

Federal Court



Cour fédérale

Date: 20230828

Docket: IMM-7858-22

Citation: 2023 FC 1157

Toronto, Ontario, August 28, 2023

PRESENT: Madam Justice Go

BETWEEN:

MONA ITANI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Mona Itani [Applicant] is a 46-year-old citizen of Lebanon. The Applicant alleges that she comes from a conservative Muslim family, and that her father and relatives have previously sought to arrange marriages for her which she rejected. The Applicant also claims that she is a lesbian and is in a serious sexual relationship with a woman named Nidale whom she first met in 2010, and began dating in secret some years later.

[2] The Applicant has one sister who lives in Canada. In 2018, the Applicant travelled to Canada on a visitor visa after her mother passed away, and again in 2019. The Applicant did not confide in her sister during these trips about her sexual orientation. During her last trip to Canada in 2020, the Applicant finally came out to her sister, who was allegedly “shocked” but thought that it made sense for the Applicant to live freely in Canada. The Applicant claims that her two brothers, who live outside of Canada, are aware of her sexual orientation and are supportive of her.

[3] The Applicant applied for refugee protection in March 2021, alleging that she would be harassed and persecuted by her community if she were to continue her relationship with Nidale.

[4] The Refugee Protection Division [RPD] rejected the Applicant’s claim in March 2022 on credibility grounds. In a decision dated July 26, 2022, the Refugee Appeal Division [RAD] upheld the RPD’s credibility findings and confirmed that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Decision].

[5] The Applicant seeks judicial review of the Decision. While I am not persuaded by all of the Applicant’s arguments, I find that the RAD committed several reviewable errors that rendered the Decision unreasonable. As such, I grant the application.

II. Issues and Standard of Review

[6] The Applicant argues overall that the RAD erred in making several of its credibility findings, and failed to demonstrate sensitivity to her culture and the Immigration and Refugee Board's *Chairperson's Guideline 9: Proceedings before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics* [SOGIESC Guideline].

[7] Specifically, the Applicant submits that the RAD unreasonably found that:

- A. The photographs submitted of her and Nidale were inconsistent with the testimonial evidence;
- B. The English used in the text conversations was inconsistent with Nidale's evidence that she knows a little English;
- C. The letters from the Applicant's siblings did not establish her sexual orientation and her evidence about her sister's support was contradictory; and
- D. The Applicant's evidence concerning her previous study permit applications to Canada was contradictory and evolving.

[8] The parties agree that the Decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov].

[9] 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": *Vavilov* at para 85. The onus is on the Applicants to demonstrate that the Decision is unreasonable: *Vavilov* at para 100. 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.

III. Analysis

[10] As I have noted above, I do not find all of the Applicant’s arguments equally persuasive. However, I conclude that the RAD did make several reviewable errors which it then relied on to support its overall negative credibility assessment. Specifically, I find the RAD erred with respect to its assessment of (a) the photographs of the couple and (b) the letters from the Applicant’s siblings.

A. *Photographs of the Couple*

[11] The Applicant submitted various photographs as evidence of her romantic relationship with Nidale, including three photos purportedly taken when Nidale proposed to the Applicant [proposal photos] and one photo of the couple sleeping in an embrace on grass [sleeping photo].

[12] The RPD found that the proposal photos, which the Applicant testified were taken using a self-timer, were not demonstrative of a romantic relationship based on the lack of a ring or emotional moment, with the exception of a photo of Nidale on her knee, which the RPD found staged. On appeal, the Applicant argued that many individuals who propose stage photos. In the Decision, the RAD noted that the Applicant did not address the absence of the ring.

[13] The Applicant also testified at the hearing that a friend took the photo of her and Nidale sleeping. The RPD found that the level of physical intimacy in the sleeping photo contradicted the couple's testimony that they were considered normal between friends, and concluded that the photo was staged. On appeal, the Applicant argued that there was nothing in the sleeping photo that would cause alarm to their friends as to the nature of her relationship with Nidale. The RAD rejected this argument and agreed with the RPD that the intimate sleeping photo demonstrates an inconsistency in light of the Applicant's testimony that she could "never" come out to their friends and Nidale's testimony that they cannot "hold hands or hug each other" in Lebanon.

[14] The Applicant argues that the fact that a photo of the ring was not taken during a proposal is irrelevant, and that it was illogical for the RAD to draw a negative inference on this basis. The Applicant submits that the RAD fails to explain how the absence of one photo can cast doubt on all the other photographs provided in support of her refugee claim.

[15] I agree with the Applicant.

[16] As the Supreme Court of Canada reminded us in *Vavilov*, "the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise": *Vavilov*, at para 104.

[17] The RPD, and by extension the RAD, never explained the relevance of the absence of a photo of a ring in the context of the credibility assessment. At the hearing, the Applicant further

argued that in making this an issue, the RAD was engaged in “unfounded generalizations” about what should be included in marriage proposal photos. I agree. I also note the inherent contradiction in criticising the Applicant for not including a photo of the ring on the one hand, while on the other hand, faulting the Applicant for staging a photo of the proposal. By merely adopting without analyzing the RPD’s finding in this regard, the RAD similarly erred.

[18] I further find that not only did the RAD fail to provide an explanation regarding the relevance of the photograph specifically of the ring, the RAD did not engage in any meaningful analysis with respect to the proposal photos overall.

[19] Under the heading “staged photographs”, the RAD summarized the RPD’s findings with respect to all the photos. The RAD then focused its analysis on the sleeping photo and agreed with the RPD that there is an inconsistency between the testimonies of the Applicant and her partner that no one in Lebanon knows about their romantic relationship, and a photograph of them sleeping in an intimate embrace. The RAD did not make any findings with respect to the proposal photos, did not state whether it accepts the Applicant’s arguments about why these photos were “staged”, and did not explain why the absence of a photo of the ring was relevant to the credibility assessment.

[20] The Respondent notes that the RAD’s comment about the absence of a ring was made in light of the occasion during which the photos were taken – the day of the proposal – and constituted an observation that the Applicant failed to address the RPD’s concerns about this absence. The Respondent asserts that this observation, while not determinative on its own, added

to the other credibility findings made by the RAD. I reject this argument since the RAD did not in fact make these observations in the Decision.

[21] At the hearing, the Respondent further submitted that the RAD explained what it did or did not agree with respect to the RPD's findings at paragraph 15 of the Decision. As such, the RAD need not specifically address every finding of the RPD in the remainder of the Decision.

[22] I am unpersuaded by the Respondent's argument.

[23] Paragraph 15 of the Decision states:

I have reviewed the evidence on the record, including the transcript of February 10, 2022, hearing and the [Applicant's] arguments. As detailed below, I find that the RPD erred in some of its application of the SOGIESC Guideline, but the errors are not determinative. I agree with the RPD that the accumulation of inconsistencies and omissions regarding material elements of the [Applicant's] claim support a negative conclusion about her credibility, so she did not establish, on a balance of probabilities, that she is lesbian.

[24] At best, this paragraph suggests that the RAD noted the RPD's error in applying the SOGIESC Guideline. It did not however state that the RAD accepted all the other findings made by the RPD, other than agreeing that the "accumulation of inconsistencies and omissions" undermined the Applicant's credibility.

[25] More critically, as the RAD found the RPD's negative credibility inference from the inconsistency between the testimonies and the sleeping photo would not be determinative in isolation, it is all the more important for it to explain its own findings, if any, with respect to the

proposal photos. By failing to provide any analysis for accepting or rejecting such evidence, the Decision lacks the requisite justification, intelligibility and transparency. Given the proposal photos form a central part of the evidence to support the Applicant's claim that she is a lesbian, the errors made by the RAD in this respect rendered the Decision unreasonable.

B. *Letters from the Applicant's Siblings*

[26] The Applicant submitted two support letters from both of her brothers in her refugee claim. The letters stated that she is "socially prosecuted" in Lebanon by their family due to her "progressive personal preferences and views", and that she faces pressure from their father to "marry against her will." The Applicant explained in her testimony that her siblings were aware of her sexual orientation but that they did not write about it because it "hurts" and is "not easy."

[27] The RPD acknowledged pursuant to the SOGIESC Guideline that the Applicant's family's Muslim background may have an impact on how they discuss her sexual orientation. However, the RPD found her explanation for the omission from her brothers' letters inconsistent with her testimony that they were aware of her sexual orientation. The RPD also found contradictions between the Applicant's BOC narrative, where she states that her sister told her Canada would be the "right place for [her] to be part of the LGBTQ community", and the fact that her sister did not provide a support letter. The Applicant explained at the hearing that her sister is "not convinced" and is not 100% in agreement with her sexual orientation.

[28] The RAD noted the Applicant's argument on appeal that her family is a conservative Muslim family and that her siblings' acceptance was not forthcoming, and disagreed that the

RPD failed to apply the SOGIESC Guideline as it was explicitly referenced in the decision. The RAD agreed with the RPD's conclusion that the letters do not establish the Applicant's sexual orientation and that her evidence about her sister's support is contradictory.

[29] The Applicant takes issue with the RAD's unclear reasons, which appear to adopt the reasoning of the RPD. The Applicant asserts that the reference to "progressive personal preferences" can logically be related to the Applicant's sexual orientation and that the RAD's finding otherwise demonstrates a "gross cultural insensitivity" or a finding unsupported by the record. The Applicant also submits that the concern regarding her sister's support is overly microscopic, as it requires a deep search to find a contradiction between the sister's support for her in making a refugee claim and being unconvinced of her sexual orientation.

[30] The Applicant argues that the RAD's treatment of the brothers' letters and understanding of their family relations perpetuated the RPD's failure to apply the SOGIESC Guideline, as the fact of being unable to be open about her relationship in Lebanon is considered persecution.

[31] Regardless of the Applicant's explanations for why the brothers did not refer to her sexual orientation in their support letters, the Respondent maintains that the RAD reasonably afforded the letters little weight, finding them insufficient to establish that her brothers were aware of her sexual orientation, as testified.

[32] I reject the Respondent's argument.

[33] Similar to my conclusion about the RAD's lack of analysis concerning the proposal photos, I agree with the Applicant that the RAD provided almost no reasons for finding the letters from the siblings insufficient to demonstrate that she is a lesbian. The RAD's reasons essentially boiled down to the following:

I agree with the RPD that the letters of the [Applicant's] brothers do not establish her sexual orientation and that her evidence about her sister's support is contradictory.

[34] As the Applicant submits, her explanation for why the brothers' letters did not refer to her sexual orientation should have been a factor to be considered under the SOGIESC Guideline.

[35] In their submissions to the RAD, counsel for the Applicant specifically relies on section 7.4.1 of the SOGIESC Guideline which states in part:

Inconsistencies in terminology may also be reasonably explained. For example, letters of support reflect the perspectives of individuals who write them. The letter writer may not use the same terms or describe the person's identity in the same way as the person themselves.

[36] Also in their submission to the RAD, counsel for the Applicant argued that the letters of support from the Applicant's brothers "reflect the prospective [*sic*] of individuals who wrote them. This informs to [*sic*] the [Applicant's] explanation about why her brothers did not refer to her sexual orientation explicitly in their letters."

[37] Neither the RPD, and by extension the RAD which appeared to simply adopt the RPD's reasons, indicate whether or not they considered section 7.4.1 of the SOGIESC Guideline, or the Applicant's submission in this regard, contrary to the teaching of *Vavilov*, at para 106.

[38] The Respondent relies on *Adelani v Canada (Citizenship and Immigration)*, 2021 FC 23 [*Adelani*] to argue that claimants proving their sexual identity “may well require more than simply [their] sworn testimony” and that the SOGIESC Guideline does “not serve as a cure-all for evidentiary issues in this regard”: at para 18, citing *Okunowo v Canada (Citizenship and Immigration)*, 2020 FC 175 at para 66.

[39] While I endorse the principle behind the above quoted comment in *Adelani*, in this case, unlike *Adelani*, the Applicant did present evidence in her refugee claim that went beyond her own testimony, including but not limited to the testimony of Nidale.

[40] Here, I pause to note, as an *obiter*, that the RAD found the RPD erred its application of the SOGIESC Guideline when the RPD concluded that Nidale’s testimony regarding their relationship was insufficient to corroborate that they are in a genuine same-sex relationship. The RAD found that the RPD applied “a stereotype of behaviour associated with long-term relationships.” Yet the RAD went on to confirm the RPD’s rejection of the Applicant’s claim as a lesbian, notwithstanding its disagreement with the RPD’s negative, stereotype-based assessment of the testimony of the Applicant’s allegedly long-term same-sex partner. The RAD never made its own finding with regard to the credibility of Nidale’s testimony. If the RAD were to accept Nidale’s testimony to be credible, it would be inconsistent with its conclusion that there was insufficient evidence supporting the Applicant’s identity as a lesbian. If, on the other hand, the RAD did not find Nidale’s testimony credible, it never explained why. Once again, the RAD’s lack of transparency and intelligibility in its reasoning leaves much to be desired.

[41] As the Applicant rightly points out, the RAD did not reject the Applicant's claim based on one or two determinative credibility findings, but rather on the accumulation of several negative findings of credibility concerns. When some of these findings were made in error, it calls into question the overall reasonableness of the Decision.

[42] In light of the errors made by the RAD in assessing the letters of support and photos, the Decision must be sent back for redetermination.

IV. Conclusion

[43] The application for judicial review is allowed.

[44] There is no question to certify.

JUDGMENT in IMM-7858-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.
3. There is no question to certify.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7858-22

STYLE OF CAUSE: MONA ITANI v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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DATE OF HEARING: AUGUST 24, 2023

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