

CANADA / JUDGMENT

Musa v. Canada (Citizenship and Immigration)

2025 FC 367

COURT

Federal Court

DECIDED

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Musa v. Canada (Citizenship and Immigration) Court (s) Database Federal Court Decisions Date 2025-02-25 Neutral citation 2025 FC 367 File numbers IMM-12723-23 Decision Content Date: 20250225 Docket: IMM-12723-23 Citation: 2025 FC 367 Toronto, Ontario, February 25, 2025 PRESENT: The Honourable Justice Battista BETWEEN: MD MUSA Applicant and THE MINISTER OF CITIZENSHIP AND IMMIGRATION Respondent JUDGMENT AND REASONS I. Overview [1] The Applicant challenges the reasonableness of the refusal rendered on his humanitarian and compassionate (H&C) application for permanent residence. The Applicant raises several problems with the decision's treatment of the evidence that he submitted. However, the application for judicial review is granted based on erroneous findings made in relation to the Applicant's sexual orientation and his return to Bangladesh as a gay man. II. Background [2] The Applicant applied for refugee status based on his fear of Islamic fundamentalists. The Refugee Protection Division (RPD) refused his claim, and the Refugee Appeal Division (RAD) dismissed the appeal of the RPD's decision. The RAD refused to consider new evidence regarding the Applicant's sexual orientation because he had not adequately explained why the evidence was not produced earlier. This Court refused leave for judicial review of the RAD's decision in June 2017 because the application had not been perfected.

[3] The Applicant then submitted a Pre-Removal Risk Assessment (PRRA) application, which was refused in February 2019. The reasons for that refusal are not before the Court.

[4] The Applicant filed two previous H&C applications, which were both refused. He was also the subject of two arrest warrants issued by Canada Border Services Agency (CBSA): the first in 2016, on the basis he was unlikely to appear for proceedings owing to having submitted fraudulent documentation in support of his study permit; and the second in 2019, for failure to appear for removal.

- [5] The Applicant submitted a third H&C application in July 2022. It was based on the consequences of returning to Bangladesh as a gay man, his establishment in Canada and his health issues. He provided several documents in support of this application, including a statutory declaration describing his experiences as a gay man and his risks of hardship in Bangladesh.
- [6] The Officer who refused the application considered four factors: (1) the Applicant's immigration history; (2) his risks in Bangladesh; (3) establishment in Canada; and (4) health considerations.
- [7] In considering the Applicant's risks in Bangladesh as a gay man, the Officer referred to the RPD and the RAD decisions, the Applicant's statements and documentary evidence, and country condition reports. The Officer concluded that gay men in Bangladesh faced "significant discrimination" but found that the Applicant had not proven his sexual orientation. III. Issue [8] The sole issue is whether the decision is reasonable pursuant to the Supreme Court's decisions in Canada (*Minister of Citizenship and Immigration*) v *Vavilov*, 2019 SCC 65 [Vavilov] and *Mason v Canada* (Citizenship and Immigration), 2023 SCC 21. A decision will be unreasonable if it fails to demonstrate "rationality internal to the reasoning process" or is "untenable in light of the relevant factual and legal constraints that bear on it" (Vavilov at para 101). Errors must be "sufficiently central or significant to render the decision unreasonable" (Vavilov at para 100). IV. Analysis [9] The decision is unreasonable due to the serious errors in the Officer's treatment of evidence provided by the Applicant to establish his sexual orientation and the risks he would face as a gay man in Bangladesh. The unreasonableness of the decision on this central aspect of the Applicant's application makes it unnecessary to resolve the Applicant's other allegations of unreasonableness.
- [10] The Officer was not clear why the evidence produced by the Applicant to establish his sexual orientation was insufficient, which makes the decision impossible to understand on a critical point, and therefore unreasonable (Vavilov at para 103). The Officer also fundamentally mischaracterized the evidence regarding the risks faced by gay men in Bangladesh (Vavilov at para 126).
- [11] First, however, the Officer made an unreasonable finding that the Applicant had "ample opportunity" to present his concerns as a gay Bangladeshi to the RPD, the RAD, and the PRRA Officer.
- [12] Evidence of the Applicant's sexual orientation was not provided to the RPD because the Applicant feared the consequences of doing so. The RAD refused to accept evidence of his sexual orientation after finding that it could have reasonably been provided to the RPD. It is not clear whether evidence establishing the Applicant's sexual orientation was accepted in his PRRA application.
- [13] If the Officer's statement was intended to indicate that the Applicant's opportunity to establish his sexual orientation was somehow foreclosed based on those previous decisions, this was unreasonable. There were no findings from previous decision makers doubting the

Applicant's sexual orientation, and the Officer was required to determine whether the evidence he presented within the application before the Officer justified permanent residence based on H&C criteria. (*Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at para 22 [citation omitted]). As stated by Justice Andrew D Little, "the Court has recognized the inherent challenges associated with establishing one's sexual orientation" (*Mohammadpour v Canada (Citizenship and Immigration)*, 2022 FC 759 at para 37 [citations omitted]).

- [14] The application before the Officer included the following evidence of the Applicant's sexual orientation: his sworn affidavit describing his coming-out process and fears based on his sexual orientation, screenshots of his profile on the gay social media site Grindr, a photo of him at Pride celebrations, and a psychological report that referenced his sexual orientation.
- [15] The Officer referenced only the Applicant's Grindr screenshots in finding that he "presented little evidence to substantiate his sexuality". It is not clear whether the other evidence of his sexual orientation was ignored or overlooked.
- [16] It is therefore not clear why the Officer was unable to conclude that the Applicant is gay, given the variety of evidence in the application, which included his sworn statement. This was a critical basis of the application, and the Officer's failure to explain its finding of "insufficient" evidence is not transparent. Transparency is a hallmark of reasonable decisions (*Vavilov* at para 99). As stated by Justice Cecily Strickland: The Officer also does not give any reasons for doubting the truthfulness of the Applicant's evidence as to his sexual orientation. As argued by the Applicant, the Officer cites no inconsistencies, contradictions or implausibilities in the sworn evidence. He simply refuses to accept or disbelieves the Applicant, on the basis that there is no corroborating documentation, that he is homosexual. In my view, this approach is in error. (*Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 737 at paras 62-63).
- [17] Despite finding that the Applicant had not established his sexual orientation, the Officer assessed documentary evidence regarding conditions for gay men in Bangladesh. In doing so, the Officer fundamentally failed to appreciate the nature of that evidence. The Officer referred to the following evidence: -Evidence that homosexuality is criminalized and subject to life imprisonment in Bangladesh; -Evidence that "discrimination, physical violence, mental torture, verbal harassment and sexual harassment" was reported by more than half of the LGBTI community; -Evidence that forty-five percent of the LGBTI community faced "discrimination, violence or harassment" almost daily or at least once a week.
- [18] The Officer summarized this evidence with the finding that "homosexual men face significant discrimination in Bangladesh". This is a gross underestimation of the risks described in the documentary evidence, and this fundamental mischaracterization of the evidence renders the decision unreasonable (*Vavilov* at para 126).

- [19] The risk of criminal sanction and life imprisonment for gay men in Bangladesh was not directly addressed by the Officer, but the Officer did cite evidence regarding the reportedly low enforcement of this law. It appears that the Officer's reliance upon evidence of low enforcement was meant to dismiss the risk of penal sanction.
- [20] If this was the case, the Officer overlooked the fact that evidence of the low enforcement of the law could be because gay men in Bangladesh are forced to live in hiding of their sexual orientation (see e.g., *AB v Canada (Citizenship and Immigration)*, 2009 FC 640 at para 19).
- [21] Moreover, the Officer unreasonably excluded from consideration the fact that the Applicant would need to hide an immutable characteristic—his sexual orientation—in order to avoid the risk of criminal sanction in Bangladesh. This concern was specifically raised in the Applicant's submissions, but it was not dealt with by the Officer.
- [22] Finally, a reasonable consideration of hardship required not simply assessing the probability of life imprisonment for sexual orientation, but assessing the severity of impact on the Applicant if this did occur. V. Conclusion [23] Overall, the Applicant's evidence and submissions related to hardship in Bangladesh based on his sexual orientation was either not addressed, minimized, or mischaracterized. The decision lacks the necessary responsiveness and justification in light of the evidence provided (Vavilov at paras 126-127). It is therefore unreasonable. JUDGMENT in IMM-12723-24 THIS COURT'S JUDGMENT is that: The application for judicial review is granted, the decision refusing the application for permanent residence on humanitarian and compassionate grounds is quashed, and the matter is referred back to a different officer for redetermination. There is no question for certification and no order regarding costs. "Michael Battista" Judge FEDERAL COURT SOLICITORS OF RECORD DOCKET: IMM-12723-24 STYLE OF CAUSE: MD MUSA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION PLACE OF HEARING: TORONTO, Ontario DATE OF HEARING: FEBRUARY 24, 2025 JUDGMENT AND REASONS: BATTISTA J. DATED: FEBRUARY 25, 2025 APPEARANCES: Sumeya Mulla For The Applicant Nicholas Dodokin For The Respondent SOLICITORS OF RECORD: Waldman and Associates Barristers and Solicitors Toronto, Ontario For The Applicant Attorney General of Canada Toronto, Ontario For The Respondent

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