

Federal Court



Cour fédérale

Date: 20190911

Docket: IMM-97-19

Citation: 2019 FC 1161

Ottawa, Ontario, September 11, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**EMMANUEL OSEMUDIAME IKHELOA
MORONKEJI OLUBUKOLA IKHELOA
KELVIN EHINOMIE IKHELOA
EMMANUELLA OBOSE IFEOLUWA IKHELOA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of a December 14, 2018 decision made by a member of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [the Decision], upholding the December 21, 2017 decision of a member of the Refugee Protection

Division [RPD], finding that the Applicants were not Convention refugees or persons in need of protection within the meaning of sections 96 and 97(1), respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, I find that the Decision is reasonable and that this application for judicial review must be dismissed.

II. **Background**

[3] The Applicants are a married couple and their two children, all citizens of Nigeria. The Applicants claim refugee protection on the basis of the sexual orientation of the male adult Applicant [the Principal Applicant]. He says that he is bisexual and that he is wanted by the Nigerian police for engaging in a sexual relationship with a man whom he met in a bar [his Former Partner]. He alleges that this relationship came to the attention of his uncle when the police came to their family home after the Former Partner named the Principal Applicant as his lover to these authorities. The uncle then demanded that the Applicants undergo cleansing rituals. The rituals would involve the Principal Applicant's wife and daughter undergoing female genital mutilation [FGM], and the Principal Applicant and his son receiving incisions on their face and body. The Applicants left Nigeria for Canada on August 20, 2017.

[4] The RPD rejected the Applicants' claims for protection under sections 96 and 97(1) of IRPA, finding that the Principal Applicant was not credible with respect to the central issues of his claim. Based on credibility concerns arising from the use of non-genuine affidavits, as well as

credibility determinations regarding the Principal Applicant's testimony about his Former Partner, the RPD was not satisfied that the Principal Applicant was bisexual as he alleged. Consequently, the RPD was not satisfied that any person sought to harm his spouse or children, as their risk of harm was solely based on the premise that the Principal Applicant was bisexual.

[5] The Principal Applicant appealed that decision to the RAD, which admitted additional documentary evidence but declined to hold an oral hearing based on the admission of that evidence. After considering the RPD's decision and the Applicants' arguments on appeal, the RAD concluded that overall the decision was correct and that there was insufficient credible evidence that the Applicants were Convention refugees or persons in need of protection.

III. **Issues and Standard of Review**

[6] The Applicants' arguments raise the following issues for the Court's consideration:

- A. Did the RAD err in its assessment of the Principal Applicant's credibility (including its assessment of the documentary evidence)?
- B. Did the RAD err in its decision not to hold an oral hearing?
- C. Did the RAD err in failing to independently assess the risk of FGM?
- D. Did the RAD err in its assessment of the Applicants' risk under section 97 of IRPA?

[7] The parties agree, and I concur, that these issues are all subject to review on a standard of reasonableness (see, e.g., *Haggar v Canada (Citizenship and Immigration)*, 2018 FC 388 at para 10; *Al-Abayechi v Canada (Citizenship and Immigration)*, 2018 FC 360 at para 11).

IV. Analysis

A. Did the RAD err in its assessment of the Principal Applicant's credibility (including its assessment of the documentary evidence)?

[8] The RAD arrived at its conclusion that the Principal Applicant was not credible in his testimony as to his relationship with his Former Partner on several bases, each of which is challenged by the Applicants. I will address each of these in turn.

(1) Initial Meeting with the Former Partner

[9] The Principal Applicant testified that he met his Former Partner in a Nigerian bar, shortly after the Principal Applicant returned from visiting Canada. They purportedly struck up a conversation surrounding the protection of LGBT rights in Canada, in comparison to the mistreatment of that community in Nigeria. The RPD concluded that this testimony lacked credibility, in part because the Applicant was vague as to how the conversation about same-sex issues began. The RAD disagreed with that particular analysis, finding that how the conversation began was a minor point that would not be sufficient on its own to conclude that the Principal Applicant was not credible. It also noted there was some evidence as to how the conversation arose, as the Principal Applicant stated he had brought up the conversation about the treatment of homosexuals in Nigeria.

[10] However, the RAD agreed with the RPD's overall reasoning that it was not plausible someone would start a conversation with a stranger in a bar about a topic that is so controversial and dangerous in Nigeria. The RAD concluded this line of reasoning was consistent with the documentary evidence about the treatment of homosexuals in Nigeria. It also found that the RPD afforded the Principal Applicant an opportunity to address this concern at the hearing, and his response was vague, which weighed against his credibility.

[11] The Applicants submit that the RAD's analysis represents speculation and conjecture. They argue that the Principal Applicant answered the RPD's questions based on his understanding of the information being sought, explaining that he and his Former Partner were seated alone in the bar, in an area away from others, and that he was in a disoriented state of mind following his return from Canada.

[12] I find that the privacy of the conversation does not undermine the reasonableness of the RAD's analysis, which turned at least in part on the fact that the Principal Applicant and his Former Partner were strangers to each other at the time they met. With respect to the Principal Applicant's disorientation, the Applicants submit that this state of mind is consistent with a psychotherapist's report which was submitted in support of his claim, as well as the sort of concerns addressed by the SOGIE Guidelines. The Applicants argue that this disorientation explains why the Principal Applicant could not recall exactly which person started the conversation, asserting that a refugee hearing should not be determined on the basis of a memory test. However, as previous noted, the RAD's adverse credibility determination about this meeting

with his Former Partner does not stem from the Principal Applicant's inability to remember who started the conversation. I find no basis to conclude that this determination is unreasonable.

(2) Failure to Contact the Former Partner

[13] The RPD also drew an adverse inference from the fact that the Principal Applicant had not taken any steps to find out what happened to his Former Partner. The RAD disagreed with the Applicants' argument that this was a peripheral finding, reasoning that the Principal Applicant's behaviour was not consistent with the claim that the relationship lasted for months and/or the potential threat posed by the man who named the Principal Applicant to the authorities. The Applicants advanced the same argument in this application for judicial review. I find no merit to the argument that this was a peripheral finding, as it goes to the credibility of the Principal Applicant's evidence of his relationship with his Former Partner, and I conclude that the RAD's reasoning is within the range of acceptable outcomes.

[14] The Applicants also argued before the RAD that the RPD did not put to the Principal Applicant the question whether he used his contacts to find out what happened to his Former Partner, before basing a negative inference on the lack of such efforts. The RAD found that the RPD raised this issue sufficiently, as the RPD asked about which people he had contacted in Nigeria to find out information, after asking whether he had tried to contact his Former Partner. The Applicants raise the same argument in this application for judicial review, but I find nothing unreasonable in the RAD's analysis.

(3) Affidavits

[15] The Applicants submitted to the RPD three affidavits, sworn by the Principal Applicant's brother-in-law, sister, and friend, attesting to events surrounding the discovery of the relationship between the Principal Applicant and his Former Partner. The RPD concluded that all three affidavits were not authentic, noting differences in font within the documents, as well as mistakes and inconsistencies in grammar, punctuation, and spelling, including the spelling of the sister's surname in the affidavit she swore. The RPD also based this conclusion on information in a Response to Information Request [RIR] in the country condition documentation. This RIR explained that it was unlikely that those associated with members of the LGBT community would swear affidavits of this nature, due to the high levels of homophobia, stigma, and criminalization of same-sex relationships in Nigeria.

[16] To support the authenticity of the affidavits on appeal, the Applicants proffered, and the RAD accepted into evidence, letters from the lawyers before whom the affidavits with the numerous errors were sworn, as well as a legal opinion from a Nigerian barrister. The lawyers' letters stated that the affidavits were authentic, and the legal opinion spoke to the validity of affidavits with errors and disagreed with the contents of the RIR. The RAD did not find the lawyers' letters to adequately explain the errors, and it preferred the evidence in the RIR to that in the legal opinion; as a result, it afforded the affidavits little weight.

[17] The Applicants argue that, while the RAD speaks of the weight to be assigned to the affidavits, its reasoning demonstrates a conclusion, like that of the RPD, that the affidavits were

not authentic. I agree with this characterization and have therefore considered the Applicant's argument that clerical errors are not necessarily determinative of the authenticity of a document (see *Mohamud v Canada (Citizenship and Immigration)*, 2018 FC 170 [*Mohamud*]). However, noting the RAD's reasoning, including that it would be unusual for two affidavits from two different lawyers to have similar mistakes, I do not find its conclusion to be unreasonable on the facts of this particular case.

[18] Moreover, the RAD's analysis turns not only on the errors in the affidavits but on the evidence in the RIR. Turning to that analysis, I have considered not only the parties' pre-hearing written submissions and oral submissions at the hearing, but also submissions contained in correspondence from the Applicants' counsel following the hearing, relating to the consideration of this particular RIR in *Gbemudu v Canada (Citizenship, Refugees and Immigration)*, 2018 FC 451 [*Gbemudu*], and the Respondent's response thereto.

[19] The Applicants submit that there is no actual evidence in the RIR of persons who deposed affidavits regarding another person's sexual orientation and were punished or faced risks for swearing to such facts. They also submit that the information in the RIR is hypothetical, as it relates to the ability of lawyers to notarize affidavits regarding a person's sexual orientation. The Applicants rely on *Gbemudu* at paragraph 81, in which Justice Russell made observations to such effect about this RIR.

[20] In my view, the observations made in *Gbemudu* do not assist the Applicants. In that case, the Court found the RAD's decision to exclude an affidavit, in part based on credibility concerns arising from the RIR, to be unreasonable. However, the Court emphasized that the deponent did not actually state any knowledge about the applicant's sexuality. I read the Court's reasoning as based at least in part on the statement in the RIR, that a lawyer can be punished for not reporting knowledge of a contravention of the Nigerian Same-Sex Marriage Prohibition Act, and the fact that there was no such knowledge stated by the deponent. This fact is distinguishable from the circumstances of the present case, where the deponents refer to conversations with the Applicants about the Principal Applicant's bisexuality.

[21] The question for this Court is whether the RAD's reliance on the RIR is reasonable. I appreciate that the legal opinion of the Nigerian barrister, introduced by the Applicants, disagrees with the RIR's conclusion that it would be strange or unusual for a deponent to swear an affidavit related to another individual's homosexuality. However, the RAD acknowledges this disagreement, as well as the barrister's statement that it is open for anyone to swear anything in an affidavit. The RAD reasons that, while this may be the case, the RIR does not dispute whether it is open for someone to swear such an affidavit, but rather it comments on the likelihood that someone would do so. Also, while the barrister points out the confidentiality that exists between a notary and a deponent, the RAD reasons that the document could be released to others, such that this confidentiality does not mitigate the risk to the deponent.

[22] The RAD notes that the majority of the sources indicate it is unlikely that a person would swear to another person's membership in the LGBT community in Nigeria; and, having weighed

the available evidence, it so finds. While the legal opinion introduced by the Applicants expresses conclusions different from those in the RIR, the RAD clearly considered the legal opinion, and there is no basis for this Court to find the RAD's analysis and resulting reliance on the RIR is unreasonable.

[23] Also, although neither party raised this precedent, I note that *Mohamud* was followed in *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at paras 17-30 [*Oranye*]. In *Oranye*, the RAD considered affidavits discussing an applicant's sexuality and gave them little weight for reasons including spelling and grammar errors and evidence that fraudulent documents are widely available in Nigeria. The Court found the RAD's decision unreasonable, both because of its reliance on typographical and spelling/grammar mistakes and because it masked a finding about the affidavits' authenticity as a weight determination and did not consider why these specific affidavits were not genuine.

[24] I agree with the reasoning in *Oranye* that the RAD should not make findings of authenticity veiled as determinations of weight. However, in the present case, I do not regard this as a basis to set aside the Decision. As noted above, I have found to be reasonable the RAD's reasoning that it would be unusual for two affidavits from two different lawyers to have similar mistakes and its reliance on the RIR to corroborate its conclusion with respect to the affidavits. Moreover, as explained below in considering the RAD's decision not to hold an oral hearing, the RAD also reasonably concluded that, because there were issues of credibility besides those regarding the affidavits, the evidence regarding the affidavits was not central to the decision.

(4) LGBT Support Documents

[25] The Applicants argue that the RAD erred by failing to conduct an independent assessment of the evidence contained in documents submitted by the Applicants from support organizations within the LGBT community in Canada. I agree with the Respondent that this argument cannot give rise to a reviewable error, as the Applicants' Memorandum of Argument submitted to the RAD demonstrates that they did not challenge the RPD's findings regarding these documents on appeal (see *Abdulmaula v Canada (Citizenship and Immigration)*, 2017 FC 14 at paras 15-16 [*Abdulmaula*]).

B. Did the RAD err in its decision not to hold an oral hearing?

[26] As noted above, the RAD admitted the new evidence introduced by the Applicants on appeal, finding that the requirements of section 110(4) and applicable jurisprudence related to the introduction of new evidence were met. It then considered the Applicants' request that, based on the admission of this new evidence, it should hold an oral hearing under section 110(6) of IRPA. Justice Roussel explained the operation of section 110(6) as follows in *Tchangoue v Canada (Citizenship and Immigration)*, 2016 FC 334 [*Tchangoue*] at para 11:

11. Subsection 110(3) of the IRPA sets out the general rule that the RAD must proceed without an oral hearing. However, in accordance with subsection 110(6) of the IRPA, where new evidence presented at the RAD: (a) raises a serious issue with respect to the credibility of the person who is the subject of the appeal; (b) is central to the decision with respect to the refugee protection claim; and (c) if accepted, would justify allowing or rejecting the refugee protection claim, the RAD may convene an oral hearing.

[27] The RAD's analysis of this issue is found in the following paragraph of the Decision:

Subsection 110(6) of the *Act* delineates when the RAD is permitted to hold a hearing. It states that the RAD can hold a hearing where there is new evidence that raises a serious credibility issue. Further, the evidence must be central to the decision. In addition, there is a requirement that the evidence would justify a final decision allowing or rejecting the claim. The Appellants have argued that the new and late documentary evidence meets the criteria of section 110(6) but do not state how it does so. In this appeal, I do not find that the documentary evidence raises a serious credibility issue as it is already in dispute. Further, I do not find that the new and late evidence regarding the affidavits are central to the decision; it is the cumulative effect of various issues that have led to this decision. Finally, the new and late evidence are not sufficient in and of themselves to justify allowing or rejecting the claim. Again, there are several issues, not only the affidavits, which led to the rejection of the claim.

[28] The Applicants note that the RPD was not satisfied that the Principal Applicant is bisexual, in part based on credibility concerns arising from the submission of non-genuine affidavits. As such, they submit that the affidavits were central to the Applicants' claim and that, as the new evidence supported the authenticity of the affidavits, they could have justified allowing the claim and an oral hearing should have been held.

[29] As previously noted, I have accepted the Applicants' argument that the RAD's reasoning, discounting the probative value of the affidavits, can be characterized as a conclusion, like that of the RPD, that the affidavits were not authentic. I also agree with the Applicants' submission that, as the evidence relied upon by the RPD to impugn the Principal Applicant's credibility included the affidavits, those affidavits and therefore the new evidence which spoke to them are relevant to the issue of credibility. However, the RAD's analysis under section 110(6) does not

suggest that it overlooked this point. It did not find that the new evidence is irrelevant to credibility, but rather that it does not raise a serious credibility issue, because credibility was already in dispute before the RPD. Moreover, it found that, because there were issues of credibility besides those regarding the affidavits, the new evidence regarding the affidavits was not central to the decision and would not justify allowing or rejecting the claim.

[30] The Applicants rely upon *Tchangoue*, in which the new evidence on appeal was found by the Court to be central to the decision and, if accepted, would have justified allowing the refugee claim, as well as Justice Mosley's recent decision in *Horvath v Canada (Citizenship and Immigration)*, 2018 FC 147, in which the new evidence was found by the Court to go to the core of the claimants' credibility. Those authorities are distinguishable from the present case, as the RAD conducted a thorough analysis under section 110(6) and concluded that the new evidence was not central to the decision. I find nothing unreasonable in that analysis and the resulting decision not to hold an oral hearing.

C. Did the RAD err in failing to independently assess the risk of FGM?

[31] The Applicants submit that the RAD erred in failing to conduct an independent assessment of the evidence before it related to the risk of FGM to the female Applicants. The RPD was not satisfied that anyone sought to harm the Principal Applicant's spouse or their children, as their risks of harm were based solely on the unproven premise that the Principal Applicant was bisexual. The RAD noted that the Applicants did not specifically raise any issues with respect to the RPD findings on FGM but, having reviewed the record, found no error. I

agree with the Respondent's submission that the Applicants' Memorandum of Argument submitted to the RAD did not take issue with the RPD's findings regarding the risk of FGM and that this argument cannot now represent a basis to challenge the RAD's Decision (see, again, *Abdulmaula*).

D. Did the RAD err in its assessment of the Applicants' risk under section 97 of IRPA?

[32] Finally, the Applicants submit that, regardless of any credibility concern it had with respect to the Principal Applicant, the RAD was required to assess his risk under s 97 of IRPA. The Applicants note that, while an adverse credibility finding may be conclusive of a refugee claim under s 96 of IRPA, it is not necessarily conclusive of a claim under s 97 (see *Odetoyinbo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 501 at para 7). In the Applicants' submission, the perception of the Principal Applicant as a bisexual man would expose him to risks upon return to Nigeria, independent of whether this perception is accurate.

[33] The RAD considered this argument and found that, while an adverse credibility finding may not necessarily be conclusive of a section 97 claim, it was conclusive in the present case, as the unproven allegations surrounding the Principal Applicant's relationship with his Former Partner were central to the allegation of his bisexuality and therefore to any resulting risk in Nigeria. I can find no flaw in this reasoning.

V. **Conclusion**

[34] Having found that none of the Applicants' arguments represents a basis to conclude that the Decision is unreasonable, this application for judicial review must be dismissed.

VI. **Certified Question**

[35] The Applicants proposed the following question for certification for appeal:

Is there a yardstick to hold an oral hearing to determine what raises a serious credibility issue when new evidence is accepted that is central to the RPD decision and sufficient to justify allowing or rejecting the claim?

[36] Under subsection 74(d) of IRPA, I must consider whether this proposed question represents a serious question of general importance that would be dispositive of an appeal. The Respondent opposes certification of this question, noting that the RAD's decision whether to hold an oral hearing is a discretionary one (see *Sow v Canada (Citizenship and Immigration)*, 2016 FC 584 at para 34).

[37] The outcome on the issue whether the RAD erred in making the decision not to hold an oral hearing turned on whether the RAD exercised its discretion reasonably, in the context of the particular evidence introduced by the Applicants on appeal and its role in relation to the overall body of evidence. As such, both the RAD's conclusion and the outcome of this judicial review turned very much on the facts of this case, and I cannot conclude that the question proposed by the Applicants represents one of general importance that would be dispositive of an appeal. The request for certification is therefore denied.

JUDGMENT IN IMM-97-19

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-97-19

STYLE OF CAUSE: EMMANUEL OSEMUDIAME IKHELOA
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PLACE OF HEARING: TORONTO, ONTARIO

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JUDGMENT AND REASONS SOUTHCOTT, J.

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