Federal Court  Cour fédérale

Date: 20191127

Docket: IMM-2005-19

Citation: 2019 FC 1512

Ottawa, Ontario, November 27, 2019

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

DALIA BERNICE AVRIL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Dalia Bernice Avril [Ms. Avril], seeks judicial review of the decision of a Senior Immigration Officer [the Officer], dated February 14, 2019, which rejected her application for a Pre-removal Risk Assessment [PRRA]. Ms. Avril asserted that she would be at risk in St. Lucia due to her sexual orientation. The Officer concluded that Ms. Avril had not provided sufficient reliable evidence to establish that she is a lesbian or that she would be at risk on the basis of her sexual orientation in St. Lucia.

[2] For the reasons that follow, the Application is allowed.

[3] In general, the Officer's assessment of key evidence presented by Ms. Avril to establish her sexual orientation is problematic. The Officer's approach leaves the impression that it would be impossible for Ms. Avril to overcome the negative credibility findings of the Refugee Protection Division [RPD] or the Immigration Officer's finding that her same sex marriage was not genuine.

I. Background

[4] Ms. Avril is a citizen of St. Lucia. She claims that she is at risk of persecution in St. Lucia due to her sexual orientation.

[5] Ms. Avril recounts that she was aware of her sexual orientation from a young age and that it was known in her community in St. Lucia.

[6] In July 2005, Ms. Avril entered Canada with her older sister, Vernatta Avril, as visitors. Ms. Avril overstayed her visitor's visa and has remained in Canada without status. She recounts that she did not apply for refugee status until 2011 because she did not know that she could claim protection on the basis of her sexual orientation. She also states that neither she nor her sister could afford to consult a lawyer.

[7] Ms. Avril recounts that she was only made aware that she could seek refugee protection based on her sexual orientation following receipt of a Direction to Report for removal served on her by the Canada Border Services Agency [CBSA] in 2011.

[8] On May 11, 2011, Ms. Avril first applied for permanent residence on humanitarian and compassionate grounds. On May 12, 2011, she also applied for refugee protection. Both applications were refused on December 5, 2011, and March 26, 2012, respectively.

[9] Ms. Avril recounts that she did not present any evidence in support of her sexual orientation to the RPD because her immigration consultant did not advise her to do so.

[10] Ms. Avril's Application for Leave and for Judicial Review of the RPD decision was refused in July 26, 2012.

[11] Ms. Avril failed to report for her removal on January 13, 2013 and a warrant for her arrest was issued.

[12] In 2013, Ms. Avril met Martina Justin. They began to live together in 2014 and married in April 2016. Ms. Justin is a permanent resident of Canada, originally from St. Lucia.

[13] In May 2017, Ms. Avril applied for permanent residence under the Spousal or Common-law Partner In-Canada Class. She and Ms. Justin were interviewed by an Immigration

Officer in September 2018. Following the interview, she was arrested and detained by the CBSA pursuant to the 2013 warrant. She was subsequently released upon the posting of a bond.

[14] Ms. Avril's spousal sponsorship application was refused. She commenced, but later discontinued, an Application for Leave and for Judicial Review of that decision.

[15] Ms. Avril then applied for a PRRA, which was refused in February 2019.

II. The Decision under Review

[16] The Officer found that Ms. Avril did not provide sufficient reliable evidence to demonstrate her sexual orientation and that she would suffer persecution in St. Lucia on that basis in accordance with sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [the Act]. The Officer noted that the evidentiary burden lay on Ms. Avril, which she had not met. The Officer stated that he was "not making a credibility finding for the purpose of this application" and added that "the issue at hand is the insufficiency of objective and reliable evidence to demonstrate that the applicant's allegations of risk have been established on a balance of probabilities and to overcome the negative credibility finding of the RPD with respect to her sexual orientation."

[17] The Officer noted that in 2012 the RPD found that Ms. Avril's claim of persecution due to her sexual orientation was not credible. The Officer also noted that her spousal sponsorship was refused in 2018 because the Immigration Officer was not persuaded that Ms. Avril and Ms. Justin were in a genuine married relationship and cohabitating.

[18] The Officer noted that a PRRA is not an appeal of the previous decisions, but that the previous decisions are a backdrop against which the new evidence is assessed. The Officer made the following findings with respect to the new evidence presented by Ms. Avril:

- Ms. Justin's affidavit did not describe the September 2018 spousal interview with sufficient detail and accuracy when compared to the transcript of the interview, which undermined its reliability. Further, the affidavit did not provide sufficient evidence to refute the RPD's negative credibility finding.

- There were discrepancies between Ms. Avril's statements and the statutory declaration of her friend, and former sexual partner, LB. For example, LB stated that she had a sexual relationship with Ms. Avril in 2014, which was after Ms. Avril began to live with Ms. Justin. In addition, LB stated that she did not get to know Ms. Avril and Ms. Justin "as a flourishing couple" until 2015 or 2016.

- LB's timeline regarding when she met Ms. Avril was confusing; in her letter she stated that she met Ms. Avril four years ago and in her statutory declaration she stated that she met Ms. Avril "4-5 years ago".

- LB's statutory declaration did not "match up" with Ms. Avril's description of her relationship with Ms. Justin. The Officer doubted that this relationship was initially "open" to the extent that Ms. Avril would have also engaged in sex with LB.

- The letters of support from four friends, which all described Ms. Avril's sexual orientation, contained similar grammatical errors. Although the letters were dated, signed and included copies of the writer's identification documents, it was unclear who wrote the letters. The Officer found that this weakened the reliability of this evidence.

- The letters of support from two other friends attesting to Ms. Avril's sexual orientation, and noting that they had seen pictures of Ms. Avril's wedding to Ms. Justin were not reliable because none of them had personal knowledge.

- All of the statutory declarations and letters of support were written by people who are close to the Applicant and had a vested interest in the outcome of the application. This evidence was not a reliable source of information and provided little probative value in demonstrating that Ms. Avril was a lesbian.

- Letters from Ms. Avril's mother and sister, which stated that they did not accept her lifestyle and that she should not contact them again, were not a reliable source of evidence, had little probative value and little weight. The Officer questioned why these letters would be sent only in 2019 given that the Applicant's statutory declaration stated that her sexual orientation had been known throughout her community in St. Lucia as early as 2005. The Officer added that there was no way to verify who wrote the letters or to determine when they were received.

- It was not clear whether letter writing was the typical form of communication between Ms. Avril and her family in St. Lucia.

- Photographs in the possession of Ms. Avril's counsel (which the Officer declined to view) depicting Ms. Avril with other women in intimate settings did not provide sufficient evidence to substantiate her sexual orientation and to overcome the negative credibility finding of the RPD. The Officer stated:

> It is not uncommon for homosexual men/women to enter into intimate heterosexual relationships, going as far as to having children, and later coming out as being homosexual. Likewise, heterosexual men/women may explore their sexuality with the same sex; however, this is not indicative of their sexual preference as being homosexual.

- Ms. Avril's membership and participation in the 519 Community Centre and Toronto Pride events were not sufficient evidence to substantiate her sexual orientation.

[19] The Officer accepted the country condition documents which indicate that persons who are LGBTQ continue to face discrimination in St. Lucia, but he did not accept that Ms. Avril would be identified as a member of this group if she were to return. As a result, he found that she

would not face more than a mere possibility of persecution in accordance with section 96 or a risk pursuant to section 97.

III. The Applicant's Submissions

[20] Ms. Avril submits that the Officer erred in assessing the new evidence, which had high probative value and directly addressed her sexual orientation.

[21] Ms. Avril notes that her sexual orientation can be established without regard to her marriage to Ms. Justin that was found not to be genuine.

[22] Ms. Avril submits that the Officer's findings that the letter and statutory declaration of LB were inconsistent and confusing are based on the Officer's misunderstanding of that evidence.

[23] Ms. Avril also submits that the Officer erred in finding that the letters from her four friends were not reliable. She argues that if the Officer found the letters not to be authentic, he should have made a clear finding. She further argues that the Officer could and should have contacted the writers to clarify his concerns, given that they had all provided identification and contact information (*Paxi v Canada (Minister of Citizenship and Immigration)*, 2016 FC 905 at para 52, 269 ACWS (3d) 143; *Downer v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 45 at para 63, 289 ACWS (3d) 376; *Nugent v Canada (Citizenship and Immigration)*, 2019 FC 1380 at para 17 [*Nugent*]).

[24] Ms. Avril also submits that the Officer erred in discounting the affidavits and letters of support from her friends because they had a vested interest, noting that such findings have been consistently rejected by this Court *(Giorganashvili v Canada (Minister of Citizenship and Immigration)*, 2017 FC 100 at para 19, 277 ACWS (3d) 156).

[25] Ms. Avril submits that the Officer also erred in rejecting the photographs of her engaged in sexual acts with LB and other women. Ms. Avril notes that the Officer declined to consider the photographs, finding that they likely depicted experimentation rather than evidence that she was a lesbian. Ms. Avril argues that the Officer's finding and statement is illogical.

[26] Ms. Avril also argues that the Officer erred by failing to provide any reason for his dismissal of the two letters provided in her PRRA update. Ms. Avril notes that the two letters were from women who had personal knowledge of her sexual orientation. Ms. Avril suggests that the only possible reason for the Officer to reject this evidence is that he regarded the letters as coming from friends with a vested interest in the outcome of the application, which is not a valid reason to reject evidence.

IV. The Respondent's Submissions

[27] The Respondent submits that, in light of the previous negative refugee and spousal sponsorship decisions, it was reasonable for the Officer to conclude that Ms. Avril failed to provide sufficient evidence to rebut those findings and establish the risk she faced.

[28] The Respondent notes that a PRRA is not a reconsideration of the RPD's rejection of her refugee protection claim and it is not an opportunity to collaterally attack the finding that her marriage is not genuine.

[29] The Respondent submits that the Officer considered all the evidence and provided detailed reasons for his assessment of the evidence and his overall finding to dismiss the application. The Respondent submits that the Officer's findings that the evidence was not reliable or credible were justified, noting that :

- The letters and declarations were based on the letter writer's acceptance that Ms. Avril was in a genuine marital relationship, which had been found not to be the case and which undermined the probative value of the evidence;
- The timeline in LB's statutory declaration was contradictory: it was unclear how LB could claim that she did not know Ms. Justin in 2014 when Ms. Avril had been living with Ms. Justin since January 2014;
- The distinctive and identical typographical errors in the letters of support from four friends undermined their reliability;
- Other letters of support were based on what Ms. Avril had recounted regarding her sexual orientation and marriage; and,
- The letters from Ms. Avril's mother and sister were undated and confusing.

[30] The Respondent further submits that the letters from friends were not rejected solely because they came from parties with a vested interest, rather the Officer set out several reasons to give little weight to this evidence.

V. Issue and Standard of Review

[31] The issue is whether the Officer's finding – that Ms. Avril had not established her sexual orientation with sufficient reliable evidence and has not overcome the credibility findings made by the RPD with respect to her refugee claim and by the Immigration Officer with respect to her spousal sponsorship application – is reasonable. This entails consideration of the Officer's assessment of the evidence.

[32] A PRRA Officer's determination of a PRRA, which is an assessment of risk, is reviewed on the reasonableness standard because it is a question of mixed fact and law (*Kadder v Canada (Citizenship and Immigration)*, 2016 FC 454 at para 11, 265 ACWS (3d) 1006).

[33] The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "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, [2008] 1 SCR 190).

VI. The Decision is Not Reasonable

[34] The Officer highlighted the previous findings of the RPD and the Immigration Division, which found that Ms. Avril was not credible and that her marriage was not genuine. While the PRRA is not an appeal of the previous findings and is limited to new evidence that has arisen since the determination of the refugee claim, and while the previous findings are relevant, the

Officer's role on the PRRA is to objectively assess the new evidence and determine whether Ms. Avril's claim of risk based on her sexual orientation is established.

[35] The Officer found that Ms. Avril had provided insufficient evidence to establish her sexual orientation or her risk of persecution as a result. The finding of insufficient evidence is based on several errors made by the Officer in his assessment of the particular evidence presented.

A. *The issue is not the genuineness of the Applicant's marriage*

[36] Contrary to the Respondent's submission, that the letters and statutory declarations were premised on the writer's acceptance that Ms. Avril was in a marital relationship, this evidence also described Ms. Avril's relationships with other women in some detail, and in some cases with the writer. Whether or not Ms. Avril's marriage to Ms. Justin was found to be genuine for the purpose of the spousal sponsorship, the other evidence should have been assessed to determine if it established Ms. Avril's sexual orientation.

B. *No oral hearing was held*

[37] Ms. Avril did not argue that the Officer erred by not convening an oral hearing. Ms. Avril accepted that the Officer based his findings on insufficient reliable evidence and that the credibility findings related to the evidence of third parties. Ms. Avril acknowledged that findings about the credibility of documents do not exactly fit the criteria for consideration of whether an

oral hearing should be conducted, in accordance with paragraph 113(b) of the Act and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[38] However, Ms. Avril's credibility was a key issue and her own evidence – both current and past – was compared to the other evidence, including the statutory declarations and letters of others. There comes a point where the credibility of the documents and third parties reflects the credibility of an applicant. In such cases, consideration should be given to whether an oral hearing is warranted. As an observation, the inconsistencies found and confusion noted by the Officer regarding Ms. Avril's relationships may have been addressed if an oral hearing had been held.

C. *The treatment of the evidence*

[39] The Officer found that the timeline described by LB was confusing, the source of some evidence was not reliable and that the authorship of certain letters was not clear, and that this "weakened the reliability" of the evidence. The Officer then gave this unreliable evidence low weight. However, the Officer's finding that the evidence was not reliable strongly suggests that he found that the evidence was not credible. Evidence that is not credible should have no weight attributed.

[40] The Respondent relies on *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067, at paras 25 and 26, 170 ACWS (3d) 397 [*Ferguson*], and submits that there was no requirement on the Officer to make a finding that the letters were not credible or were fraudulent before giving them low weight. In *Ferguson*, Justice Zinn explained:

> [25] When a PRRA applicant offers evidence, in either oral or documentary form, the officer may engage in two separate assessments of that evidence. First, he may assess whether the evidence is credible. When there is a finding that the evidence is not credible, it is in truth a finding that the source of the evidence is not reliable. Findings of credibility may be made on the basis that previous statements of the witness contradict or are inconsistent with the evidence now being offered (see for example *Karimi*, above), or because the witness failed to tender this important evidence at an earlier opportunity, thus bringing into question whether it is a recent fabrication (see for example *Sidhu v. Canada* 2004 FC 39). Documentary evidence may also be found to be unreliable because its author is not credible. Self-serving reports may fall into this category. In either case, the trier of fact may assign little or no weight to the evidence offered based on its reliability, and hold that the legal standard has not been met.
>
> [26] If the trier of fact finds that the evidence is credible, then an assessment must be made as to the weight that is to be given to it. It is not only evidence that has passed the test of reliability that may be assessed for weight. It is open to the trier of fact, in considering the evidence, to move immediately to an assessment of weight or probative value without considering whether it is credible. Invariably this occurs when the trier of fact is of the view that the answer to the first question is irrelevant because the evidence is to be given little or no weight, even if it is found to be reliable evidence. For example, evidence of third parties who have no means of independently verifying the facts to which they testify is likely to be ascribed little weight, whether it is credible or not.

[41] The jurisprudence, including *Ferguson*, has explained that reliability and credibility are synonymous. Evidence that is not reliable is not credible and evidence that is not credible reflects that its source is not reliable.

[42] In *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940, 297 ACWS (3d) 381, Justice Gascon noted at para 42:

> 42 The term “credibility” is often erroneously used in a broader sense of insufficiency or lack of persuasive value. However, these are two different concepts. A credibility assessment

> goes to the reliability of the evidence. When there is a finding that the evidence is not credible, it is a determination that the source of the evidence (for example, an applicant's testimony) is not reliable.

[43] In *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 12-34, 301 ACWS (3d) 832, Justice Grammond described the different evidentiary concepts of credibility, probative value, weight and sufficiency in the context of judicial review of immigration decisions. Justice Grammond explained that the first step is to determine the credibility of the evidence submitted to the decision-maker, i.e., whether the evidence is worthy of belief (at paras 16-18). Justice Grammond noted that credibility has two components: veracity and reliability, although they are not easy to separate. While credibility may be more focussed on honesty, reliability refers to a witness's ability to recount the facts with accuracy (at paras 17-19).

[44] The second step is the assessment of probative value (at para 21).

[45] Justice Grammond noted, at para 28, that weight and probative value are often used synonymously but that the two concepts should be distinguished. He explained, at paras 29-30, that weight is a function of credibility and probative value. If a document has no credibility, then it can have no weight.

[46] The Respondent submits that in the present case the Officer simply gave the evidence low weight, without making any assessment of credibility. I note that the Officer states that he is not making a credibility assessment on the application. However, saying this does not make it so. Ms. Avril's credibility was at issue and the evidence was tendered to establish her sexual orientation and the risk she faces as a result and to overcome the negative credibility findings of

the RPD. In the present case, the Officer found that much of the evidence was "not reliable", which can only mean that the Officer found it not credible. Although the Officer avoided describing his findings as about credibility, there is no other conclusion to be drawn. If the evidence is not credible, it can have no weight – not minimal weight. Unlike the situation described at para 26 of *Ferguson*, the Officer first found the evidence to be not reliable – i.e. not credible – and then assessed the weight of the evidence. The Officer did not simply move to an assessment of the weight of the evidence.

D. *LB's evidence is not inconsistent with the Applicant's evidence*

[47] LB provided a letter and a statutory declaration. LB attested first-hand to Ms. Avril's sexual orientation, including that LB had a sexual relationship with Ms. Avril. She also described Ms. Avril's participation in LGBT groups and events.

[48] The Officer's finding that LB claimed to have met Ms. Avril "4 years ago" in her letter, but in her statutory declaration claimed to have met her "4-5 years ago" is not inconsistent and is easily reconcilable given that the statutory declaration was provided five months after the letter.

[49] The Officer also found that it was inconsistent and confusing for LB to state that she was in a sexual relationship with Ms. Avril in 2014 when Ms. Avril claimed to be in a relationship and cohabiting with Ms. Justin beginning in 2014. However, this does not mean that one or the other is not accurate. Ms. Avril stated that her relationship with Ms. Justin, in its early stages, was "open". As Ms. Avril points out, her evidence did not state that her relationship with

Ms. Justin was exclusive in that time period, nor did any other evidence. Ms. Avril stated that she ended her sexual relationship with LB in 2014.

[50] LB stated in her statutory declaration:

> 6 My personal experience with Dalia also includes a few sexual encounters with each other. We first had sex in January 2014, in between my relationships and well before Dalia's marriage. After that we have (sic) sex together on 2-3 more occasions, all in 2014. At the time Dalia was dating Martina Justin but, at the beginning at least, they had an 'open relationship'. …But after this initial period, my relationship with Dalia became solely platonic.

[51] The Officer's finding that LB had stated that she did not get to know Ms. Avril and Ms. Justin "as a flourishing couple" until 2015 or 2016 is not an accurate summary of LB's full evidence. Nor is it inconsistent with LB's statement that she spent most of her time with Ms. Avril "one-on-one" (i.e. in the absence of Ms. Justin) in 2014.

[52] LB stated:

> 8 I first started to get to know Martina in 2014, after my relationship with Dalia became platonic. But most of my time with Dalia was one-on –one. I only really got to know them as a couple and see their relationship flourish in 2015-2016 as we would double date regularly.

[53] The Officer's scrutiny of LB's evidence led him to overlook that it was possible for Ms. Avril to have had a sexual relationship with LB while also being in the early stages of her relationship with Ms. Justin before it became more serious and exclusive.

E. *The four supporting letters from friends could have been clarified*

[54] The four letters from Ms. Avril's friends shared similar grammatical and typographical errors. For example, the letters had extra spaces, used lower case letters at the start of some sentences, and referred to Ms. Avril as "dalia" rather than "Dalia". However, the content of the letters was unique. Each friend described their particular relationship with Ms. Avril. Each friend provided their contact information and a copy of an identification document.

[55] The Officer found that the lack of clarity about who wrote the letters "weakens the reliability" of the evidence. However, the Officer knew who signed the letters and had their contact information. The Officer's finding suggests that he believed that the letters were written by the same person, perhaps by Ms. Avril, and not by those who signed the letters.

[56] If the Officer regarded the letters as inauthentic – which he apparently did he should have clearly stated this finding and given the letters no weight.

[57] In *Osikoya v Canada (Citizenship and Immigration)*, 2018 FC 720, 294 ACWS (3d) 366, Justice Norris addressed a similarly vague finding, noting at para 51:

> 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 [my emphasis].

[58] In *Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 20, 286 ACWS (3d) 324, Justice Mactavish made the same point:

> [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'.

[59] Similarly, in the present case, the Officer gave the four letters minimal weight rather than making a clear finding that they were not authentic. The letters, if authentic, would have high probative value because the friends who signed the letters described their personal knowledge of Ms. Avril's sexual orientation.

[60] In addition, the Officer could have clarified his concerns about who actually wrote the letters by contacting the friends, given that they provided their contact information and invited the Officer to contact them for additional information.

[61] In *Paxi v Canada (Minister of Citizenship and Immigration)*, 2016 FC 905, 269 ACWS (3d) 143 [*Paxi*], Justice Russell found the decision-maker's failure to verify the authenticity of important documents to be a reviewable error. Justice Russell stated at para 52:

> Besides the church letterhead, the date, and the signature of the Pastor Eduardo, the letter is detailed and authoritative, and it provides detailed contact information, including a phone number, and clearly makes it easy for anyone who doubts its authenticity to check it out. These are not the signs of an inauthentic document,

> and if the Board thought that a missing date was material, then the Board's mistake over the date means it overlooked a material fact. The letter is of extreme importance for the Applicants' situation. It seems odd that if the Applicants say they are fleeing what the Pastor Eduardo calls "a terrible situation," the Board would simply not take the opportunity to use the contact information provided by the letterhead before demanding notarized and other objective identification documents. Lives are at stake here, and yet a simple check is not made. For the Board to take issue with the authenticity of the document yet make no further inquiries despite having the appropriate contact information to do so is a reviewable error: *Kojouri v Canada (Minister of Citizenship and Immigration)*, 2003FC 1389 at paras 18-19; *Huyen v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 1267 at para 5.

[62] In *Downer v Canada (Minister of Citizenship and Immigration)*, 2018 FC 45 at para 63, 289 ACWS (3d) 376, Justice Russell found that the decision maker had not explained why they did not contact the author of the documents at issue:

> 63 And I think the RAD also has to answer the obvious question: Why would a dishonest applicant provide information that would allow the RAD to easily check her reliability on the whole basis of her claim? In my experience, liars are not in the habit of providing an easy means to check the reliability of their evidence. In this case, the RAD provides no reason for not making the check (reasons may exist but they are not explained) and failed to mention the Applicant's request that the RAD use the means at its disposal to dispel or confirm any credibility concerns.

[63] Although Ms. Avril did not make such a specific request, the same question is raised; why would her friends provide their contact information if they did not agree to be contacted to verify their information, and why would Ms. Avril tender this evidence if it were fraudulent, knowing that it could be checked?

[64] More recently, in *Nugent*, at para 17, Justice O'Reilly found a PRRA Officer's decision to be unreasonable for several reasons, including that the Officer erred by discounting letters describing the Applicant's sexual orientation because the letters were unsworn. Relying on *Paxi*, Justice O'Reilly found that if the reliability of the letters was in question, the Officer should have contacted the writers, given that contact information was provided.

F. *The "vested interest" finding*

[65] The Officer erred by finding that the reliability of the statutory declarations and letters which described Ms. Avril's sexual orientation was "further weakened" because the documents came from persons with a vested interest.

[66] In *Tabatadze v Canada (Minister of Citizenship and Immigration)*, 2016 FC 24, 262 ACWS (3d) 460 [*Tabatadze*], Justice Brown summed up the state of the jurisprudence at paras 4 -6:

> [4] While counsel canvassed a number of issues, in my view, the determinative issue is the RPD's blanket rejection of all affidavit evidence filed by the Applicant's family and relatives. The RPD gave this evidence "no weight", saying: "[d]ocuments signed by his family members are self-serving since they are from his family members who have interests in the outcome of the claimant's refugee claim in Canada and as a result, the panel gives no weight to these documents." This Court has repeatedly criticized the outright rejection of evidence provided by relatives and family members of an applicant or claimant because such evidence is self-serving: see *Kaburia v Canada (Citizenship and Immigration)*, 2002 FCT 516 at para 25; *Ahmed v Canada (Citizenship and Immigration)*, 2004 FC 226 at para 31; *Mata Diaz v Canada (Citizenship and Immigration)*, 2010 FC 319 at para 37; *Magyar v Canada (Citizenship and Immigration)*, 2015 FC 750 at para 44; and *Cruz Ugalde v Canada (Public Safety and Emergency*

> *Preparedness)*, 2011 FC 458 at para 26, as examples. I repeat those criticisms here.
>
> [5] This Court stated one of the underlying reasons why this approach is unreasonable in *Varon v Canada (Citizenship and Immigration)*, 2015 FC 356 at para 56:
>
> > …If evidence can be given "little evidentiary weight" [or no weight at all in the case at bar] because a witness has a vested interest in the outcome of a hearing then no refugee claim could ever succeed because all claimants who give evidence on their own behalf have a vested interest in the outcome of the hearing. …
>
> [6] In addition, rejection of evidence from family and friends because it is self-serving or because the witnesses are interested in the outcome, is an unprincipled approach to potentially probative and relevant evidence. To allow a tribunal to reject otherwise relevant and probative evidence in this manner creates a tool that may be used at any time in any case against any claimant. It therefore defeats a primary task of such decision-makers which is to assess and weigh the evidence before them.

[67] As in *Tabatadze*, the evidence tendered by Ms. Avril from her friends, which attests to her sexual orientation, is probative and should not be rejected solely because of its source. Only her friends and family would be aware of her sexual orientation, as there is no truly 'objective' evidence of anyone's sexual orientation.

[68] While the jurisprudence guards against rejecting evidence solely on the basis that it comes from persons with a vested interest, when the error in not following up to verify the Officer's concerns about who wrote the letters is taken into account, the sole reason remaining to reject the letters is because the friends had a vested interest. The Officer's reliance on a vested interest cannot save the day.

[69] Moreover, what vested interest would Ms. Avril's friends have in attesting to her sexual orientation? The notion of a vested interest suggests that a positive outcome will provide some benefit for the affiant. Unlike the situation of evidence from family members of a person who faces obstacles to immigration which may affect their employment or ability to support their family, there is no such vested interest here. Apart from losing a friend that may be required to return to their country of origin, there is no apparent benefit to Ms. Avril's friends in writing letters or providing affidavits.

G. *The photographs and the Officer's comment*

[70] The Officer declined to consider the photographs, which Ms. Avril offered to produce, finding that they likely depicted experimentation rather than evidence that she is a lesbian. The Officer stated :

> […] the photographs […] provide insufficient evidence to substantiate her sexual orientation as a lesbian. For instance, it is not uncommon for homosexual men/women to enter into intimate heterosexual relationships, going as far as to having children, and later coming out as being homosexual. Likewise, heterosexual men/women may explore their sexuality with the same sex; however, this is not indicative of their sexual preference as being homosexual.

[71] The Officer's gratuitous comment reflects only his own opinion, unsupported by any research or objective evidence about the habits of men and women. Moreover, it does not make any sense. I do not understand why anyone who is "experimenting" with their sexual preferences would document this in photographs and take the risk that the photos would be revealed without their consent. In addition, as noted by Ms. Avril, the photos depict her with other women, which demonstrates that she is a lesbian or, alternatively, that she is bisexual. As Ms. Avril notes, the

country condition documents describe the same risks for bisexual persons in St. Lucia as for gay and lesbian persons.

H. *The PRRA must be redetermined*

[72] Ms. Avril submitted three statutory declarations, including her own, plus 12 letters to establish her sexual orientation. The Officer found problems with all of the evidence. As noted, the Officer erred in his assessment of key pieces of evidence. As a result, the Officer's conclusion that the evidence was not sufficient is not defensible on the facts and the law. On the redetermination of this PRRA, at minimum, the statutory declaration and letter from LB and the letters from the four friends must be assessed, and if necessary, verified with the writers. This evidence on its own speaks directly to Ms. Avril's sexual orientation, and together with all the other evidence, should be weighed to determine whether Ms. Avril has established her sexual orientation on a balance of probabilities.

JUDGMENT in file IMM-2005-19

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is granted.

2. The PRRA decision is quashed.

3. The PRRA should be remitted to a different Officer for determination.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2005-19
STYLE OF CAUSE:	DALIA BERNICE AVRIL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 7, 2019
REASONS FOR JUDGMENT AND JUDGMENT:	KANE J.
DATED:	NOVEMBER 27, 2019

APPEARANCES:

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