

CANADA / JUDGMENT

Ndungu v. Canada (Citizenship and Immigration)

2025 FC 529

COURT

Federal Court

DECIDED

21 March 2025

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Decision Content

Date: 20250321

Docket: IMM-11827-23

Citation: 2025 FC 529

Ottawa, Ontario, March 21, 2025

PRESENT: Mr. Justice Pentney

BETWEEN:

JAMES MAINA NDUNGU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

- [1] The Applicant, James Maina Ndungu, seeks judicial review of the decision of the Refugee Appeal Division [RAD] dismissing his appeal from the negative decision of the Refugee Protection Division [RPD].
- [2] The Applicant left Kenya and claimed asylum in Canada based on his fear of persecution due to his sexual orientation, which he describes as bisexual. He said that he faced risks from Kenyan authorities, Kenyan society and members of the Mungiki gang. The Applicant was subject to admissibility proceedings before the Immigration Division [ID] because of his links with the Mungiki gang, and the ID found that the Minister had not established that he was inadmissible. Following this, the Applicant's refugee claim proceeded to a hearing.
- [3] The RPD dismissed the Applicant's refugee claim because it found he did not credibly establish his claim. The RAD dismissed the Applicant's appeal from the RPD decision, based on his lack of credibility.
- [4] The Applicant seeks judicial review of the RAD's decision.
- [5] For the reasons that follow, the application for judicial review will be dismissed.

I. Background [6] The Applicant is a citizen of Kenya. He alleges that he fears persecution in Kenya due to his sexual orientation, which he describes as bisexual. He says that he had two same-sex relationships in Kenya, a high school boyfriend and a partner while he was in his mid-twenties. When the Applicant's relationship with his first partner was discovered, he was expelled from high school for several weeks and kicked out of his family home. The Applicant claims that he was forcibly recruited into the Mungiki gang around 2007, but he left the gang as soon as he was able to do so.

- [7] The next incident occurred in 2013, when the Applicant says he was found showering with his partner. This resulted in him being publicly mocked, evicted from his apartment, and attacked and beaten by members of the Mungiki gang. He was also mocked and threatened by the police.
- [8] After this experience, the Applicant says he began to make plans to leave Kenya. He obtained a student visa for the United States (U.S.) where his sister lived. His sister had agreed to provide him with financial assistance, but after he arrived in the U.S., she eventually stopped supporting him. During his time in the U.S., the Applicant had two brief marriages with women. He says that he was also involved with a man during this period.

- [9] In May 2019, the Applicant was arrested by U.S. Customs officials for being out of status. He was eventually released on conditions, and then fled to Canada where he made a refugee claim based on his fear of persecution due to his sexual orientation.
- [10] The Applicant was interviewed on three occasions by Canada Border Service Agency [CBSA] officials. During the initial interviews, the Applicant stated he was a member of the Mungiki gang from 2007 to 2014, and that he had participated in various gang activities and witnessed acts of violence by gang members. In a later interview, the Applicant denied any involvement in the activities of the gang.
- [11] As a result of his association with the Mungiki, the Applicant was referred for an admissibility hearing before the ID of the Immigration and Refugee Board. At the ID hearing, the Applicant recanted much of his narrative and alleged that he had been forced to join the gang and did not participate in any actions on its behalf.
- [12] The ID determined that the Applicant was not inadmissible because he was, at most, a forced recruit of the Mungiki gang and he left it as soon as he was able to do so. The Applicant's refugee claim was then re-activated and it proceeded to a hearing.
- [13] The RPD denied the Applicant's refugee claim in February 2023, finding that he lacked credibility and did not establish a well-founded fear of persecution. The Applicant appealed to the RAD, but it also dismissed his claim finding that he lacked credibility and had intended to create and submit fraudulent documents to bolster his refugee claim.
- [14] The RAD agreed with the RPD's credibility findings, noting among other things:
- the Applicant's evidence about his involvement with the Mungiki gang was contradictory and his explanations for his evolving statements were not convincing;
- he did not mention his first same-sex partner in Kenya when he completed his Basis of Claim form, or provide a reasonable explanation for the omission, despite the fact that he said the discovery of this relationship resulted in him being expelled from school and forced to leave his family home;
- the Applicant's brother sent him a package containing material that the Applicant intended to use to forge documents to corroborate his allegations relating to his negative experiences in Kenya;
- the evidence regarding the Applicant's same-sex partners in the U.S. and Canada was conflicting, and he did not provide an adequate explanation for the failure of his current partner to provide evidence to corroborate their relationship.
- [15] Based on the accumulation of credibility issues, the RAD dismissed the Applicant's appeal. The Applicant seeks judicial review of this decision.

II. Issues and Standard of Review [16] The Applicant argues that the RAD erred by failing to consider whether he was at risk of persecution by the Mungiki gang as a person who had been forcibly recruited. He says that the RPD and RAD incorrectly contradicted the prior finding by the ID that he had been recruited by the Mungiki, and also ignored the evidence that the gang persecutes individuals who leave it.

[17] This question must be assessed under the framework for reasonableness review set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] and confirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21.

[18] In summary, under the Vavilov framework, a reviewing court is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints (Vavilov at para 85). The onus is on the Applicants to demonstrate that “any shortcomings or flaws ... are sufficiently central or significant to render the decision unreasonable” (Vavilov at para 100). Absent exceptional circumstances, reviewing courts must not interfere with the decision-maker’s factual findings and cannot reweigh and reassess evidence considered by the decision-maker (Vavilov at para 125).

III. Analysis [19] The Applicant submits that his refugee claim was based on two grounds: his sexual orientation and his prior involvement with the Mungiki gang. Despite the inconsistencies in his narrative over time, the Applicant asserts that he has consistently said that he was forcibly recruited by the Mungiki. He put forward evidence that he was attacked by gang members when he was discovered with his same-sex partner in Kenya. The objective evidence – which is not disputed – attests to the atrocities committed by the Mungiki, including its punishment of people who try to leave the group.

[20] The Applicant argues that the RAD failed to analyze this aspect of his claim because it was unduly focused on his lack of credibility. He says that the RAD completely failed to consider how the evidence of Mungiki retribution against former members might put him at risk if he returned to Kenya. This mistake makes the entire decision unreasonable, according to the Applicant, because it demonstrates that the RAD did not follow a rational chain of analysis.

[21] The Applicant acknowledges the negative credibility findings made by the RPD and RAD. However, he submits that the RAD needed to explain how these negative credibility findings tainted all aspects of his claim, and that it needed to examine his risks as a former member of the Mungiki gang. Instead of doing this, he says that the RAD cut off its analysis after it found him to be lacking in credibility.

- [22] The Applicant relies on the ID's finding that he had been consistent in claiming that he was forcibly recruited into the gang. He contrasts that with the RPD's conclusion that he had fabricated his encounters with the Mungiki and that he had failed to establish that he had ever been recruited by, or threatened, or attacked by members of the gang. The Applicant submits that the finding that he was forcibly recruited was *res judicata* and thus binding on the RPD and RAD.
- [23] The Applicant claims that the RAD failed to analyze this aspect of his claim because it found him to be lacking in credibility. As a result of its faulty logic, the RAD did not analyze the risk he would face as a person who was forcibly recruited into the Mungiki but later escaped from the gang. The Applicant submits that this is unreasonable, and that the RAD decision should be quashed.
- [24] I am not persuaded.
- [25] The doctrine of *res judicata* has no application here, for many reasons. In summary, *res judicata* prevents the re-litigation of the same legal issue as between the same parties: *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44 at para 25. In this case, the ID was required to determine whether the Applicant was inadmissible for involvement in organized criminality, in proceedings brought under the authority of the Minister of Public Safety and Emergency Preparedness. In contrast to this, the RPD was required to determine whether the Applicant had established his claim for asylum, in proceedings involving the Minister of Citizenship and Immigration. These are different legal questions, involving different parties.
- [26] It is also important that the RPD and RAD considered evidence that was not put before the ID, including the Applicant's testimony and supporting documents.
- [27] More fundamentally, the RAD cannot be faulted for failing to analyze an argument that was not put forward by the Applicant. It is true that the Applicant mentioned in his refugee narrative that he was forcibly recruited into the Mungiki gang and that he fears he will be targeted by them because of his ethnicity if he returns. However, it is also true that the Applicant did not ever mention a fear of being targeted as an ex-member of the gang. Elsewhere in his narrative, the Applicant describes being attacked by gang members when he was with his same-sex partner in a park in Kenya. The focus of his claim as explained in his Basis of Claim narrative as well as the addendum he filed on May 12, 2022, was on the threats and violence he experienced as a bisexual man in Kenya and his fears of persecution because of his sexual orientation. This was also the main point advanced in his appeal submissions to the RAD.
- [28] Even if I accept that the RPD and RAD had an obligation to explain why they were departing from the ID's finding on the Applicant's involvement with the gang, I am not persuaded that a careful reading of the ID's decision supports the Applicant's argument. As discussed in more detail below, the ID's finding is best understood as amounting to nothing more than a grudging acceptance that the Applicant's involvement with the group was quite limited, that he was a forced recruit, and that he was able to leave the gang without difficulty. This does

not support his argument that he now faces a risk of persecution because of his former gang membership.

- [29] The RAD's assessment of the various credibility concerns with the Applicant's evidence is amply supported in the record and clearly explained in its decision. The RAD set out an exhaustive review of the answers provided by the Applicant during the CBSA interviews, noting the inconsistencies between them, and pointing out that in the last interview the Applicant completely changed his story about the degree of his involvement in gang activities.
- [30] The RAD then examined the ID decision, noting that the result of that proceeding was favourable to the Applicant because he was not found to be inadmissible to Canada. The RAD emphasized, however, that the ID's decision was hardly definitive in regard to his involvement with the Mungiki gang. As the RAD states, the ID found that the Applicant was "very much lacking in credibility" and that it did not accept his explanations for the contradictions in his evidence.
- [31] In its decision, the ID reviewed the contradictions in the Applicant's evidence about his connection with the gang. The ID's findings on this point are best understood in relation to the onus on the Minister in the admissibility hearing to show reasonable grounds to believe that the Applicant was a member of the gang, and thus should be excluded for his involvement in an organized crime group.
- [32] On the one hand, the ID reviewed the evidence about the Mungiki's practice of forcing people to join their gang by threats of extreme violence, and stated that it did not believe the Applicant's account of an encounter when he claims to have been threatened in this way. Based on the Applicant's evidence about his participation in the gang around the period of an election, the ID stated, "When I consider all of that, it seems to me what happened was that you were forcibly recruited into this Mungiki group around election time." Once the election was over, the gang reverted to its main activity of extorting the population, and the Applicant's involvement came to an end.
- [33] In contrast, the ID also found that although the Applicant referred to himself as a member, he had been forcibly recruited and "did not have to run away from the group to leave the group." Instead, he simply stopped associating with them after they went back to their criminal activities. Based on this, the ID member stated, "So, when I consider all of the elements that I have spoken about, I do not consider that you were what we would call a member of that organization. I think that you were forced to join and that you left as soon as would have been possible."
- [34] In considering the persuasive force of the ID's decision, it is also relevant to underline its findings regarding the Applicant's credibility. The following portions of the ID's decision give a clear picture of its assessment of the Applicant's credibility:

And frankly, today, I found you very much lacking in credibility.

And I was tempted to find that the Minister had not proven their case because the only evidence that the Minister has that you were a member of the Mungiki comes from your evidence, and I was tempted to say you are just so completely lacking in credibility that there is no credible evidence whatsoever that you were a member of the Mungiki.

You told quite a different story to me today than to what you told, especially in your first couple of interviews at the port of entry.

And you gave all sorts of excuses for why there were these contradictions.

And frankly, I do not accept any of those explanations....

I think what is more likely is that today, you were trying to minimize your involvement with the group because you realize that it can get you into a lot of trouble if you are found to be a member of the group.

[35] The RAD's exhaustive review of the Applicant's interviews with the CBSA Officers and the ID decision demonstrate a careful assessment of evidence and previous findings that go to the heart of his refugee claim. The entire focus of the Applicant's refugee claim was on the risk he faced as a bisexual man in Kenya. The RAD's assessment of that question is grounded in the evidence and based on the applicable law. There is no basis to find the RAD's finding on this point to be unreasonable. The RPD and RAD were not legally bound to apply the ID's decision, and in any event the ID's decision on the Applicant's involvement with – and potential risk from – the Mungiki gang is equivocal at best.

[36] The Applicant also challenges the RAD's finding that his lack of credibility on some questions cast doubt over his entire narrative. The Applicant submits that the RAD was required to assess each piece of evidence separately before coming to an overall conclusion on his claim.

[37] I am not persuaded.

[38] The RAD set out the basis for its credibility findings in clear terms, and its conclusion that the problems with the Applicant's evidence were sufficiently serious as to call into question his entire evidence is amply justified. I will not repeat the earlier discussion about the Applicant's inconsistent statements to the CBSA Officers as contrasted with his evidence before the ID. In addition to that, the RAD reviewed the Applicant's evidence about his same-sex relationships, noting that he omitted an important detail when he failed to refer to his first partner in Kenya. The RAD then examined the evidence regarding the Applicant's other relationships, noting certain gaps and inconsistencies.

[39] Crucially, the RAD pointed out that the Applicant had not challenged the RPD's finding that he had attempted to forge documents to bolster his refugee claim. A courier package the Applicant's brother had sent to him was intercepted by the CBSA and found to contain documents and stamps that could be used to create forged documents. The RPD rejected the Applicant's evolving explanations for this and concluded that he had intended to submit

forged documents to bolster his claim of mistreatment in Kenya based on his sexual orientation. The RAD reasonably concluded that this was a determinative finding that undermined the Applicant's credibility generally.

[40] There is no basis to disturb the RAD's credibility findings. It explained why it found the accumulation of negative credibility findings to be serious enough as to undermine the Applicant's credibility generally, and its findings are fully supported in the record.

[41] For the reasons set out above, I am not persuaded by the Applicant's arguments. The RAD decision is reasonable when assessed under the Vavilov framework. The reasoning is clear, and the RAD's findings are based on the evidence and responsive to the Applicant's appeal submissions. There is no basis to set the decision aside.

[42] The application for judicial review is therefore dismissed.

[43] There is no question of general importance for certification.

JUDGMENT in IMM-11827-23

THIS COURT'S JUDGMENT is that:

The application for judicial review is dismissed.

There is no question of general importance for certification.

"William F. Pentney"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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