

Federal Court



Cour fédérale

Date: 20180706

Docket: IMM-5066-17

Citation: 2018 FC 687

Vancouver, British Columbia, July 6, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ANELLA JN FRANCOIS

Applicant

and

**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 Protection Division of the Immigration and Refugee Board [RPD], dated November 3, 2017, in which the RPD refused the Applicant's claim for refugee protection under ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application is allowed because the RPD erred in its treatment of affidavit evidence submitted by the Applicant in support of her claim.

II. **Background**

[3] The Applicant, Anella Jn Francois, is a citizen of St. Lucia. She came to Canada in August 2011 and several months later claimed refugee protection, asserting fear that she would be killed by her ex-boyfriend or the ex-husband of a woman with whom she had developed a romantic relationship in St. Lucia in 2010. She also says that she was abused by the man who was her first serious romantic partner. Ms. Francois claims both fear of abuse and fear of persecution by the larger community in St. Lucia, because she says it has become known that she is bisexual. Ms. Francois' refugee claim was heard and rejected by the RPD in the decision that is the subject of this application for judicial review.

[4] The determinative issues for the RPD were Ms. Francois' sexual identity as a bisexual woman and her credibility. The RPD held that she had not established her sexual identity as a bisexual woman. It also found that she was not a credible witness with respect to central aspects of her claim and had not provided sufficient reliable and trustworthy evidence to support her fear of returning to St. Lucia or of the abuse she alleged she had suffered at the hands of her ex-boyfriend, the ex-husband of the woman with whom she had a relationship, or the community at large.

[5] The RPD found that Ms. Francois' credibility was negatively affected by the fact that she had been to Canada twice before without claiming protection and that she delayed in claiming on

her third visit to Canada. It found that, while not determinative, this indicated a lack of subjective fear. In arriving at this conclusion, the RPD relied on what it considered to be a discrepancy between her Personal Information Form and her testimony at the RPD hearing. The discrepancy related to whether she had resumed living with the man who was her first serious romantic partner, and whom she alleged had been abusive towards her, when she returned to St. Lucia following her first visit to Canada. The RPD also found that Ms. Francois had attempted to deceive Canadian border officials on her second trip to Canada by arriving under a different name, which negatively affected her general credibility. The RPD also did not accept Ms. Francois' explanation that she did not claim refugee protection immediately upon her third arrival in Canada because she did not know about the availability of refugee protection or how to make a refugee claim. Based on its specialized knowledge, the RPD held that there was general awareness of the refugee process in the St. Lucian community.

[6] As to her sexual identity, the RPD held that Ms. Francois had failed to establish that she was a bisexual woman, because she was inconsistent in her account of the progression of her relationship with the woman she met in St. Lucia in 2010, she was unable to provide evidence from her, and she did not call her current same-sex romantic partner in Canada as a witness. The RPD considered a letter that Ms. Francois submitted from an LGBT support group in Canada but concluded that she attended this group mainly to support her refugee claim.

[7] Finally, concerning her allegations of domestic abuse, the RPD found that Ms. Francois had no reliable corroborative evidence that she reported this abuse to the police. While she submitted affidavits from family and friends, the RPD gave them little weight, because they

contained information that it found not to be credible and the affiants' evidence could not be tested in the hearing. As the worst allegations of abuse by her ex-boyfriend and her St. Lucian partner's husband were linked to them discovering her relationship with that partner, and as the RPD had concluded that relationship did not occur, it gave no credence to those allegations of abuse.

[8] In rejecting Ms. Francois' claim, the RPD found that she had not provided sufficient credible evidence that she is bisexual and found that she had not provided sufficient reliable and trustworthy evidence that she had suffered past abuse.

III. **Issues and Standard of Review**

[9] The Applicant raises issues in connection with the RPD's credibility determinations and its assessment of her documentary evidence. The parties agree, and I concur, that these issues are to be assessed on a standard of reasonableness.

[10] The Applicant also raises procedural fairness issues surrounding elements of the RPD's analysis, upon which she submits she should have been provided an opportunity to comment before the RPD arrived at a decision. She submits, and I concur, that the standard of correctness applies to considerations of procedural fairness.

IV. Analysis

[11] My decision to allow this application for judicial review turns on the RPD's treatment of the affidavit evidence submitted by Ms. Francois in support of her claim. She provided affidavits sworn by her father, her sister, her son, and a friend in St. Lucia. These affidavits speak to the past abuse alleged by Ms. Francois, threats of future abuse, and Ms. Francois' relationship with her St. Lucian partner. The RPD's decision states that it gives these affidavits little weight as they contain information that it finds not credible and the affiants' evidence cannot be tested in the hearing room.

[12] Ms. Francois argues that the RPD erred in its treatment of this evidence by failing to give any explanation as to why it found the information in the affidavits not to be credible. I agree with her submission that this aspect of the decision is unintelligible, and therefore unreasonable, as the RPD failed to articulate why it reached the credibility conclusion that it did with respect to the affidavits (see, for instance, *Kaur v Canada (Minister of Citizenship and Immigration)*, 2005 FC 873 at para 4).

[13] The Respondent argues that this aspect of the RPD's analysis should be read as a finding that the affidavits are not probative, not as a credibility determination, and that a decision to afford evidence little weight does not represent a basis to interfere with the decision on judicial review. While the Respondent is correct that the RPD states that it gives these affidavits little weight, it states that it is giving them little weight because they contain information the RPD finds not to be credible. There is clearly a credibility determination underlying the RPD's

treatment of the evidence, and it is the absence of an explanation for that determination that undermines the reasonableness of that treatment.

[14] The Respondent also submits that the RPD's reference to information that it found not credible relates to credibility findings previously made in the decision, such as those relating to Ms. Francois' assertion that she is bisexual and the discrepancy in her evidence surrounding where she lived when she returned to St. Lucia following her first Canadian visit. However, as submitted by Ms. Francois, if this is the correct interpretation of this portion of the RPD's decision, it also demonstrates a reviewable error. It is not available to a decision maker to reject a person's evidence as lacking in credibility and then reject other evidence because it is inconsistent with that credibility conclusion (see, e.g. *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 at para 12). Rather, the RPD was required to conduct an independent assessment of the affidavit evidence submitted in support of Ms. Francois' claim.

[15] The affidavit evidence cannot be characterized as a minor component of the evidence submitted by Ms. Francois in support of her claim. In the absence of a reasonable treatment of that evidence, the decision of the RPD to reject her claim is also unreasonable and must be set aside and returned to a differently constituted panel of the RPD for redetermination.

[16] Neither party proposed any question for certification for appeal, and none is stated.

[17] Finally, as a housekeeping matter, I note that the Application for Leave and for Judicial Review incorrectly names the Respondent as the Minister of Immigration, Refugees and Citizenship Canada. The correct name of the relevant minister is the Minister of Citizenship and Immigration. My Judgment will accordingly correct the style of cause.

JUDGMENT IN IMM-5066-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed and the matter is returned to a differently constituted panel of the RPD for redetermination.
2. No question is certified for appeal.
3. The style of cause is hereby amended to reflect the correct respondent, the Minister of Citizenship and Immigration.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5066-17

STYLE OF CAUSE: ANELLA JN FRANCOIS V THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 14, 2018

JUDGMENT AND REASONS: SOUTHCOTT J.

DATED: JULY 6, 2018

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