

Federal Court



Cour fédérale

Date: 20200512

Docket: IMM-4472-19

Citation: 2020 FC 613

Ottawa, Ontario, May 12, 2020

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

**SIYA AZANOR, AKPOUFOMA PHILIP AZANOR
AND SARAH OKE AZANOR BY HER
LITIGATION GUARDIAN SIYA AZANOR**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of the Refugee Appeal Division [RAD], wherein the RAD affirmed the finding of the Refugee Protection Division [RPD] and determined that the Applicants are not Convention refugees or persons in need of protection. The

RAD dismissed the appeal in accordance with paragraph 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, the application is dismissed.

II. **Background**

[3] The Applicants are citizens of Nigeria. The Principal Applicant is the mother of the other two applicants; one of whom is a female minor and the other being an eighteen-year-old male. They are Christians. The Principal Applicant was born and raised in Port Harcourt, River State and has a university level education. She became pregnant with her first child when she was still at school and subsequently married and had a second child with her husband. She says that she had same-sex relationships in school, at University and during her married life.

[4] On July 23, 2016, the Principal Applicant claimed she was discovered being intimate with a woman by one of her neighbours. Believing that the Nigerian police were investigating her same-sex activities, she fled Nigeria to the United States on August 1, 2016 and remained there for just over a year with her children before entering Canada.

[5] The Principal Applicant had previously travelled to the United Kingdom [UK], between 2003 and 2008, without making a claim for protection, and later travelled to the United States [US] before arriving in Canada, also without filing a claim. The Principal Applicant explained in her claim for protection that she did not file for asylum in the UK because her sexual identity

was not yet known by members of her community, and in the United States she had a fear of arrest and deportation and could not afford a lawyer.

[6] On September 27, 2018 the RPD heard the Applicants' claims. A decision was rendered on October 31, 2018. The claims were denied, with credibility being the determinative issue. The RPD held there was insufficient reliable and trustworthy evidence to establish the Principal Applicant's claims regarding her sexual orientation and the claims that she and her family face ongoing persecution in Nigeria. In particular, the RPD was suspicious of the Principal Applicant's low level of familiarity with the laws on homosexuality in Nigeria and by her inability to produce corroborative documentation about her alleged same-sex relationships. The RPD also considered the fact that she did not make refugee claims in the UK and the US when she was visiting these countries, prior to coming to Canada. Finally, the RPD found that the claims of the Principal Applicant's two children could not succeed, being rooted in their mother's bisexual profile. During the hearing, the Principal Applicant was the primary witness; however, a few questions were directed to her son. The son and his sister were present throughout the hearing including while the Principal Applicant testified about the factual basis of her claim. The Applicants were represented by counsel and no objection was raised to the presence of the children during the hearing by either the Principal Applicant or counsel.

[7] The Applicants raised a number of challenges to the RPD decision at the RAD, including that there were violations of the Chairperson's Guideline 4 regarding women refugees fearing gender-related persecution, and the Chairperson's Guideline 9 regarding sexual orientation, gender and identity expression [SOGIE Guidelines].

[8] The Applicant's appeal to the RAD was dismissed on June 21, 2019. The RAD did not wholly accept the RPD's analysis, but found that it was sufficiently correct to ultimately affirm the decision.

[9] An attempt to submit additional evidence by affidavit pursuant to s. 110(4) of the IRPA was rejected. The RAD found that the affidavit was inadmissible:

“[t]he RAD finds that the evidence did not arise after the rejection of the claims. Although the affidavit is dated after the hearing, the contents of the affidavit either reiterate what the Appellants already said during the hearing, or provide additional explanations for the alleged discrepancies identified by the RPD. These additional explanations are not events that occurred after the rejection of the claims, but are simply additional details that were not provided at the hearing... the Appellants were given an opportunity to explain their allegations and address the RPD's concerns at the hearing. The role of the RAD is not to provide the opportunity to complete a deficient record. The RAD does not find that this is new evidence.”

[10] The RAD further rejected the Applicant's contention that a “police invitation letter” dated July 25, 2016 and addressed to the Principal Applicant's home was only received on January 2, 2019, determining that in fact the letter was received in 2016.

[11] A letter of attestation from a friend and from the Applicant's mother that were meant to corroborate allegations were similarly rejected by the RAD. The basis of rejection was that the letters were received on October 8, 2018, three weeks before the RPD rejected the claims. At the conclusion of the RPD hearing, counsel had advised the panel member of an intent to submit further documentary evidence. This had not been done prior to the RPD decision. The Principal Applicant says that she was told by counsel that it was too late.

[12] A request for an oral hearing was rejected by the RAD applying section 110(6) of the IRPA as the proposed new evidence had been found to be inadmissible.

[13] The RAD found that the RPD erred in finding it implausible that the Principal Applicant felt confused about her first same-sex relationship but also liked it at the same time. The RAD held this finding was based on speculation and made assumptions about the interior world of the Applicant. The RAD noted that “implausibility findings must be made only in the clearest of cases”.

[14] Further, the RAD found that the RPD erred in finding it implausible that the Principal Applicant was unfamiliar with the Nigerian laws on homosexuality. The RPD expected the Principal Applicant to be aware of the provisions within the *Same-Sex Marriage (Prohibition) Act*. This was an improper implausibility finding, the RAD held. The Applicant had sufficient knowledge of the fact that homosexual acts are not officially acceptable in Nigeria and that she would receive some form of condemnation at the very least.

[15] The RAD was skeptical about the various agents of persecution named by the Principal Applicant. It held that she did not adduce sufficient evidence, on a balance of probabilities, to support such claims. If the Applicant was afraid of her ex-husband, she should have included this in her Basis of Claim [BOC] as this could increase the level of persecution significantly. In relation to the community or the head of the community, her testimony was found not to be credible, as she did not know the names of the head of the community and the neighbours who she claimed were targeting her for rituals.

[16] The RAD affirmed the RPD's negative inferences relating to the Principal Applicant's failure to make asylum claims in either the United Kingdom or the United States.

[17] The RAD found on a balance of probabilities that a consent letter from the Principal Applicant's former husband to take the children with her when she left Nigeria was written prior to the allegations, and thus, that the Applicants were not fleeing persecution related to same-sex conduct when they left Nigeria for the United States.

[18] The RAD held that the RPD did not violate the SOGIE Guidelines. The Applicant argued that her full and candid testimony at the RPD hearing was impeded because her children were in the room, along with some observers who were employees of the RPD there for training purposes. However, no attempts to ask the Principal Applicant's children to leave the room were taken by Applicant's counsel during any part of the hearing. The observers were allowed to be present under Rule 58 of the *Refugee Protection Division Rules*, SOR/2012-256 and did not require an advance application to do so. An opportunity was provided to counsel to comment on the presence of the observers, and it was not taken. The RAD further found that the manner of questioning was done in an appropriate and sensitive manner consistent with the SOGIE Guidelines.

III. Issues

[19] Having considered the parties' submissions, I find that the issues are:

- (1) Whether the RAD erred in rejecting new evidence;

- (2) Whether the RAD rendered an unreasonable decision concerning the determination that the Applicant was not credible; and
- (3) Whether the RAD erred in finding no violation of the SOGIE Guidelines.

IV. Standard of Review

[20] The parties submit, and I agree, that the standard of review of the RAD decision is reasonableness. Written submissions were made before the Supreme Court of Canada's decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. The parties relied on the *Dunsmuir* framework in their submissions on standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9 [Dunsmuir]).

[21] The Supreme Court in *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 [Canada Post], addressed the situation where the parties make submissions based on *Dunsmuir* yet the reviewing court is expected to apply the *Vavilov* framework. Justice Rowe at para 24 held that there is no unfairness where the standard and outcome would be the same under either *Dunsmuir* or *Vavilov*. In the case at bar, the presumptive standard of reasonableness applies.

[22] The Applicants take issue, however, with the standard applied by the RAD in reviewing the RPD decision. The Applicants note that it is incumbent on the RAD to conduct an independent assessment of the Applicants' claim in its appellate function, following the hybrid appeal approach outlined in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93.

An important aspect of this hybrid approach is that there is no presumption that the RPD has a meaningful advantage, even where credibility findings are concerned: *Rozas Del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 [*Del Solar*]. The Applicants helpfully quote from Justice Diner's decision in *Del Solar* at paragraph 136:

I note that the Federal Court of Appeal wrote, "one should always keep in mind that the very first objective of the IRPA (s. 3(2)(a)) is to recognize that the refugee program is about saving lives and offering protection to the displaced and persecuted" (Huruglica at para 53). This case, like all refugee cases, impacts real lives. In my view, to be reasonable, a deferential standard selected by the RAD cannot simply duplicate the supervisory role of this Court on judicial review. The RAD reasonableness standard runs the risk of curtailing the opportunity to have flawed credibility determinations corrected

V. Analysis

A. *Whether the RAD erred in rejecting new evidence*

[23] Credibility issues were the crux of the RPD's decision. In light of this, the Applicants submit that the RAD ought to have accepted new affidavit evidence, which they say works directly to restore credibility. However, the RAD was obliged to apply the statutory test for admission of new evidence under section 110(4) of the IRPA, and it did so reasonably in my view.

[24] It was reasonable for the RAD to find that the affidavit tendered by the Principal Applicant does not meet the statutory test for new evidence; rather, it largely supplements testimony from the RPD hearing with further explanations that were available at the time. Next, the RAD determined that the police invitation letter from the Nigerian police, dated July 25,

2016, was available to the Applicants at the time of the RPD hearing. The Applicant's claim that this letter was received on January 2, 2019, rather than in July 2016, does not find support in the available evidence. Finally, the RAD reasonably rejected letters of attestation from the Principal Applicant's friend and from her mother, on the basis that they also pre-date the RPD decision.

B. Whether the RAD rendered an unreasonable decision concerning the determination that the Principal Applicant was not credible

[25] The RAD conducted a correctness review of the RPD decision, and affirmed key credibility findings against the Applicants. It is true the RAD found some errors in the RPD's analysis, but these were not fatal and did not undermine the RPD decision as a whole.

[26] As the Respondent noted in oral argument, the Principal Applicant's descriptions of alleged agents of persecution were more extreme in her oral testimony at the RPD as compared to written submissions in the Basis of Claim form. The Principal Applicant's explanation that there was a mistake on the date of the consent letter written by her ex-husband allowing the children to travel with her (dated July 3, 2016, and predating the incident precipitating the Applicants to flee Nigeria on July 23, 2016) is not convincing. It was not an error for the RAD to reject this explanation, especially in view of its other negative credibility findings. Finally, the Applicants' failure to claim refugee status in the US detracts from the credibility of the persecution narrative.

C. Whether the RAD erred in finding no violation of the SOGIE Guidelines

[27] The Applicants assert that the RAD erred in not finding that the RPD Member violated the SOGIE Guidelines. It is alleged that the Principal Applicant was prevented from providing full oral testimony regarding her bisexual identity as she was apparently uncomfortable discussing this subject in the hearing room; further, the Applicants claim the Principal Applicant was wrongly denied the opportunity to provide corroborative evidence about her sexual identity to the RAD.

[28] It is conceivable that the presence in the hearing room of the Principal Applicant's two children, and the two observers from the IRB, created some awkwardness and discomfort for the Principal Applicant. Nevertheless, objections to this were not raised by the Principal Applicant or her counsel at the time of the hearing. These objections were only raised afterwards. In the absence of complaint, the RPD Member did not err in proceeding with the sensitive yet relevant line of questioning concerning the Principal Applicant's sexual identity.

[29] As to the application of the SOGIE Guidelines to the issue of concealment of same-sex relationships, it was open to the RAD to make the determination it did on the merits of the evidence properly before it and on the basis of its credibility findings.

VI. Conclusions

[30] The Applicants object to the negative findings of the RPD and the RAD, but have not raised an error in the RAD's decision that invites this Court's intervention. The credibility

determinations of the RAD are owed considerable deference by this Court. Further, the errors the RAD identified with the RPD decision do not render the RAD's affirmation of that decision unintelligible. For these reasons, the Applicants' judicial review application cannot succeed.

[31] No serious questions of general importance were proposed and none will be certified

JUDGMENT IN IMM-4472-19

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4472-19

STYLE OF CAUSE: SIYA AZANOR, AKPOUFOMA PHILIP AZANOR,
AND SARAH OKE AZANOR BY HER LITIGATION
GUARDIAN SIYA AZANOR V THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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DATED: MAY 12, 2020

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