

Federal Court



Cour fédérale

Date: 20220114

Docket: IMM-595-20

Citation: 2022 FC 38

Toronto, Ontario, January 14, 2022

PRESENT: Madam Justice Go

BETWEEN:

DAUDA OLUWASANJO ADEKANBI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Dauda Oluwasanjo Adekanbi [Applicant] seeks judicial review of the RAD's decision [Decision] affirming the RPD's finding that the Applicant is not credible in his claim for refugee protection from persecution in Nigeria based on sexual orientation. The Applicant submits that the Decision was unreasonable based on its treatment of the evidentiary record before it. The Respondent submits that there was no error in the RAD's decision warranting the

intervention of the court. For the reasons set out below, I find the Decision to be reasonable and I dismiss the application.

II. **Background**

A. *Factual Context*

[2] The Applicant is a citizen of Nigeria. The Applicant claims that he began a relationship with a male classmate at university in December 2011, when he was 15 years old. Their relationship continued in secret until the summer of 2013.

[3] The Applicant states that he started getting insults and threats on campus in July 2013. The insults, threats and name-calling became so unbearable that the Applicant states he would shield himself in fear that going out would cause more abuse, so he decided to leave campus and return home. When he got home, he explained everything to his father.

[4] As the news of the Applicant's same-sex relationship spread through their community, the Applicant claims that members of his father's family made it known that they planned to force the Applicant to undergo a cleansing ritual to "cure" his homosexuality, which might end up harming or killing him.

[5] The Applicant states that although his father was upset by the news of the former's same-sex relationship, he feared for his son's safety and made plans for them to travel immediately to the United States together. There, the Applicant's father turned him over to an agent who

brought him to Canada, where he was picked up by his stepmother, who already lived in Toronto with the Applicant's siblings. The Applicant's stepmother and her minor children had previously been granted refugee status in Canada based on other grounds. At the time of the RPD hearing, the Applicant's father had also arrived in Canada and filed a refugee claim but did not testify at the Applicant's RPD hearing.

B. *Prior Proceedings*

[6] The Applicant initially had a RPD hearing in June 2014 and his claim was rejected in July 2014. The matter was then appealed to the RAD. The RAD member who heard the Applicant's first appeal returned the matter to the RPD on the basis that the RPD should have taken into account the Applicant's status as a minor.

C. *The RPD Decision*

[7] By the time the Applicant's matter was heard the second time before the RPD, he had turned 21. The RPD determined that the Applicant was not a credible witness and found, on a balance of probabilities, that there was insufficient evidence to support the Applicant's allegations regarding either his sexual orientation or any of the allegations or problems in Nigeria. Specifically, the RPD's negative credibility findings were based on the following concerns:

- Despite having been in a relationship with his same sex partner, T.A., for about 20 months, the Applicant's vague and general description of T.A. is not consistent with the allegation of a close interpersonal relationship.

- The Applicant testified to details about the problems he faced in July 2013, including receiving 20 death threats, losing close friends, being threatened and having things thrown at him. Noting that the Basis of Claim [BOC] narrative lacks important details about when the relationship started, with whom, how it evolved, and the omission about death threats, the RPD drew an adverse credibility inference. While the Applicant was traumatized back in 2013, five years later he had still failed to make additional changes to his BOC, despite having advice from competent legal counsel.
- The Applicant's failure to mention his partner's problems in the narrative undermined the allegations which were central to the claim.
- The undated affidavit from the Applicant's father is inconsistent with the Applicant's BOC with respect to when and how he learned of the Applicant's same sex orientation. The father, who was in Canada, was not called as a witness to provide more fulsome details about what happened and when.
- The neighbour's affidavit stated that the Applicant was found "caught in sexual activity" in May 2013, while the Applicant's testimony was that the matters unfolded on campus in July 2013.
- There was a lack of corroborating documentation of any ongoing affiliation with 519 Community Centre, a LGBTQ Group in Toronto, or a lack of effort to obtain documentation, other than a document indicated the Applicant had gone to 519 in or about January 2014.
- The Applicant stated he had not been in any same sex relationship in Canada, even though he had been in Canada for four and a half years.

[8] The RPD gave little or no weight to a) a psychological report with a diagnosis for stressor related disorder with prolonged duration, and b) a letter from North York Community House.

[9] In the end, the RPD found there is less than a mere possibility that the Applicant would face risk of persecution or, on a balance of probabilities, be at risk of harms pursuant to section 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

D. *Decision under Review*

[10] The RAD found the Applicant's credibility to be the determinative issue. It went on to conduct an independent assessment of the evidence and rejected some of the credibility findings of the RPD. For instance, the RAD did not consider the inconsistency with regard to the Applicant stating he did not know how others came to know about his relationship on the one hand, and both affidavits stating the Applicant was "caught" on the other. The RAD rejected the RPD's reasoning that the affidavits were fraudulent because of the "ready availability of fraudulent documents procured by many Nigerian claimants", but gave the affidavits little weight due to the contradictions between these documents and the Applicant's own evidence.

[11] While not agreeing with all of the RPD's findings, the RAD found that the Applicant "has not proven, on a balance of probabilities, that he is homosexual", and rejected his claim.

III. **Issues**

[12] The Applicant raised the following issues before this Court:

- A. *The RAD breached the Applicant's right to procedural fairness by raising a new issue that was already confirmed by the RPD;*
- B. *The RAD erred in its credibility findings;*

C. *The RAD failed to properly assess the documentary evidence; and*

D. *The RAD erred by disregarding SOGIE guidelines.*

IV. **Standard of Review**

[13] The presumptive standard of review of the merits of an administrative decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], at para 25. The RAD decision is to be reviewed on the standard of reasonableness: *Elmi v Canada (Citizenship and Immigration)*, 2020 FC 296, at para 8. 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. The onus is on the Applicant to demonstrate that the RAD decision is unreasonable. To set aside a decision on this basis, “the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency”: *Vavilov*, at para 100.

[14] The parties appear to agree that the standard of review is reasonableness. In any event, I do not find any reason to depart from the presumptive standard of review in this case.

V. **Analysis**

A. *Did the RAD err by considering an issue that was not part of the RPD’s finding and was not included in the ground of appeal?*

[15] After noting that the Applicant testified that he received 20 death threats from his classmates at school starting in July 2013 and the RPD's finding that this information should have been contained in the BOC, the RAD concluded:

I make a negative finding of credibility with regard to the Appellant's allegations as a result of this significant omission. Further, I find that the Appellant provided this information as an embellishment in his oral testimony, and I draw a further negative finding of credibility on this basis.

[16] The Applicant submits that the RAD does not have jurisdiction to consider an issue that, although fully canvassed before the RPD, was not relied upon in the RPD's decision, and therefore was not the subject matter of the Applicant's appeal. The Applicant submits the RAD did just that by finding the Applicant's oral testimony is an embellishment to beef up the Applicant's claim.

[17] With respect, I disagree. The omission of the 20 death threats in the Applicant's BOC was indeed made an issue by the RPD when it stated in its decision:

If one had received in [excess] of 20 death threats, that is also an important matter that one might have been able to mention in either the original narrative or revision submitted later on.

Noting as I do, the claimant signed the narrative today, April 13th, 2018, asserting and affirming moments later that it was complete, true and correct. Clearly his allegations and oral testimony would suggest otherwise, he has failed to explain to my satisfaction why this is so.

[18] Clearly, the issue about the 20 death threats formed part of the credibility finding relied upon by the RPD in rejecting the Applicant's claim. The RAD decision confirmed that finding, albeit with its additional reasoning.

[19] The Applicant relied on *Ugbekile v Canada (Citizenship and Immigration)*, 2016 FC 1397 [*Ugbekile*], for his position that if the RAD decided credibility was a new issue, it should have provided the Applicant with an opportunity to make submissions on the issue. *Ugbekile* does not assist the Applicant. In that case, the RPD did not make any finding of credibility, and the claim was rejected based on other grounds. Here, credibility was central to the RPD's determination of the Applicant's claim, and the Applicant's omission of details about the death threats was one of many issues of credibility relied upon by the RPD.

[20] As confirmed in *Oluwaseyi Adeoye v Canada (Minister of Citizenship and Immigration)*, 2018 FC 246, at para 13, where the applicant was already on notice that credibility was a live issue based on the RPD's original decision, there is no procedural fairness issue when the RAD finds an additional basis to question the applicant's credibility using the evidentiary record before the RPD. Here, the RAD's concern was not even based on an additional issue, but on an issue already relied on by the RPD. As such, I found the RAD has no obligation to provide any additional opportunity to the Applicant to file further submissions on this point.

B. *Did the RAD err by rejecting the affidavits?*

[21] The Applicant submits the RAD erred by rejecting the neighbour's affidavit based on "minor contradictions." The discrepancy in question refers to the neighbour stating he became aware the Applicant is a homosexual and was caught while he was at school in May 2013, whereas the Applicant stated that it happened in July 2013. The RAD found the inconsistency to be significant because the neighbour swore of learning of the incident *months before* it was

alleged to have occurred by the Applicant. I find the RAD's analysis reasonable. More to the point, the affidavit evidence did not establish the facts as alleged by the Applicant.

[22] The same conclusion applies to the RAD's consideration of the unsigned affidavit of the Applicant's father. There, the inconsistencies related to when and how the Applicant's father found out about his son's same-sex relationship. According to the father, he was informed by school authorities that his son had been caught in "inappropriate behaviour" on school property with another male. The Applicant stated he told his father when he left school and returned home. The RAD noted further that the Applicant stated he learned about the phone call that his father received from school when the Applicant was in the U.S. and did not include this in his BOC. The RAD found this discrepancy to be significant given that this flowed from the incident that resulted in the Applicant leaving Nigeria. I see no error in this finding.

[23] I would also add that the RAD's negative finding of credibility is not limited to the inconsistencies as noted above, but also based on numerous omissions in the Applicant's BOC narrative, which were put to him at the RPD hearing. Subsequently, the RAD conducted its own independent assessment and rejected some of the RPD findings.

[24] "It is well established that all the important facts and details of a claim must be included in the initial BOC form, and the failure to include them can affect the refugee protection claimant's credibility": *Occilus v Canada (Minister of Citizenship and Immigration)*, 2020 FC 374, at para 20, citing *Ogaulu v Canada (Citizenship and Immigration)*, 2019 FC 547, at para 18, *Zeferino v Canada (Citizenship and Immigration)*, 2011 FC 456, at para 31.

[25] Here, the Applicant's BOC omitted important facts and details central to his claim. The RAD's finding on the Applicant's credibility was thus reasonable.

C. *Did the RAD fail to properly assess the documentary evidence?*

[26] The Applicant submitted a psychological assessment report dated January 18, 2014, which confirmed that the Applicant "satisfies diagnostic criteria for stressor-related disorder with prolonged duration" and "requires mental-health treatment." The psychologist opined that the Applicant's condition "can improve with appropriate care and guaranteed freedom from the threat of removal", but "will deteriorate" if "refused permission to remain in Canada."

[27] The Applicant submits that the RAD should have considered the psychological evidence from an independent and impartial psychologist, which would have given them insight into the Applicant's mental health. The RAD's failure to consider the report was an error, according to the Applicant.

[28] Contrary to the Applicant's assertion, the RAD did not fail to consider the psychologist's report, and in fact corrected the RPD's error in failing to consider the said report. However, the Decision also noted that the Applicant testified at the hearing in 2018 that he felt better after attending the 519 Community Center in 2014. The RAD thus found the Applicant's evidence was that his psychological well-being has improved since 2014. The RAD's analysis in this regard was reasonably supported by the evidence.

[29] I accept that the Applicant did seek psychological support and likely had suffered from some form of trauma, as the report has noted. However, it is unclear from the Applicant's submission what error the RAD was supposed to have committed with respect to the psychological assessment. The Applicant appears to suggest that he would not get proper health treatment in Nigeria if returned. That, with respect, was not the determinative issue at the RAD. The cases of *Olalere v Canada (Citizenship and Immigration)*, 2017 FC 385 and *Omekam v Canada (Minister of Citizenship and Immigration)*, 2006 FC 331, cited by the Applicant, both dealt with the RAD's determination of internal flight alternative (IFA) and the board's failure to consider the applicant's psychological state if removed to the IFA, and are not applicable here.

D. *Did the RAD err by disregarding the SOGIE guidelines?*

[30] Citing *McKenzie v Canada (Citizenship and Immigration)*, 2019 FC 555 [*McKenzie*], the Applicant submits that the RAD failed to consider the Chairperson's Guideline 9: Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression [SOGIE guidelines].

[31] After quoting extensively from *McKenzie*, paras 35-48, the Applicant submits the RAD must make their findings with an appreciation of the social context within which the claim arises, and that to help enable an individual to present their case, the need for procedural accommodations may arise. The Applicant, who was represented by counsel at his RPD hearing and at the RAD, does not explain what procedural accommodations were raised and were left unaddressed by the RAD.

[32] The Applicant also quotes the following passage from *McKenzie*:

[34] It has been held that a distinction must be made between an amendment to a PIF to add a different statement than in the original and one that simply provides more details to information already on record: *Diaz Puentes v Canada (Citizenship and Immigration)* 2007 FC 1335 at para 17. Following the logic of *Strugar*, the story on the record, as stated by the RAD, was “his claim is that he is a homosexual man.” The amendments did not change that story. They simply provided more details. For the RAD to turn the amendments from being the provision of additional detail into an omission is, on the facts of this case and considering *Strugar*, unreasonable.

[33] I fail to see the applicability of the above passage to the case at hand. The negative credibility findings by the RPD, and later the RAD, were not based on any amendment that the Applicant sought to make to his BOC. On the contrary, the Applicant was asked, at his second RPD hearing, whether he wanted to amend his BOC and answered in the negative. Even if I were to accept that the Applicant should not be expected to include all the details about his claim in his BOC – including details about his partner – the Applicant still fails to explain how the application of the SOGIE guidelines would help resolve the inconsistencies between his own evidence and the affidavits he submitted to support his claim.

[34] The Applicant also submits that, following the analysis in *McKenzie*, “an individual’s self-awareness and self-acceptance of their SOGIE is sufficient proof.” With respect, Justice Elliott’s analysis in *McKenzie* was far more nuanced and was specific to the facts of that case. The claimant in *McKenzie* was a pastor – a father of three – who struggled with his sexual orientation. It was in that context that Justice Elliott referenced Section 3.1 of the SOGIE guidelines and commented:

[41] Section 3.1 addresses that self-acceptance may be gradual or non-linear. Mr. McKenzie’s affidavit indicated he was having issues

with self-acceptance. Section 3.1 also states there is no standard set of criteria to establish an individual's identification. In the case of Mr. McKenzie, he identifies as a homosexual man. Without a fulsome analysis by the RAD, it is not possible to understand why having a same-sex relationship in 1994 and same-sex relationships prior to May 2014, means Mr. McKenzie does not fit the profile.

[35] The RAD in this case did not reject the Applicant's claim because he "did not fit the profile" of a homosexual, nor has the Applicant pointed to any instance in which the RAD engaged in stereotypes. Notwithstanding the SOGIE guidelines, the Applicant carries the onus of proving his allegations and has simply failed to do so in this case.

E. *Other Issues*

[36] Finally, while the Applicant took issue with the RAD adopting the RPD's finding that his description of his partner was "vague" and lacking in details, I do not find, on a reasonableness standard, the RAD has committed any error in expecting a more "detailed and spontaneous description" of a partner with whom he had a relationship for 20 months, beyond a description of his height, his skinniness, and his being gentle, caring and smart.

[37] I acknowledge it must not have been easy for the Applicant to come to Canada alone as a minor and to navigate through a legal system that is foreign to him, especially when he had experienced trauma. I recognize that the Applicant's mental health has improved since he came to Canada; he has also continued to pursue his education in order to build a better future for himself. However, at the end of the day, the burden is on the Applicant to show that the RAD Decision was unreasonable and unfortunately, he has not discharged that burden.

VI. **Certification**

[38] Counsel for both parties were asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

VII. **Conclusion**

[39] The application for judicial review is dismissed.

JUDGMENT in IMM-595-20

THIS COURT'S JUDGMENT is that:

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

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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