

Federal Court



Cour fédérale

Date: 20210720

Docket: IMM-6918-19

Citation: 2021 FC 772

Ottawa, Ontario, July 20, 2021

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

**CALLISTER ONYEKA OKPUGO
DONALD CHIBUDO OKPUGO (MINOR)
RAPHEAL EBUBECHI OKPUGO (MINOR)
ALFREDA CHIZARA OKPUGO (MINOR)
ALFRED TOCHUKWU OKPUGO (MINOR)**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are citizens of Nigeria who made a claim for protection based on the Principal Applicant's (PA) alleged bisexuality and the risk of female genital mutilation (FGM) to her minor daughter.

[2] The Applicants are challenging the Refugee Appeal Division (RAD) decision dated October 25, 2019 that confirmed the decision of the Refugee Protection Division (RPD) that they were neither Convention refugees nor persons in need of protection pursuant to s.111(1)(a) of the *Immigration and Refugee Protection Act, SC 2001 c 27 [IRPA]* (the Decision).

[3] Only the claim of the PA will be reviewed as the applicants did not challenge the RAD's findings on the claims of the minor applicants.

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

II. **Background Facts**

[5] The PA claims she has always been bisexual.

[6] The PA married her husband in 2005. She claims she began a relationship with a married woman named Celestina in 2012.

[7] In July, 2017 the brother-in-law of the PA walked in on the PA and Celestina engaged in an intimate activity. He assaulted the PA and called her husband. The PA was hospitalized for 10 days.

[8] Celestina escaped. She has not been seen since by the PA.

[9] The husband of the PA forced her to leave the matrimonial home and his family insisted she undergo a cleansing ritual in which she would have to be seen naked in public and have incisions made on her body. The family also said they wanted the PA's daughter to undergo FGM so that she did not become bisexual.

[10] In September, 2017 the PA and her minor children left for Canada. At the last minute her husband decided to stay in Nigeria.

[11] On February 14, 2018 the RPD found there was insufficient credible evidence to establish the PA's claims and rejected the refugee protection claims of the PA and her children.

[12] On October 25, 2019 the RAD affirmed the determination by made by the RPD that the Applicants were not convention refugees nor persons in need of protection.

[13] This application for judicial review was filed on November 14, 2019.

III. **Decision under Review**

[14] New evidence, which will be discussed later, was presented to the RAD. Some was accepted and some was rejected.

[15] The RAD reviewed the transcript of the RPD hearing. The panel conducted an independent assessment of the new evidence and the arguments. In the result, the RAD made additional credibility findings that confirmed the RPD's decision.

[16] The RAD also considered the Chair's Guideline 4: *Women Refugee Claimants Fearing Gender-Related Persecution* and Guideline 9: *Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression (SOGIE Guideline)*.

[17] In addition, the RAD noted issues raised by the psychologist, particularly that the PA had short-term memory difficulties, issues with her concentration and focus and that she found herself distracted by thoughts of her future. The RAD indicated it had considered those factors in assessing the PA's credibility.

[18] The credibility findings made by the RAD will be considered in the analysis portion that follows.

[19] The RAD refused to hold an oral hearing as provided by subsection 110(6) of the *IRPA*.

IV. **Issues**

[20] The PA raised three issues including whether the RAD erred by failing to make a section 97 analysis.

[21] I find the issue is whether the Decision is reasonable. In determining that question there are two determinative sub-issues:

1. Did the RAD err by refusing to accept new evidence?
2. Did the RAD err in its assessments that the applicants' evidence was not credible?

V. **Standard of Review**

[22] The PA relied on *Dunsmuir v New Brunswick* 2008 SCC 9 (*Dunsmuir*) to submit that the standard of review is reasonableness with respect to questions of fact and mixed fact and law but that the standard is correctness for questions of law.

[23] The PA's memorandum was filed before the Supreme Court released its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] which extensively reviewed the law of judicial review of administrative decisions.

[24] *Vavilov* confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness subject to certain exceptions, none of which apply to these facts: *Vavilov* at paragraph 23.

[25] Even before *Vavilov*, the standard of review of an administrative body considering its home statute, in this case the *IRPA*, presumptively was reasonableness: *Vavilov* at paragraph 7, citing *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61.

[26] I find that the standard of review for both issues is reasonableness.

[27] When applying the reasonableness standard while conducting judicial review, a Court is to refrain from deciding the issue afresh. The Court is to consider only whether the Decision,

including the rationale for it and the outcome to which it led, is unreasonable: *Vavilov* at paragraph 83.

[28] The requirements of a reasonable decision were re-stated in *Vavilov* as being one that possesses an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision-maker. Importantly, the reasonableness standard requires a reviewing court to defer to such a decision: *Vavilov* at paragraph 85.

[29] A reviewing court must also remember that the written reasons given by an administrative body are not to be assessed against a standard of perfection. If the reasons given for a decision do not include all the arguments, statutory provisions, jurisprudence or other details a reviewing judge would have preferred, that, on its own, is not a basis to set aside the decision. The court's review is not to be divorced from the institutional context in which the decision was made nor from the history of the proceedings: *Vavilov* at paragraph 91.

VI. **Did the RAD err by refusing to accept new evidence?**

[30] The new evidence submitted to the RAD for consideration was:

1. a letter from Celestina, dated March 22, 2018;
2. a police invitation to the PA regarding Celestina from March 2018;
3. a notarized letter from the PA's husband, Chima Okpugo; and
4. a flight itinerary.

[31] The record shows that the new letter from Celestina was not notarized.

[32] The admission of new evidence before the RAD is governed by subsection 110(4) of the *IRPA*:

| Evidence that may be presented | Éléments de preuve admissibles |
|---|--|
| (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection. | (4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet. |

[33] In determining whether to admit or reject the new evidence, the RAD identified and applied both the above-noted statutory test and the relevant jurisprudence directing the RAD to consider the credibility, relevance, and newness of the evidence: *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] and *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*].

[34] The RAD admitted the police invitation and the letter from the PA's husband.

[35] The RAD refused to admit the new letter from Celestina and the flight itinerary. The flight itinerary was not admitted as the flight plans were not in dispute and were not relevant. That finding has not been contested. The refusal of the letter from Celestina is in contention.

A. *Letter from Celestina and Request for an Oral Hearing*

[36] The PA requested an oral hearing for the new evidence.

[37] The RAD refused the PA's request for an oral hearing. It observed that subsection 110(6) of the *IRPA* requires that in order to hold an oral hearing the new evidence must raise a serious issue about the credibility of the person who is the subject of the appeal and the issue must be central to the claim for protection. It also requires the RAD to determine that, if admitted, such evidence would justify either allowing or rejecting the claim.

[38] The RAD found that the police invitation, even if the content was accepted, only showed that Celestina was arrested. It did not raise a serious issue as to the credibility of the applicants and was not determinative of the applicants' claim.

[39] The PA's submissions to the RAD for the acceptance of the new letter from Celestina were very brief. The PA submitted the letter was admissible because: (1) Celestina says that her husband kicked her out of the house and she has been forced to find reprieve with a friend in Ghana; (2) it was not previously reasonably available as it was written March 22, 2018 to explain new events such as her move to Ghana and, (3) the information is probative and relevant as it confirms the PA was in a same-sex relationship that became publicly known.

[40] The RAD noted that the PA testified before the RPD that she had no direct contact with Celestina since July, 2017 and she did not know where Celestina was located. The sister of the

PA provided the March, 2018 letter from Celestina together with the waybill and envelope in which it was delivered.

[41] The RAD determined that the source and circumstance of how the PA was able to acquire the letter from Celestina, who was hiding somewhere in Ghana, was not supported by sufficient evidence. In addition, there was no affidavit stating how and when the letter was received. As such, the letter was not admitted into evidence.

[42] The RAD made a number of serious credibility findings against the PA. The refusal to hold an oral hearing was well founded as the letter did not raise a serious credibility issue that if corrected would have been capable of justifying or allowing the claim.

[43] The PA insists that the refusal to hold an oral hearing shows that the RAD did not bother to read the memorandum of argument. To the contrary, it is well-known that the decision-maker is presumed to have considered all the evidence before them and they are not required to refer to every contrary piece of evidence they receive or explain how they dealt with it: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, (1998), 157 FTR 35 at para 16.

[44] For the foregoing reasons, I find that the RAD did not err in refusing to accept new evidence or to hold an oral hearing.

VII. **Did the RAD err in its assessments that the applicants' evidence was not credible?**

[45] The determinative issue before the RPD and the RAD was the PA's credibility.

[46] The RAD reviewed the credibility findings made by the RPD and made additional credibility findings of its own. There are many credibility findings.

[47] I find that it is only necessary to review a few more of the credibility findings.

A. *Who knew about the PA's sexuality?*

[48] The first credibility finding that the RAD discussed was the evidence given by the PA concerning whether anyone, other than the person with whom she was involved, knew that she was bisexual. The RPD posed the question several times during the course of the hearing. Each time, the PA said that no one else knew.

[49] At one point the RPD brought to the attention of the PA that there was a notarized letter from her cousin in Nigeria stating that the PA “had always confided in her about her preference for same-sex relationships”. The PA at that point said she had misunderstood. She thought the RPD was asking only in relation to people at high school.

[50] The RAD found the answer was not a reasonable explanation because the question was very clear. The RAD went on to say that it was not a significant contradiction by itself, however it did relate to the fundamental issue of bisexuality which is deeply disapproved of in Nigeria and would have put the PA in danger.

[51] The RAD found that it was a contradiction in the context of other contradictions, vagueness and inconsistencies.

[52] I find that the RAD did not err in this credibility assessment.

B. *When the brother-in-law walked in, at what point did Celestina escape?*

[53] The RPD record contained a letter from Celestina in which she described the incident when the PA's brother-in-law found them and hit the PA. In the letter, Celestina says that she was there when the assault happened and the PA fell to the floor bleeding. Neighbours gathered to take them to the police and Celestina said that she "took to [her] heels and ran [off]".

[54] The RAD found that in the RPD hearing the PA testified that Celestina had left before she was hit. The RAD noted that the RPD questioned the PA further on this issue and that the PA had provided different descriptions of the encounter during the hearing. These inconsistencies led the RPD to find the account of the assault was not credible.

[55] In submissions to the RAD, the PA argued that because she had been in a haste to save her life, it was not unreasonable to believe she may have been faulty in her recollection. The RAD observed that the PA did not indicate that she was not certain of the details before giving a detailed account of the incident to the RPD.

[56] The PA argued that the psychological report addressed the discrepancy and that it should be considered according to the *SOGIE Guideline*. The RAD disagreed that the report addressed the discrepancy. It found that the psychologist said the PA had issues with her short-term memory while the event in question had happened years earlier. The RAD noted that the RPD asked the questions in a fair manner and the PA gave a detailed account of the incident.

[57] The RAD concluded that the psychological report did not fully account for the discrepancy in the description of Celestina's escape after the brother-in-law entered the room.

[58] The RAD again found it was not a significant discrepancy in the context of an event where there was a traumatic activity. It would not be sufficient on its own to find that the incident did not occur. But, it was a discrepancy on a fundamental issue and it is in the context of other issues with credibility of the narrative provided by the PA.

[59] I find that the RAD did not err in this credibility assessment.

C. *Other negative credibility findings of note*

[60] On reviewing the testimony of the PA, the RAD found the PA was not able to clearly explain to the RPD how her sister got the original letter from Celestina; her evidence was vague and confusing. At one point the PA said she sent a text to Celestina but also stated that she had not had any contact with her. Ultimately, the RAD concluded that the inconsistencies regarding the level of contact between the PA and Celestina was a relevant consideration.

[61] The RAD reviewed the testimony of the PA about whether she became unconscious when she was hit. The RAD found that testimony was inconsistent. When questioned by the RPD, the PA offered that she was "a bit unconscious".

[62] However, the medical report stated that the PA was unconscious. It also stated that the diagnosis was an "assault" which the RAD observed is a "cause", not a diagnosis. The RAD

noted that although the report described symptoms and treatment, the actual injuries and pathology was not provided.

[63] The RAD also commented that the PA had provided photos of her, with bandages on her head, in what appears to be a hospital. The medical report however did not state that she had a head injury.

[64] The RAD concluded that even if there was a head injury, there was not sufficient credible evidence to find that it was caused by an assault due to her bisexuality.

[65] The RAD concluded that the cumulative effect of issues on the significant and fundamental aspects of the PA's narrative were such that it led to a finding that there was insufficient credible evidence that the events described by the PA had occurred.

D. *Was there sufficient credible evidence that the PA was a member of the LGBTIQ community?*

[66] The RAD considered notarized letters from the sister, cousin and husband of the PA attesting to her bisexuality. After reviewing the current Response to Information Request in the National Documentation Package, the RAD found the majority of sources indicated it was unlikely that a person would swear to another person's membership in the LGBTIQ community. The evidence showed that the repercussions of being a member of the LGBTIQ community were so severe that it was unlikely that someone would swear or even approach an official to swear that a person was a member.

[67] The PA had also produced a letter from the Metropolitan Community Church (MCC) stating that she participates “as a bisexual”.

[68] The RAD noted that the PA started attending the MCC in October, 2017 and the letter is dated December 6, 2017. During that time the PA volunteered to clean for two months. This evidence only accounted for the PA’s participation for two months and was found to be insufficient to find the PA has continued her involvement since then.

[69] The RAD concluded that the PA had been provided with sufficient opportunity to present evidence to show she was a member of the LGBTIQ community before the RPD and the RAD but she had failed to do so.

VIII. **Conclusion**

[70] The determinative issue in this case was credibility. The PA has failed to demonstrate the RAD’s decision confirming that the applicants were neither Convention refugees nor persons in need of protection was unreasonable. They have not shown the RAD came to any conclusions that were not supportable on the evidence.

[71] The Court of Appeal in *Siad v Canada (Secretary of State)*, [1997] 1 FC 608, at para 24 (FCA) set out the requirements that must be met by the decision-maker when rejecting a claimant on grounds of credibility:

The Tribunal is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within "the heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be

overturned unless they are perverse, capricious or made without regard to the evidence.

[72] An important indicator of credibility is the consistency with which a witness has told a particular story. (*Dan-Ash v Canada (Minister of Employment and Immigration)* (1988), 93 NR 33 (FCA))

[73] When a tribunal rejects a claim on the ground that the claimant is not credible, it must state that ground clearly (*Ababio v Canada (Minister of Employment and Immigration)* (1988), FCJ No 250 (FCA)) and it must give reasons for the credibility finding. (*Armson v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 800 (FCA)).

[74] The RAD clearly stated the grounds for each credibility finding, with reasons.

[75] The RAD has also complied with the *Vavilov* requirements.

[76] The Decision is based on an internally coherent and rational chain of analysis that is justified in relation to the constraining facts and law: *Vavilov* at para 85.

[77] The RAD noted and clearly articulated a number of inconsistencies and contradictions in the evidence presented by the PA. The reasoning of the RAD leading to the various conclusions it made is rational and logical, without any fatal flaws: *Vavilov* at para 102.

[78] On review of the Decision and the underlying record, I am satisfied that there are no 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.

[79] The application is dismissed, without costs.

[80] No serious question of general importance was posed by the parties, nor does one exist.

JUDGMENT IN IMM-6918-19

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.
2. No costs are awarded.
3. There is no serious question of general importance for certification.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6918-19

STYLE OF CAUSE: CALLISTER ONYEKA OKPUGO, DONALD
CHIBUDO OKPUGO (MINOR), RAPHEAL
EBUBECHI OKPUGO MINOR), ALFREDA CHIZARA
OKPUGO (MINOR)
ALFRED TOCHUKWU OKPUGO (MINOR)v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: JANUARY 11, 2021

JUDGMENT AND REASONS: ELLIOTT J.

DATED: JULY 20, 2021

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