

Federal Court



Cour fédérale

Date: 20180711

Docket: IMM-5059-17

Citation: 2018 FC 720

Ottawa, Ontario, July 11, 2018

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

HANNAH ABIMBOLA OSIKOYA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Hannah Abimbola Osikoya, is a citizen of Nigeria. She came to Canada to study in September 2014. In January 2017, she made a claim for refugee protection on the basis that she would be at risk if she returned to Nigeria because she is bisexual. After a two day hearing, the Refugee Protection Division [RPD] rejected the claim. The result turned on the RPD's negative credibility findings. Ms. Osikoya appealed this decision to the Refugee Appeal

Division [RAD]. She did not request an oral hearing and did not offer any new evidence. On October 30, 2017, the RAD dismissed the appeal. Ms. Osikoya now applies for judicial review of the RAD's decision under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons that follow, I find that the RAD's decision must be set aside. The RAD unreasonably drew adverse inferences relating to Ms. Osikoya's credibility on two central aspects of her claim. The RAD also failed to provide a transparent and intelligible analysis of a potentially corroborative document. As a result, the application for judicial review will be allowed and a new hearing ordered.

II. BACKGROUND

[3] Ms. Osikoya was born in Ijede, Nigeria on August 23, 1991. She describes a happy childhood growing up in Nigeria. She was "protected and pampered by every member of the family."

[4] Ms. Osikoya states that she first noticed her attraction to girls in secondary school. She thought this was not normal as same-sex relationships are not accepted in her community. By her fourth year of secondary school, she knew that she was bisexual, but she did not feel safe disclosing this to anyone. She states that she felt pressured to date a boy to dispel any suspicions about her sexuality.

[5] Ms. Osikoya states that she had her first same-sex relationship in her fifth year of secondary school, with Yemisi Oladele. While in university, she dated both men and women, including a woman named Adebola Iwalewa. She says that during their relationship the two took suggestive photos together naked and downloaded pornography from the internet. Their relationship continued for about three years (sometimes at a distance) until Ms. Osikoya left for Canada in September 2014. It appears that the two parted on good terms. Ms. Osikoya says that she would speak with Ms. Iwalewa by telephone from Canada but the two never communicated via Facebook, email or text message. Ms. Osikoya says she was afraid that if they did so their relationship might be discovered. She also states that while in Canada she has dated both men and women.

[6] Ms. Osikoya states that on August 28, 2016 – approximately two years after she arrived in Canada – Nigerian police discovered suggestive photos of her and Ms. Iwalewa as well as pornographic materials on Ms. Iwalewa's laptop. She says she learned this from an aunt, who called her and told her that the police had visited the family home in Nigeria and accused Ms. Osikoya of homosexuality. Her aunt called her again three days later and told her that when she returned to Nigeria she must perform a ritual cleansing so that the police would no longer be interested in pressing charges. She says her aunt also told her she would arrange for her to marry a wealthy Chief many years her senior. Ms. Osikoya states that when her father learned of what had happened, he stopped paying her school fees and asked her to come home and undergo a ritual cleansing.

[7] Ms. Osikoya described these events in her Basis of Claim [BOC] form and narrative, which she completed on November 23, 2016. She also described them in her testimony before the RPD in March 2017.

[8] Ms. Osikoya testified at the RPD hearing that she was currently in a relationship with Mbeurora Kandjii. The two started dating in December 2016. She stated that when they were not together they never communicated via Facebook, email or text but only by telephone.

[9] Ms. Kandjii swore an affidavit on February 21, 2017, in which she describes her relationship with Ms. Osikoya. She testified at the RPD hearing on March 15, 2017.

[10] Ms. Osikoya also relied on, among other things, a letter purporting to be from the aunt who told her about the events in Nigeria, a letter from a therapist describing her as being fearful of returning to Nigeria, a letter from a psychodynamic consultant describing her as presenting symptoms consistent with post-traumatic stress disorder, and a letter from the 519 Community Centre confirming her involvement with their LGBT Refugee Support Group since November 2016.

[11] The respondent intervened before the RPD to address issues of credibility. The respondent sought a finding that Ms. Osikoya is not a Convention refugee or a person in need of protection.

[12] The RPD denied Ms. Osikoya's claim for protection. It determined that Ms. Osikoya had not established, on a balance of probabilities, that she is bisexual. This conclusion turned on the following findings:

- a) Ms. Osikoya and Ms. Kandjii had not established their romantic relationship. Ms. Osikoya did not mention the relationship in documentation supporting the claim and she and Ms. Kandjii provided contradictory testimony about their relationship;
- b) Ms. Osikoya had provided inconsistent evidence about being sought by Nigerian police; and
- c) The remaining evidence, especially considering the lack of any corroborating evidence of previous same-sex relationships, was insufficient to establish that Ms. Osikoya is bisexual.

III. THE DECISION UNDER REVIEW

[13] Ms. Osikoya appealed the dismissal of her claim to the RAD on five grounds. The RAD rejected all of them.

[14] First, Ms. Osikoya submitted that the RPD erred by failing to follow the *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*. (The *Chairperson's Guideline 9: Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression* was not in effect at the time of the hearing.) The RAD noted that the RPD hearing was held over two days and that accommodations were made for Ms. Osikoya. While Ms. Osikoya had some difficulty presenting her evidence – she often asked for questions to be repeated and she had trouble recalling some details – the RPD stated that its credibility concerns were not related to this. The RAD found that the RPD accommodated Ms. Osikoya appropriately. The Gender Guidelines do not shield a claimant's testimony from scrutiny or preclude assessing a claimant's credibility.

[15] Second, Ms. Osikoya submitted that the RPD erred in drawing an adverse inference from the fact that, while her BOC narrative describes Nigerian police looking for her on the suspicion that she is homosexual, when she completed her Schedule 12 information form, she answered “No” when asked whether she had “ever been sought, arrested, or detained by the police or military or any other authorities in any country, including Canada.” The RAD reviewed the evidence and agreed with the RPD’s conclusion. Ms. Osikoya’s claim that the police were looking for her was a central element of her fear of persecution in Nigeria. Given that she was represented by experienced counsel, her explanation that she did not understand the question in Schedule 12 was not reasonable. In the absence of any reasonable explanation for this obvious discrepancy, the RAD agreed with the RPD’s negative credibility finding.

[16] Third, Ms. Osikoya submitted that the RPD erred in drawing a negative conclusion from her failure to amend her BOC to include information about her new same-sex relationship. The RAD found that this was a significant omission from the BOC narrative and that the RPD was correct to impugn Ms. Osikoya’s credibility for this reason. As well, the RAD found from its own assessment that the evidence about this relationship was not credible. Ms. Osikoya and Ms. Kandjii gave inconsistent accounts of many things including who initiated the intimacy, the status of their relationship, and when they last spent time together. The RAD considered that, since Ms. Osikoya is well-educated and fluent in English, it was reasonable to expect her to give specific and consistent details about her current relationship. The RAD found that the inconsistencies in the evidence went to the core of the relationship and, as such, raised serious credibility concerns. As a result, the RAD reached the same conclusion about the lack of credibility as the RPD did.

[17] Fourth, Ms. Osikoya submitted that the RPD erred in drawing an adverse inference from her failure to provide evidence supporting her claim to have been involved in same-sex relationships. The RPD had asked her why she did not have any evidence showing she had been in other same-sex relationships, including the three-year relationship with Ms. Iwalewa. Ms. Osikoya responded that she did not have any photographs, phone records, emails or texts because she did not know how many phones she had used over the years and in any event she no longer had them. While she claimed to have photographs from a previous same-sex relationship in Canada, they were on a phone which was broken. The RPD did not find these explanations to be reasonable under the circumstances. On appeal, the RAD noted that the RPD had relied on several factors when assessing the credibility of Ms. Osikoya's claim, including concerns with inconsistencies in her testimony, contradictory evidence, and lack of corroborating evidence. The RAD found no error in the RPD's negative credibility finding. While there was some evidence capable of corroborating Ms. Osikoya's claim – e.g. the letter from her aunt and the letter from the 519 Community Centre – the RAD agreed with the RPD that they should be given “minimal” weight and had “low” probative value in all the circumstances.

[18] Finally, Ms. Osikoya submitted that the RPD erred in failing to conduct a separate analysis under s 97 of the Act. The RAD disagreed. Having decided that Ms. Osikoya had failed to establish her allegations under s 96, the RPD was not required to say anything more.

[19] The RAD concluded as follows:

The RPD found the Appellant to be generally lacking in credibility. Having independently reviewed the evidence, including reviewing the transcript of the two days of the hearing, the RAD has reached the same conclusion. As such, the RAD does

not find the Appellant and her allegations of persecution to be credible.

On this basis, the RAD found that “there is not a serious possibility the Appellant would be persecuted if she was returned to Nigeria, pursuant to section 96 of the *Act*. The panel similarly finds that, on a balance of probabilities, the Appellant would not be personally subjected to a danger of torture, or face a risk to life, or a risk of cruel and unusual treatment or punishment in Nigeria pursuant to section 97 of the *Act*.” The RAD therefore dismissed Ms. Osikoya’s appeal of the decision of the RPD.

IV. STANDARD OF REVIEW

[20] It is well-established that the RAD’s decision, including its credibility findings, is reviewed on a reasonableness standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35; *Murugesu v Canada (Citizenship and Immigration)*, 2016 FC 819 at para 15; *Majoros v Canada (Citizenship and Immigration)*, 2017 FC 667 at para 24).

[21] Reasonableness review “is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome” (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for “the existence of justification, transparency and intelligibility within the decision-making process” and determines “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). These criteria are met if “the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the

range of acceptable outcomes” (*Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

V. ISSUE

[22] The sole issue on this application for judicial review is whether the RAD’s credibility findings are reasonable.

VI. ANALYSIS

[23] The parties helpfully focused their submissions on the RAD’s assessment of four factors:

- a) Ms. Osikoya’s inconsistent evidence concerning whether the Nigerian police were looking for her;
- b) Ms. Osikoya’s failure to mention her new relationship with Ms. Kandjii in her BOC;
- c) the potentially corroborative evidence; and
- d) Ms. Osikoya’s credibility generally in light of the psychological evidence.

I will consider each of these in turn.

A. *Inconsistent evidence about being wanted by the Nigerian police*

[24] Ms. Osikoya signed her BOC and Schedule 12 forms on the same day – November 23, 2016.

[25] The BOC form asked: “Have you or your family ever been harmed, mistreated or threatened by any person or group?” Ms. Osikoya answered: “I have been threatened by members of the Nigerian police force and members of my father’s family.” She went on to describe the call from her aunt, who told her that “the police came to her house accusing me of homosexuality” after the images were discovered on Ms. Iwalewa’s laptop. She described these events again in the narrative she attached to the BOC form.

[26] The Schedule 12 form asked: “Have you ever been sought, arrested, or detained by the police or military or any other authorities in any country, including Canada?” Ms. Osikoya answered: “No.”

[27] When asked about this apparent contradiction at the RPD hearing, Ms. Osikoya explained that she did not know what “sought” meant. She said she understood the question on the Schedule 12 form to be asking whether she had ever been arrested or detained, which she had not been.

[28] The RPD stated: “Were this the panel’s only concern, it may have weighed differently in the balance of the evidence; however, in light of the totality of the evidence, the panel finds that

the claimant's inconsistent evidence about whether the authorities who she fears, are looking for her is material and draws an adverse inference in terms of credibility.”

[29] The RAD agreed with the RPD:

The RPD clearly put to the Appellant to explain the inconsistencies in her evidence about whether she was wanted by the police or not. Her response that she did not understand the question was not reasonable under the circumstances. In this regard, the RAD notes that the Appellant was represented by experienced legal counsel throughout her proceedings before the RPD and the RAD. The RAD also notes that “Iyabo Ojo”, legal assistant to the Appellant’s counsel, solemnly declared that she assisted in “the accurate completion” of the Appellant’s Schedule 12 form. The RAD further notes that the Appellant is fluent in English and highly educated with degrees and diplomas in both Nigeria and Canada. The RAD accordingly finds no error in the RPD’s adverse credibility finding for the Appellant’s inconsistent evidence about whether she is wanted by the police in Nigeria. This allegation that the police are looking for the Appellant and suspect her of committing a criminalized act in Nigeria is a central element of her claim for protection.

[30] In my view, the RAD’s conclusion is unreasonable. I say this for three reasons.

[31] First, the RAD found that Ms. Osikoya’s credibility was damaged because she said contradictory things about “a central element of her claim for protection.” Failing to keep one’s story straight can certainly raise credibility concerns, especially if the inconsistencies relate to a key part of the claim. But Ms. Osikoya is unlikely to have failed to keep this part of her story straight, whether she was telling the truth or not. The importance of the event to her claim, the obviousness of the inconsistency, and the fact that the forms were completed on the same day all suggest that the more likely – and therefore more reasonable – explanation is the one she gave:

she did not understand the question on the Schedule 12 form completely. If she had, surely she would have answered “Yes” instead of “No.”

[32] Second, Ms. Osikoya’s understanding of the question – that it referred only to arrests and detentions – is not unreasonable in light of how the question appears on the form. It is one of several under the heading “Arrests and criminal offences.” The party answering it is instructed to “[a]dd a sheet of paper if you need more space to list additional arrests and/or criminal offences, or to explain the circumstances of any acquittal, discharge or pardon.” If the question is answered affirmatively, the next questions ask where, when, by whom, and for what reason the claimant was detained. None of this suggests that the question is also meant to cover cases where the police are merely looking for someone but have not found that person yet and have not laid any charges. This context supports Ms. Osikoya’s understanding of the question, even if the question should be understood more broadly given the use of the word “sought” in addition to “arrested” and “detained.”

[33] Third, Ms. Osikoya may not have been alone in misunderstanding the question. Ms. Ojo, the legal assistant, helped her with both the Schedule 12 and the BOC forms. If Ms. Ojo had understood the question on the Schedule 12 form in the same way as the RPD and the RAD did, she could not have solemnly declared that she had assisted Ms. Osikoya in the “accurate completion” of the forms, given what she knew was stated in the BOC form and the narrative. At the very least, the fact that Ms. Osikoya had assistance in completing the forms cuts both ways. The same is true of the fact that she was represented by counsel.

[34] In view of all this, it was unreasonable for the RAD to agree with the RPD's negative credibility finding on this point. This is significant because, as the RAD itself notes, the allegation that Nigerian police are looking for Ms. Osikoya "is a central element of her claim for protection."

B. *The failure to mention the relationship with Ms. Kandjii*

[35] Another central element of Ms. Osikoya's claim is that she is bisexual. The RAD drew an adverse inference about the credibility of this claim from Ms. Osikoya's failure to amend her BOC to include information about her new relationship with Ms. Kandjii. This conclusion is also unreasonable.

[36] When she testified before the RPD, Ms. Osikoya claimed to be in a relationship with Ms. Kandjii. This was a relatively new relationship. It began after Ms. Osikoya signed the original documents supporting her refugee claim in November 2016, including the BOC and the attached narrative, but before she submitted them to the Immigration and Refugee Board in January 2017. However, she did not amend or supplement her BOC form or narrative, either before she submitted them or before the hearing, to add this potentially important new information.

[37] The RAD, like the RPD, found that this weakened the credibility of her claim to be in a romantic relationship with Ms. Kandjii. The RAD held as follows:

The RAD similarly finds the RPD was correct to impugn the Appellant's credibility for the omission of her alleged relationship with [Ms. Kandjii] from her BOC. This is a material omission that goes to the heart of the Appellant's claim for protection based upon her sexual orientation. In this regard, the Appellant's

testimony that she did not know she could amend the BOC was not credible, especially since she submitted other amendments to her BOC. The RAD similarly did not find the Appellant's testimony that she did not think to add her romantic relationship with [Ms. Kandjii] to her BOC to be credible.

[38] The timing of Ms. Osikoya's relationship with Ms. Kandjii – after she decided to make a claim for refugee protection on the basis of sexual orientation and before her RPD hearing – called for careful scrutiny of the genuineness of that relationship. The RAD, however, also questioned the relationship because it found that Ms. Osikoya did not disclose it in a timely way by including it in her BOC. In doing so, it fell into error.

[39] The relationship post-dated the completion of the original BOC and narrative so it is not surprising it was not mentioned there. The question for the RAD, like the RPD, was why Ms. Osikoya had not “updated” her BOC by adding this information.

[40] Ms. Osikoya's testimony on this point is somewhat confusing but, read as a whole, her explanation appears to be two-fold. First, she did not want to include Ms. Kandjii initially because this would add too much stress to her given her own personal circumstances at the time. I take this to be her explanation for why she did not update her narrative before she submitted it in January 2017. Neither the RAD nor the RPD address this part of her evidence.

[41] Second, not knowing much about procedure, she did not know that she could amend her BOC after it was submitted. The RAD, like the RPD, did not find this explanation credible given that Ms. Osikoya had made changes to her BOC after it was submitted. When this discrepancy was put to Ms. Osikoya, however, her response had a nuance which neither the RAD nor the

RPD appears to have appreciated. After acknowledging that she had made changes to her BOC narrative but did not add that she was in a new relationship with a woman, Ms. Osikoya stated: “Yeah because the information that I added were like names, like it was just like the . . . it was the same information but the only thing I added was the name.” What I take from this is that Ms. Osikoya understood that she could add details to her BOC but did not realize she could also add new matters of substance. A review of the amended BOC is consistent with this understanding. The changes, which were made on March 8, 2017, consisted of adding or correcting names of individuals who were referred to in the original narrative and correcting the name of a place she mentioned. Nothing of substance was added.

[42] In addition to this, when she made these changes to her BOC, Ms. Osikoya was presumably aware that Ms. Kandjii had recently sworn an affidavit describing their relationship (recall that the affidavit was sworn on February 21, 2017). Even if Ms. Osikoya should have known that she could add matters of substance to her BOC once Ms. Kandjii was ready and willing to support her claim, she reasonably could have thought this was unnecessary given that the new information was set out in an affidavit which her lawyer was going to submit in support of her claim and given that Ms. Kandjii was going to be a witness at the hearing. Neither the RAD nor the RPD consider this possibility.

[43] The RAD and the RPD do not mention Ms. Kandjii’s affidavit in their respective reasons. As a result, one might think that the first time anyone heard about Ms. Osikoya’s relationship with Ms. Kandjii was on March 15, 2017, the first day of the RPD hearing. If that had happened, it could have been a sound reason for the RAD (and the RPD) to doubt the genuineness of the

relationship. But that is not what happened. The RAD's conclusion that there was a "material omission" in the BOC that "goes to the heart of [Ms. Osikoya's] claim for protection based upon her sexual orientation" is unreasonable given that the relationship had been disclosed in advance by other means and given the RAD's failure to address Ms. Osikoya's reason for not disclosing it sooner than she did.

[44] Again, the RAD's unreasonable conclusion is significant: what the RAD erroneously found to be a "material omission" went to "the heart of [Ms. Osikoya's] claim for protection based upon her sexual orientation."

C. *The potentially corroborative evidence*

[45] In support of her claim, Ms. Osikoya provided a letter purporting to be from her aunt, Olapeju Oluwabukola Sobamiwa. The letter describes the police coming to Ms. Sobamiwa's home on the morning of August 28, 2016, looking for Ms. Osikoya. The police explained they wanted to interrogate Ms. Osikoya regarding pornographic video and compromising pictures retrieved from Ms. Iwalewa's laptop. Ms. Sobamiwa states she knew Ms. Iwalewa (who she refers to simply as Abedola) to be Ms. Osikoya's "close friend and university mate." According to Ms. Sobamiwa, the police told her that "if the allegations and findings are correct they will charge Hannah for Homosexuality." Ms. Sobamiwa also describes her calls to Ms. Osikoya to report what happened and the reactions of Ms. Osikoya's father and his family to this news.

[46] The RPD dealt with this letter as follows:

The panel has considered that the claimant provided a copy of a letter from her aunt, which is consistent with her allegations about the police. The letter contains some specific details, but in light of the lack of credibility of the claimant's current relationship, the inconsistency in police involvement in her case, and the lack of any credible evidence of her homosexual relationships, the panel does not find the letter to be sufficient to establish the claimant's allegations.

[47] For its part, the RAD concluded that the RPD "was correct to give minimal weight to the Appellant's other documents, including a letter from her aunt. The RPD's findings are in accordance with settled law, namely, that when a general negative credibility finding is made by the RPD, it is open for it to give low probative value to other documents."

[48] In my view, the RAD's assessment of the letter from Ms. Osikoya's aunt lacks transparency and intelligibility and, therefore, is unreasonable.

[49] I begin by noting that there are a number of reasons the RAD could have found the letter was not authentic. It is not dated. It is not sworn. While a certified copy of the photo page of Ms. Sobamiwa's Nigerian passport appears to have been included with the letter, there is no independent evidence that Ms. Sobamiwa was the author of the letter. Indeed, there is no independent evidence that Ms. Sobamiwa is even Ms. Osikoya's aunt.

[50] While the RAD reasonably could have given the letter no weight, this is not what it did. Instead, it gave the letter "minimal weight" and "low probative value." This is unreasonable.

[51] The letter purports to describe first-hand observations of events that are a key reason why Ms. Osikoya is claiming protection. If it is truthful, it corroborates Ms. Osikoya's claims in key respects. On its face, it could only have high probative value. The real issue is one of weight, and this turns on the letter's authenticity. The letter is either authentic or it is not. If it is not authentic, it should be given no weight and its contents can safely be disregarded. The problem with the RAD's assessment is that while it must have had concerns about the letter's authenticity, it does not reject the letter as inauthentic. Instead, the RAD accepts that it deserves some weight and has some probative value, only not enough to overcome other problems with the claim. But if the claim was corroborated in material respects by the letter, the other problems with the claim may be more apparent than real. The RAD needed to say a great deal more than it did to explain why the claim was rejected despite this corroborative evidence.

[52] The letter from Ms. Osikoya's aunt may be contrasted with the letter from the 519 Community Centre. The 519 Community Centre is a respected organization that does important work with the LGBT community in Toronto, including LGBT refugee claimants. There would have been no issue with respect to the authenticity of its letter, or with the truthfulness of the statement that Ms. Osikoya had been "a dedicated member since November 2016" of the Among Friends LGBT Refugee Support Group. While there would thus be no reason to discount the weight to be given to the letter, it has low probative value because the fact it proved – that Ms. Osikoya had self-identified as bisexual to a community group at the same time as she began her refugee claim – did little to advance her claim for protection. The same cannot be said about the letter from Ms. Osikoya's aunt if it is given any weight at all.

[53] Justice Anne Mactavish has observed that “[i]f a decision-maker is not convinced of the authenticity of a document, then they should say so and give the document no weight whatsoever. Decision-makers should not cast aspersions on the authenticity of a document, and then endeavour to hedge their bets by giving the document ‘little weight’” (*Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 20). Building on this, Justice Shirzad Ahmed stated recently: “Fact finders must have the courage to find facts. They cannot mask authenticity findings by simply deeming evidence to be of ‘little probative value’” (*Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 27). Respectfully, I agree with my colleagues. The RAD’s treatment of the letter from Ms. Osikoya’s aunt demonstrates the incoherence that can result from equivocal findings of fact.

D. *Ms. Osikoya’s credibility generally in light of the psychological evidence*

[54] Finally, Ms. Osikoya submits that the RAD committed an “overarching error” by failing to have any regard to the psychological evidence filed in support of her claim. That evidence included: Ms. Osikoya’s report of symptoms consistent with depression and post-traumatic stress disorder; her report of episodes of cognitive and memory problems; and evidence that such problems can be made worse under the pressure of testifying in a proceeding like an RPD hearing. Ms. Osikoya submits that the RAD should have considered this evidence when conducting its own credibility assessment and considering the significance of difficulties she had in providing specific details or clear and consistent testimony.

[55] For the following reasons, I do not agree.

[56] First, while evidence of a witness' psychological condition can provide an important context for assessing his or her credibility (see, for example, *Hidad v Canada (Citizenship and Immigration)*, 2015 FC 489 at paras 10-12; *Ali Ors v Canada (Citizenship and Immigration)*, 2014 FC 1103 at paras 21-23; *Turcios v Canada (Citizenship and Immigration)*, 2015 FC 318 at para 22; and *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 393 at para 33), Ms. Osikoya did not raise any objection before the RAD about how the RPD had dealt with the psychological evidence she filed. The RPD considered the evidence in granting Ms. Osikoya certain accommodations during the hearing. The RPD also noted expressly that its "credibility concerns are not related to requests for questions to be rephrased, or inability to retrieve specific details." Since Ms. Osikoya did not argue before the RAD that the RPD should have done anything else, the RAD cannot be faulted for not addressing the psychological evidence.

[57] Second, in any event, the evidence about Ms. Osikoya's psychological condition was thin at best. The opinions offered were very general. They were based largely, if not entirely, on Ms. Osikoya's self-reporting and on limited contact with her. There was no evidence that she had undergone comprehensive psychological testing. The qualifications of the authors of the letters to offer the opinions they did were barely mentioned. In all the circumstances, this evidence did not warrant any greater significance than the RPD gave it.

[58] Finally, as both the RPD and the RAD appreciated, there were many other reasons to doubt the credibility of Ms. Osikoya's claim than the difficulties she had articulating her evidence. The psychological evidence did nothing to address, for example, the complete absence

of evidence to corroborate Ms. Osikoya's claim to have been in a long-term romantic relationship with Ms. Iwalewa.

[59] In sum, the psychological evidence played a modest role in the proceeding and it could not reasonably have played any greater role. In the circumstances of this case, the failure of the RAD to engage with that evidence is not an error.

E. *Summary*

[60] Sexual orientation is a deeply personal matter. The attractions and actions that can demonstrate it are inherently private and, therefore, inherently difficult to prove (*Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760 at para 42). As well, sexual orientations such as bisexuality are the subject of stigmatization, opprobrium, criminalization, and worse in many places. Someone with a non-conforming sexual orientation can have very good reasons for keeping that fact a secret, and very good reasons to fear persecution should it be revealed. Equally, even if one is on good terms with current or former partners, they too may have very good reasons to keep the relationship a secret. As a result, sexual orientation can be difficult to establish when it is the basis of a claim for protection. At the risk of stating the obvious, one cannot expect sexual orientation to be as readily established with corroborating evidence as, say, someone's employment or education history might be.

[61] Still, when a fear of persecution is based on sexual orientation, the claimant is uniquely well-positioned to establish this critical fact with evidence and, if evidence is lacking, to explain why. In determining whether a claimant should be given protection in Canada on this basis, a

decision-maker must evaluate the credibility of the claim with care and sensitivity, ensuring that it is judged against expectations that are fair and reasonable given the specific circumstances of the case. The *Chairperson's Guideline 9: Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression* (effective May 1, 2017) now provide assistance to members of the Immigration and Refugee Board in this regard, helping to ensure that claims for protection on these grounds are scrutinized rigorously but fairly. This can only enhance the integrity and repute of the refugee determination process.

[62] Ms. Osikoya's claim for refugee protection as a bisexual woman warranted careful scrutiny. In many respects, the RAD's negative assessment of it cannot be faulted. However, as I have explained, the RAD drew unreasonable conclusions with respect to two central aspects of this case. As well, its analysis of a piece of evidence that could provide important corroboration for the claim lacks transparency and intelligibility. These three factors all figured in the RAD's rejection of Ms. Osikoya's claim.

[63] I recognize that there were other reasons the RAD did not accept Ms. Osikoya's claim to be bisexual. Standing on their own, they could well have withstood scrutiny on judicial review. However, they do not stand on their own. They are linked to unreasonable conclusions about central aspects of the claim for protection. It is not for me to speculate about whether the RAD would have assessed the rest of the evidence in the same way had it not erred in these ways. Nor may I consider whether the claim could reasonably have been rejected on those grounds alone. To do either would, in effect, be to engage in a weighing of the evidence which I am not permitted to do when applying the reasonableness standard of review. The RAD's conclusion

that Ms. Osikoya failed to establish her refugee claim must, therefore, be set aside and a new hearing ordered.

VII. CONCLUSION

[64] For these reasons, the application for judicial review is allowed, the RAD's decision is set aside, and the matter is remitted for reconsideration by a differently constituted panel.

[65] The parties did not suggest any questions of general importance. I agree that none arise.

JUDGMENT in IMM-5059-17

THIS COURT'S JUDGMENT is that

1. The application is allowed.
2. The decision of the Refugee Appeal Division dated October 30, 2017, is set aside and the matter is remitted for reconsideration by a differently constituted panel.
3. No question of general importance is stated.

“John Norris”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5059-17

STYLE OF CAUSE: HANNAH ABIMBOLA OSIKOYA v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 11, 2018

JUDGMENT AND REASONS: NORRIS J.

DATED: JULY 11, 2018

APPEARANCES:

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