employed to achieve strategic objectives, as opposed to simply managing daily operations. The *Immigration and Refugee Protection Act*, in s. 159(1)(h), provides statutory authority for the Guidelines.

[Emphasis added]

[46] The Policy Instrument confirms that the IRB expects the Chairperson’s Guidelines to be followed, unless there are good reasons to depart from them. I have already found that there is no intelligible path nor any reasoned justification by the RAD leading from its stating a snippet from the *SOGIE Guidelines* to the determination that Mr. McKenzie was not credible. The non-binding nature of the Chairperson’s Guidelines does nothing to alter that finding.

[47] The penultimate paragraph [14] in *Ahmed* also addresses how Chairperson’s Guidelines should be used by the Board and, the likely consequences of failing to follow an applicable guideline:

The Board is obviously entitled to make adverse credibility assessments. However, in gender-based claims it must make those findings with an appreciation of the social context within which the claim arises. In my view, the Board failed to show an appreciation for the circumstances in which Ms Ahmed found herself and, therefore, its summary dismissal of her explanations for her behaviour, and of her claim, was unreasonable.

[48] The RAD's failure to show an appreciation of Mr. McKenzie's life story and personal profile and circumstances – his social context – when considering the *SOGIE Guidelines* suffers from the same failure as contemplated and found in *Ahmed*. The RAD's decision in Mr. McKenzie's case is unreasonable for the same reason as stated in *Ahmed*

B. *No Corroboration for Relationship with Courtney*

[49] The RAD looked at Mr. McKenzie's submission that he had been in a homosexual relationship with a man between 1994 and 1998. It found there was "no documentation – probative or otherwise – in the file to support this allegation."

[50] Mr. McKenzie submits this problem was to be expected as the relationship with Courtney was more than 20 years ago. He also says the RAD should have applied sections 3.2 and 7.2.1 of the *SOGIE Guidelines* which state that:

3.2 An individual's testimony may be the only evidence of their SOGIE where, in a given case, corroborative or additional evidence is not reasonably available.

7.2.1 Corroborating evidence from family or friends may not be available in cases involving SOGIE. An example of when this type of corroboration may not be available is when an individual has concealed their SOGIE because of perceived stigma or risk of harm.

[51] The RAD did not take into consideration the long time between the end of Mr. McKenzie's relationship with Courtney and his refugee claim. It also did not refer to the *SOGIE Guidelines* and, in fact, did not make any other comment at all about the "no corroboration" topic. It was just a bald statement.

[52] Mr. McKenzie submits that this Court has recognized that when evaluating claims based on sexual orientation there are inherent difficulties in proving a claimant has engaged in any particular sexual activities. For example, they may not be in contact with past sexual partners for various reasons: *Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760 at para 42 [*Ogunrinde*].

[53] In the case of Mr. McKenzie, the reason he is not in contact with Courtney is that Courtney died. The RAD failed both to apply common sense (passage of time, death) and consider the *SOGIE Guidelines* (both section 3.2 and 7.2.1) before deciding there was no corroboration.

[54] More importantly, the RAD provided no reason for needing corroboration. Mr. McKenzie had provided a sworn affidavit to the RAD attesting to his relationship with Courtney. The RAD failed to follow *Maldonado v Minister of Employment and Immigration* [1980] 2 FC 302 [CA] [*Maldonado*] in which Mr. Justice Heald established, at page 305, that when an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there is reason to doubt their truthfulness.

[55] The RAD did not state why it doubted the relationship with Courtney. When there is no reason provided to doubt the truthfulness of Mr. McKenzie's affidavit, the RAD is left with an affidavit that is presumed to be true. No corroboration is required.

[56] The RAD's decision to require corroboration without addressing *Maldonado* is unreasonable.

C. *Failure of Hugh-Roy Hanson to Testify at RPD Hearing*

[57] Mr. Hanson had written a letter of support for Mr. McKenzie in which he set out in some detail his knowledge of Mr. McKenzie's life, gained over the prior eight years and through their close friendship. He confirmed that in August 2016 Mr. McKenzie had confided that he then identified as a sexual minority and had decided to seek refugee protection in Canada as he was fearful of returning to Jamaica.

[58] The RAD said that the letter of support by Mr. Hanson "contained an extraordinary amount of information about the formation of the relationship." The RAD determined that as the letter did not include information that was contained in Mr. McKenzie's BOC, it was not credible.

[59] The BOC information was found by the RAD to state significant aspects of that formative time: Mr. Hanson's baptism, his being placed in the choir and made a Sunday school teacher. The RAD noted those events caused rumours in the community, and for Mr. Hanson to omit them from his letter was not credible. The RAD went on to say that it would have been helpful and "possibly determinative of the case" for Mr. Hanson to have been a witness.

[60] In the result, the letter of support that Mr. Hanson had submitted to the RPD was found by the RAD to have been undermined by his not attending the hearing.

[61] Mr. McKenzie points out that the RAD did not raise any concerns with the documents confirming that Mr. Hanson was accepted as a Convention refugee based on his identity as a gay

man which was some of the extensive information he had provided in the letter of support to the RPD.

[62] Mr. McKenzie complains that the RPD failed to analyze the support letter for what it did say. It was more concerned with what it did not say contrary to the decision in *Mahmud v Canada (Minister of Citizenship and Immigration)*, 167 FTR 309.

[63] Mr. McKenzie put that proposition to the RAD. The RAD acknowledged it, but repeated the mistake rather than address it.

[64] The RAD set out what the support letter said but then analyzed and seized upon what it did not say. The fact that the support letter confirmed that Mr. McKenzie was a homosexual and provided a lot of personal details was rejected by the RAD because in part of his letter he did not mirror the BOC.

[65] In my view, that is not a reasonable finding. I agree with and adopt the statement made by Mr. Justice Russell in *Sivaraja v Canada (Citizenship and Immigration)*, 2015 FC 732 at paragraph 36 where he cited Mahmud to say:

The Board also erred in rejecting the aunt's letter because it did not include the details it would have liked to see.

[66] The RAD wished that Mr. Hanson's letter had said something else. Be that as it may, it was still required to analyze what the letter did say. By not doing so, the RAD's analysis was unreasonable.



V. **Conclusion**

[67] For all the foregoing reasons the application for judicial review is granted and the decision of the RAD dated October 27, 2017 is set aside.

[68] Neither party suggested there is a serious question of general importance for certification on these facts.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is granted. The matter is returned to another panel of the RAD for redetermination. There is no serious question of general importance for certification.

"E. Susan Elliott"

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Judge

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

**DOCKET:** IMM-4862-17

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**PLACE OF HEARING:** TORONTO, ONTARIO

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