

Federal Court



Cour fédérale

Date: 20230719

Docket: IMM-4215-22

Citation: 2023 FC 990

Ottawa, Ontario, July 19, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

KANNAN VAIRANATHAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Kannan Vairanathan, seeks judicial review of a decision of the Refugee Appeal Division (“RAD”) dated April 20, 2022, confirming the determination of the Refugee Protection Division (“RPD”) that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 or 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“*IRPA*”).

[2] The RAD found the determinative issue to be the Applicant's credibility. While the Applicant does not challenge the RAD's negative credibility findings, he submits that the RAD unreasonably failed to determine whether the Applicant is a gay man, rendering the decision unreasonable.

[3] For the reasons that follow, I find that the RAD's decision is reasonable. This application for judicial review is dismissed.

II. Facts

A. *The Applicant*

[4] The Applicant is a 29-year-old, Tamil Hindu citizen of India. He is a gay man. He was born and raised in Thillaivilagam, in the state of Tamil Nadu, where his parents still reside.

[5] According to this Basis of Claim ("BOC") narrative, the Applicant realized he was gay when he was 15 years old but was unable to disclose his sexual orientation to anyone in his life because being gay is not socially acceptable in his community.

[6] In 2007, while a student at a secondary school in Thillaivilagam, the Applicant became friends with a male classmate, Suthakaran Arjunan ("Suthakaran"). Soon after, the Applicant and Suthakaran began an intimate relationship, which they kept a secret. In 2012, the Applicant and Suthakaran both began studying at the same university in Thanjavur, where they rented a room and lived together.

[7] The Applicant claims that in April 2013, the landlord entered their room in a drunken fit, while the Applicant and Suthakaran were engaging in sexual intercourse. The landlord allegedly evicted them from the house the following morning. The Applicant also learned that the landlord informed his university that he and Suthakaran are gay, when the dean called them to inform them of their dismissal from the university. The Applicant and Suthakaran were given certificates of their official termination and forced to return home.

[8] The Applicant claims that upon return to Thillaiwilagam, he told his parents that he and Suthakaran chose to drop out of the university. The Applicant took up work in his family's farming business, as per his parents' wishes. Suthakaran also began working in his own family's farming business. The Applicant claims that he and Suthakaran had a private location where they would meet for sexual relations.

[9] On October 10, 2018, the Applicant was allegedly forced to marry a Tamil Hindu woman. The Applicant's wife moved into his parents' home, where the Applicant lived. The Applicant continued his secret relationship with Suthakaran.

[10] The Applicant claims that in January 2019, Suthakaran came to visit him at his parents' home, thinking that only the two of them were present. The two were being intimate when the Applicant's wife allegedly came home and discovered them. The Applicant claims his wife began screaming, which alerted his parents in the house next door. The Applicant's parents returned to the house, where his wife informed them of what she had seen between the Applicant

and Suthakaran. The Applicant claims that his father began physically abusing him and ordered Suthakaran to leave. His wife left the home to live with her parents.

[11] The Applicant claims that the day after the incident, his father attempted to poison the Applicant by putting rat poison in his food. In the days following, the Applicant's father allegedly tried to poison the Applicant for a second and third time, making the Applicant afraid of staying at home with his family. He claims that Suthakaran's family had also learned of the incident between them but accused the Applicant of being responsible for their affair. The Applicant claims that he does not know Suthakaran's current whereabouts.

[12] The Applicant claims that on the same day his father tried to poison him for the third time, he was picked up by police officers at his home, taken to a police station, and questioned about his relationship with Suthakaran. The Applicant claims that he was beaten by the police, after which he was stripped naked and physically assaulted again. He alleges that one of the officers rubbed a cloth soaked in a kind of chemical on his genitals, which made him lose consciousness and resulted in lasting scars. The Applicant claims he was held at the station for about four hours, after which he was released on the condition that he must lead his life as a straight man, return to his wife, and have children with her. The police officers allegedly warned that if the Applicant continued his affair with Suthakaran, he would face consequences.

[13] Fearing for his life, the Applicant allegedly fled to Chennai, where he stayed with his friend, Ramalingam Viswanathan ("Ramalingam"). Allegedly afraid of telling his friend the truth, the Applicant told Ramalingam that he was suspected of having an illicit affair with

another woman and his in-laws sent the police to kill him. The Applicant stayed with Ramalingam for three days. Ramalingam connected the Applicant to an agent, who demanded \$10,000 to smuggle the Applicant to Canada. The Applicant agreed. The agent relocated the Applicant to his home in the outskirts of Chennai, pending the finalization of his travel arrangements. The Applicant claims that he secured a loan from Ramalingam's brother in Qatar, which he is still paying back. The Applicant's BOC narrative states that although he shared the information about his stay with Ramalingam and at the agent's home with the Canada Border Services Agency ("CBSA") officer upon arrival to Canada, this information was not included in his Schedule A form as part of his refugee claim.

[14] The Applicant arrived in Canada on June 8, 2019, landing in Vancouver, British Columbia. The Applicant made a claim for refugee protection at the airport upon arrival. He alleges that the two officers he spoke to at the airport were aggressive and threatened to deport him back to India the same day. The Applicant claims that he was intimidated and afraid, and therefore decided not to disclose his sexuality to the officers. The Applicant claims that he fears persecution in India on the basis of his sexuality.

B. *RPD Decision*

[15] In a decision dated November 23, 2021, the RPD found that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of *IRPA*. The RPD found that the Applicant's claim lacked credibility.

[16] At the outset of the reasons for its decision, the RPD noted that it considered the *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* (“*Chairperson’s Guideline 9*”).

[17] The RPD based its decision on the following credibility concerns regarding the Applicant’s claim and supporting evidence, as summarized in the RAD’s decision:

- A. The Applicant embellished his testimony by stating that police searched for him in Chennai, using photographs of him in public places;
- B. The Applicant embellished his testimony by stating his wife’s parents attempted to kill him, which the RPD concluded on the basis that this detail was omitted from his BOC narrative;
- C. The Applicant embellished his testimony by stating that his father was searching for him in Chennai in order to kill him, which the RPD concluded on the basis that this detail was omitted from his BOC narrative;
- D. The RPD found that the Applicant’s testimony regarding how he was discovered with Suthakaran to be inconsistent, reactive, and manufactured;
- E. In his Port of Entry (“POE”) interview, the Applicant stated that his wife tried to have him killed upon learning of his location in Chennai, and that his parents also hired an agent to kill him, which required him to seek medical attention, but the

Applicant omitted both of these details from his testimony before the RPD. The RPD found these omissions, paired with the Applicant's admission that he did not seek medical attention for such an incident, to undermine his credibility; and

- F. Despite his claims otherwise, the Applicant's immigration documents stated that he had never been arrested or detained and did not reference his residency in Chennai for six months before his arrival in Canada.

[18] The RPD found that the Applicant's documentary evidence did not overcome the numerous negative credibility findings regarding his claim. The RPD therefore concluded that the Applicant is not credible and, in turn, that he is not of a diverse sexual orientation, gender identity or expression, or sex characteristic ("SOGIESC") as he claims. For these reasons, the RPD dismissed the Applicant's claim for refugee protection.

C. *Decision under Review*

[19] In a decision dated April 20, 2022, the RAD dismissed the Applicant's appeal. The RAD upheld the RPD's decision that the Applicant's claim lacks credibility and he is therefore not a Convention refugee nor a person in need of protection.

(1) Procedural Fairness

[20] On appeal, the Applicant submitted that the POE notes and immigration forms from June 11, 2019 should be excluded from the evidentiary record because he was detained as defined

under section 10(b) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) and was deprived of his right to counsel at the time of the interview. The RAD found that the Applicant failed to establish that he was detained within the meaning of the *Charter*. The RAD found no evidence that the CBSA officers detained the Applicant after his POE interview on June 8, 2019 and the interview notes state that he was escorted to an inspection area; the June 11, 2019 POE notes state that the Applicant informed CBSA officers that he was staying in a hostel in Vancouver, and; the Applicant’s only mention of detention was at the end of his testimony at the RPD hearing, when asked about an omission in his responses.

[21] On this basis, the RAD concluded that the Applicant failed to engage section 10(b) of the *Charter*. The RAD further noted a refugee claimant is not entitled to representation when being questioned by immigration officials at a POE, as per the Supreme Court of Canada in *Dehghani v Canada (Minister of Employment and Immigration)*, [1993] 1 SCR 1053.

(2) Credibility

[22] The RAD found that the RPD failed to meaningfully apply *Chairperson’s Guideline 9* to the Applicant’s claim. The RAD noted that a passive reference to the guideline is insufficient to establish that it was meaningfully applied and the RPD’s reasons fail to reference the guideline in any of its credibility findings. That being said, the RAD found that in its own application of *Chairperson’s Guideline 9*, the RPD was correct in most of its credibility findings regarding the Applicant’s claim. The RAD ultimately agreed with the RPD’s overall conclusion that the Applicant failed to establish that he is a gay man or that he faces a risk in India on the basis of his sexual orientation.

[23] The RAD agreed with the RPD in that the Applicant's credibility was undermined by the fact that his BOC narrative and testimony failed to mention that his parents hired a group of men to kill him, these men chased him with weapons, and this attack resulted in seeking medical attention, as he stated in his June 11, 2019 POE interview. When the RPD member questioned him about this discrepancy, the Applicant testified that he was scared during his POE interview and upon further probing, admitted that he did not seek medical attention in Chennai for a head injury related to the incident. The RAD found that the Applicant's claim that he was injured by a group of men who were hired by his parents to kill him goes to the heart of his claim for refugee protection and the omission of this information in his BOC narrative or testimony undermines the credibility of his claim. The RAD found that in light of the factors enumerated in *Chairperson's Guideline 9* regarding inconsistencies and material omissions, the Applicant's claim included insufficient evidence of cultural, psychological, social, or other issues accounting for this material omission in his narrative and testimony.

[24] The RAD also agreed with the RPD's finding that the Applicant's testimony regarding his father's alleged attempt to poison him with rat poison or kill him while he was in hiding in Chennai lacked credibility. The RAD noted that despite the inclusion of this claim in his BOC narrative, the Applicant's testimony did not state that his father attempted to poison him on three separate occasions upon learning that the Applicant is gay, or that his father searched for him in Chennai and attempted to kill him. The RAD rejected the Applicant's explanation that his testimony before the RPD was merely an elaboration of the information in his BOC narrative and found that the Applicant's testimony regarding these allegations is central to his claimed fear of

persecution at the hands of his family on the basis of his sexual orientation. The RAD found that the factors in *Chairperson's Guideline 9* also failed to account for this material omission.

[25] The RAD found that the RPD correctly impugned the Applicant's credibility on the basis that his BOC narrative did not include the claim that police officers searched for him in Chennai using his photograph, despite his testimony to that effect. Before the RPD, the Applicant testified that he saw police officers with his photograph and failed to answer the RPD member's question about how he was able to get close enough to the officers to see that they were holding his photograph. The RAD rejected the Applicant's submission that his actual testimony before the RPD was that he "learned" that the police officers were using his photograph rather than saw them do so, or that this omission was minor. The RAD found this omission to be central to the Applicant's claim that he fears persecution at the hands of the Indian police due to his sexual orientation and concluded that the factors in *Chairperson's Guideline 9* did not account for this omission.

[26] The RAD found that the RPD correctly concluded that the Applicant embellished his claim by stating that his in-laws tried to kill him. In his June 11, 2019 POE interview, the Applicant stated that his wife's parents tried to have him killed and also that his wife tried to have him killed. The Applicant's BOC narrative stated that his wife's parents had connections in the police and they used these connections to have the police arrest and torture him, with no mention of his wife or in-laws trying to kill him while he was in Chennai. The RAD rejected the Applicant's explanations for this omission, found that this material omission undermined the credibility of his claim, and concluded that the factors in *Chairperson's Guideline 9* did not

account for this omission. The RAD found, on a balance of probabilities, that neither the Applicant's wife nor in-laws tried to have him killed while he was in Chennai.

[27] The RAD agreed with the RPD's finding that the Applicant provided inconsistent evidence regarding where he stayed prior to travelling to Canada and that these inconsistencies undermined his credibility that he was in hiding. The Applicant's BOC narrative stated that he fled to Chennai before coming to Canada, he stated that he was in hiding in Delhi in his June 11, 2019 POE interview, and he stated that he was Thillaivilagam from April 2013 to June 2019 in his Schedule A form as part of his refugee claim. The RAD impugned the Applicant's credibility on the basis that he failed to provide consistent evidence about his whereabouts after the alleged events of January 2019, which it found are central to his claim that he fled his home due to his fear of persecution. The RAD further found that the letter provided by the Applicant's friend in Chennai, who he alleges that he stayed with, was unpersuasive because it did not account for the Applicant's various statements about his location, did not explain his inconsistent information regarding his whereabouts prior to leaving for Canada, and did not overcome the other credibility concerns regarding this aspect of the Applicant's claim.

[28] Lastly, the RAD concluded that the Applicant provided insufficient evidence to establish his sexual orientation. The RAD found that the Applicant's photographs of himself and Suthakaran did not establish their romantic relationship; his photographs of discoloration on his thighs were insufficient to establish that he was tortured by police and, even if they did, do not on their own establish his sexual orientation, and; the Applicant's university transcript does not establish that he was kicked out of his program because he was found to be gay.

[29] For these reasons, the RAD concluded that the Applicant failed to establish the central elements of his claim, including that he is gay. The RAD therefore dismissed the Applicant's appeal and upheld the RPD's finding that he is neither a Convention refugee nor a person in need of protection as per sections 96 and 97 of *IRPA*.

III. Issue and Standard of Review

[30] This application raises the sole issue of whether the RAD's decision is reasonable.

[31] The standard of review is not in dispute. The parties agree the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) (“*Vavilov*”). I agree.

[32] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[33] For a decision to be unreasonable, an applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about

a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a “minor misstep” (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

IV. Analysis

[34] The Applicant does not challenge the credibility concerns that the RAD found to be the determinative basis for dismissing the appeal. Rather, the Applicant submits that the RAD erred in failing to determine whether the Applicant is a gay man, notwithstanding the remaining negative credibility findings.

[35] I note that the Applicant’s submissions on judicial review are largely vague and scattered. In sum, the Applicant submits that the RAD failed to grapple with key issues surrounding his claim that is a gay man, which he claims that the RAD is obligated to assess regardless of its credibility findings regarding the merits of the claim.

[36] The Applicant relies on this Court’s decision in *Odetoyinbo v Canada (Citizenship and Immigration)*, 2009 FC 501 (“*Odetoyinbo*”), which states that the RAD unreasonably ignored evidence that gay men experience abuse in Nigeria, even if it rejected the applicant’s account of his treatment in Nigeria (at para 8). The Applicant submits that the RAD erroneously failed to conduct an analysis of the risk facing the Applicant as a gay man, notwithstanding negative credibility findings regarding other elements of his claim.

[37] The Respondent maintains that the RAD's decision is reasonable and accords with the evidence. The Respondent notes that the Applicant's arguments are based on a misapprehension of the RAD's decision, which explicitly found that it did not believe the Applicant's claim that he is gay. The Respondent submits that it is well-established that a decision-maker need not reference all arguments, provisions, jurisprudence, or evidence raised and a failure to do so is in and of itself is insufficient basis to warrant judicial review (*Vavilov* at paras 91, 94).

[38] The Respondent submits that while the Applicant claims that the RAD was obligated to consider his testimony that he is gay in isolation from the remainder of his claim, the Applicant's sexual orientation is intrinsic to his allegations that he faces persecution in India on the basis of his sexual orientation. The Respondent relies on this Court's decision in *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924, in which Justice Gascon stated that "a lack of credibility concerning central elements of a refugee protection claim can extend and trickle down to other elements of the claim" (at para 24). The Respondent submits that the same reasoning applies to the RAD's assessment of the Applicant's testimony pertaining to his sexual orientation.

[39] The Respondent further submits that while the Applicant relies on *Odetoyinbo*, that case is distinguishable from the Applicant's case because in *Odetoyinbo*, the RAD did not make an explicit finding that the applicant was not bisexual. However, in the Applicant's case, both the RPD and RAD explicitly found that the Applicant failed to provide his sexual orientation and, therefore, his case can be distinguished from *Odetoyinbo*, analogously to the distinction made by this Court in *Ali v Canada (Citizenship and Immigration)*, 2021 FC 77 ("Ali").

[40] I agree with the Respondent. In my view, the RAD's decision bears all the hallmarks of reasonableness and, contrary to the Applicant's submission, includes an analysis of the Applicant's claim regarding his sexual orientation that is justified in light of the evidence available. The RAD's decision references key aspects of the Applicant's evidence proffered in support of the claim that he is gay and fears persecution in India on this basis, including photographs of himself and Suthakaran, photographs of discoloration on his thighs from an alleged attack against him for being gay, and a university transcript. The RAD's conclusion that this evidence fails to establish that the Applicant is gay, particularly in light of the numerous other credibility concerns that are central to the claim, is cogently justified and establishes a clear line of analysis between the record and the overall decision (*Vavilov* at para 102).

[41] The Respondent rightly notes this Court's jurisprudence establishing that negative credibility findings that go to central aspects of a refugee claim can extend to other elements of the claim. The Respondent cites this Court's decision in *Khan v Canada (Citizenship and Immigration)*, 2021 FC 1233, where my colleague Justice Pamel stated:

[9] In any event, to support a claim of risk of persecution on account of imputed membership in a particular group, such a claim must be grounded in evidence (*Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760); no such evidence exists here. The record in this case includes no reason for Mr. Khan to be perceived as being gay or bisexual other than his claim that he purportedly is. Once that claim was found to lack credibility, any claim of risk on the basis that Mr. Khan may be perceived to be gay or bisexual had no foundation. In other words, once the RAD made negative credibility findings relating to the central story underlying Mr. Khan's claim that he is a gay man whose same-sex relationship was discovered by his family, no separate assessment of his perceived sexual orientation was necessary.

[42] I find that the same reasoning can be applied to the Applicant's case. The Applicant's claim that he is a gay man is intrinsically connected to all the elements of the claim that were found by both the RPD and RAD to lack credibility and contain significant and unexplained inconsistencies. The RAD reasonably found that the lack of credibility of those elements also impugns the credibility of the Applicant's claim that he is gay, in addition to the finding that the evidence provided also fails to establish his sexual orientation.

[43] I further agree with the Respondent that this case is distinguishable from the facts in *Odetoyinbo*, in the same respect that it was distinguished in *Ali*. In *Ali*, my colleague Justice Pallotta found the following regarding the applicability of *Odetoyinbo*:

[28] I agree with the respondent that the RAD was not required to conduct a separate section 97 analysis in this matter. In *Odetoyinbo*, the tribunal did not explicitly find that the applicant was not bisexual, and accordingly, the tribunal could not ignore objective evidence of gay men being subjected to abuse in Nigeria. In the present case, the RAD specifically found Mr. Ali had not proven his bisexuality, and *Odetoyinbo* can be distinguished on this basis. Therefore, there was no obligation on the RAD to address general country condition evidence regarding the treatment of bisexuals in Ghana.

[44] The same reasoning can be applied to the case at hand. The RAD considered the Applicant's evidence, considered the numerous negative credibility findings, and explicitly found that the Applicant had failed to prove his sexuality. As found in *Ali*, this distinguishes the Applicant's case from *Odetoyinbo* and means that there the RAD did not have an obligation to address the general country conditions regarding the treatment of gay men in India, the Applicant's submissions suggest.

[45] For these reasons, I find that the RAD's decision is transparent, intelligible, and justified, and accords with the factual and legal constraints bearing upon it (*Vavilov* at paras 15, 99).

V. Conclusion

[46] This application for judicial review should be dismissed. The Applicant has failed to raise a reviewable error in the RAD's reasons for the decision. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-4215-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. There is no question to certify.

“Shirzad A.”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4215-22

STYLE OF CAUSE: KANNAN VAIRANATHAN v THE MINISTER OF
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PLACE OF HEARING: TORONTO, ONTARIO

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DATED: JULY 19, 2023

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