

Federal Court



Cour fédérale

Date: 20160414

Docket: IMM-2852-15

Citation: 2016 FC 413

Ottawa, Ontario, April 14, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SAMUEL WANYOIKE KAMAU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION AND THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS**

Respondents

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD] dated May 26, 2015 [Decision], which rejected the Applicant's claim for refugee protection pursuant to ss 96 and 97(1) of the Act.

II. BACKGROUND

[1] The Applicant is a 33-year-old citizen of Kenya who claims a fear of persecution due to his alleged sexual orientation as a bisexual man.

[2] The Applicant says that he began to feel attraction to members of his own sex during high school and his first same-sex experience took place in boarding school around the tenth grade. While the Applicant had heterosexual relationships after high school, he claims that his same-sex attraction continued. He says that he hid these feelings as a result of the pervasive homophobia in Kenya.

[3] The Applicant claims he had several one-off, casual, same-sex encounters in Kenya, as well as one male partner with whom he had a sexual relationship for approximately three months.

[4] In 2008, the Applicant obtained a visitor's visa to the United States [US]. Upon arrival there, he applied for permanent residence and gained authorization to work while his application was pending. Living in Minneapolis, Minnesota, the Applicant says he dated and engaged in a number of "swinging" relationships with both men and women. He also says he had one ongoing sexual relationship with a man from 2009 to 2014.

[5] The Applicant says that in 2011, upon learning of his bisexual relationships in the US, his family in Kenya confronted him and ultimately disowned him, disentiing him to his inheritance. The Applicant claims he received threats over the internet and by text message.

[6] In 2013, the Applicant's permanent residence application in the United States was refused. Following the expiry of his final work permit in February 2014, he was subject to removal proceedings and had to leave the country by March 2015.

[7] The Applicant's maternal uncle offered to help him to make a refugee claim at the US-Canada border subject to an exemption under the US-Canada Safe Third Country Agreement. On March 24, 2015, the Applicant made his claim upon arrival at Fort Erie, Ontario.

[8] On May 19, 2015, the Applicant's hearing took place before the RPD. That afternoon, following the hearing, the Applicant's counsel submitted a 2014 *New York Times* article to the RPD by fax which addressed an issue that arose at the hearing with respect to the description of the sexual orientation of the Applicant's former partner in Minnesota, Benjamin Mosioma. In the Applicant's Basis of Claim form [BOC] he used the word "bisexual" to describe Benjamin, but at the hearing he testified that Benjamin described himself as "straight but with gay tendencies." The article that the Applicant's counsel requested be admitted into evidence spoke to the fluid nature of bisexuality. The Applicant argues that its content would help to explain the discrepancy in the Applicant's descriptions of Benjamin. On May 25, 2015 the Applicant's counsel faxed the RPD a letter from the Applicant's aunt, Lilian Walker, in St. Paul, Minnesota which corroborated the Applicant's allegations and sexual orientation.

[9] On May 25, 2015, the RPD member responsible for the Decision refused to admit either of these new pieces of evidence, stating that, given the dates of the article and letter (March 20, 2014 and May 10, 2015, respectively), both could have been reasonably provided to the RPD prior to the hearing.

[10] As a result of the Decision, the Applicant was scheduled for removal to Kenya on September 15, 2015. On September 11, 2015, Justice Boswell stayed the removal pending a final disposition of this judicial review application.

III. DECISION UNDER REVIEW

[11] The RPD found that the Applicant is not a Convention refugee or a person in need of protection and rejected his claim. Based on the totality of the evidence, the RPD determined, on a balance of probabilities, that there is no serious possibility that, should the Applicant be returned to Kenya, he would be persecuted there, or that he would personally be subjected to a danger of torture, or face a risk to his life or one of cruel and unusual treatment or punishment.

[12] The Decision identified the determinative issue in the Applicant's claim to be credibility. Given that the BOC contains instructions to "include everything that is important" for a claim, including "dates, names and places" and that the Applicant is fluent in English and had the benefit of the assistance of counsel when he completed his BOC, the RPD drew a negative inference with respect to the Applicant's credibility over what it considered to be several key omissions related to his alleged same-sex relationships.

[13] The RPD examined first what the Applicant claimed as his first same-sex relationship in Kenya. It found that while the Applicant provided his first same-sex partner's name (Clive) and several details about him in his testimony (including that he was a house captain at his school), he failed to provide any of this information in his BOC. The RPD drew a negative inference from this omission.

[14] The Applicant testified that the next meaningful same-sex relationship he had in Kenya was with a man he met at a club in Nairobi (Michael Mwangi) sometime in 2002. In describing this relationship, the RPD found the Applicant to be "vague, evasive, and hesitant" in his narrative. Noting that the Applicant did not make any mention in his BOC of this or any other same-sex relationship in Kenya that was more than a casual encounter, the RPD found the Applicant's lack of recollection of details of what he claims to have been a six to nine-month relationship undermined his credibility.

[15] As regards the Applicant's testimony that he had "one on-going relationship with a man" during his time spent living in the US (Benjamin Mosioma), the RPD noted that the Applicant provided no details in his BOC regarding this man's name or dates concerning their relationship. However, at the hearing, the Applicant indicated that the pair had a friendship from 2009 to September 2014 and that they were also lovers. Given the alleged length of the relationship, and the fact that Benjamin was the Applicant's only ongoing same-sex relationship in the US, the RPD did not find it reasonable that the Applicant had failed to provide details of this relationship in his BOC.

[16] The RPD points out that, despite first stating in testimony that Benjamin was the only man he had a relationship with in the US, the Applicant went on to describe a casual relationship that was “not a fling” but with “someone who is always coming and going” between 2011 to 2013 (Jazmine Eric). No mention of Jazmine was made in the BOC, and the RPD found that the Applicant was unable to reasonably explain why this relationship was left out of his original narrative.

[17] The RPD noted that, in marked contrast to these stark and omission-filled descriptions of same-sex relationships, the Applicant provided extensive, consistent, “forthcoming and spontaneous” details in his testimony and BOC, including the full names and dates and time frames, of his relationship with two women. Given that the Applicant was able to provide such comprehensive information, the RPD found that it was reasonable to expect that he would have known to provide similar details of his same-sex relationships.

[18] The RPD considered a letter submitted by the Applicant written by his mother which stated that she had heard rumours from relatives of her husband that the Applicant was bisexual. The RPD found that the Applicant did not provide any details of how relatives in Kenya could have found out about his bisexuality and that the letter lacked any security or identifying features to support its authenticity. As a result, the RPD placed little evidentiary weight on it with respect to establishing the Applicant’s sexual orientation, and found it insufficient to overcome the concerns regarding the Applicant’s credibility.

[19] The Applicant's lack of credibility in providing information about his former same-sex partners was detrimental to his overall credibility and undermined his allegations of a risk to his life based on his sexual orientation.

IV. ISSUES

[20] The Applicant raises the following issues:

1. Were the RPD's credibility findings unreasonable?
2. Was the Applicant denied procedural fairness?

V. STANDARD OF REVIEW

[21] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[22] As regards the first issue, both parties concur and I agree that the standard of review for credibility findings made by the RPD is reasonableness: *Lumaj v Canada (Citizenship and*

Immigration), 2012 FC 763 at para 25; *Wu v Canada (Citizenship and Immigration)*, 2009 FC 929 at para 17; *Navarro v Canada (Citizenship and Immigration)*, 2008 FC 358 at paras 11-13.

[23] The Applicant alleges that he was denied procedural fairness as the RPD erred in the consideration of whether to admit post-hearing evidence. This second issue is subject to the correctness standard of review: *Behary v Canada (Citizenship and Immigration)*, 2015 FC 794 at para 6; *Khela v Mission Institution*, 2014 SCC 24 at para 79; *Cox v Canada (Citizenship and Immigration)*, 2012 FC 1220 at para 79 [*Cox*].

[24] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: see *Dunsmuir*, above, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

VI. STATUTORY PROVISIONS

[25] The following provisions of the Act are applicable in this proceeding:

Convention Refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui,

persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

(b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) the person is unable or,

(i) elle ne peut ou, de ce fait,

because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or Medical care.

...

Credibility

106. The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.

...

No credible basis

107. (2) If the Refugee Protection Division is of the opinion, in rejecting a claim,

ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir

...

Crédibilité

106. La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.

...

Preuve

107. (2) Si elle estime, en cas de rejet, qu'il n'a été présenté aucun élément de preuve

that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim.

crédible ou digne de foi sur lequel elle aurait pu fonder une décision favorable, la section doit faire état dans sa décision de l'absence de minimum de fondement de la demande.

[26] The following provisions of the *Refugee Protection Division Rules*, SOR/2012-25 [Rules] are applicable in this proceeding:

Disclosure of documents by party

34 (1) If a party wants to use a document in a hearing, the party must provide a copy of the document to the other party, if any, and to the Division.

Proof that document was provided

(2) The copy of the document provided to the Division must be accompanied by a written statement indicating how and when a copy of that document was provided to the other party, if any.

Time limit

(3) Documents provided under this rule must be received by their recipients no later than

(a) 10 days before the date fixed for the hearing; or (b) five days before the date fixed for the hearing if the document

Communication de documents par une partie

34 (1) Pour utiliser un document à une audience, une partie en transmet une copie à l'autre partie, le cas échéant, et une copie à la Section.

Preuve de transmission

(2) La copie du document transmise à la Section est accompagnée d'une déclaration écrite indiquant à quel moment et de quelle façon la copie a été transmise à l'autre partie, le cas échéant.

Délai

(3) Les documents transmis en application de la présente règle doivent être reçus par leurs destinataires au plus tard, selon le cas :

a) dix jours avant la date fixée pour l'audience;
b) si le document est transmis en réponse à un document reçu

is provided to respond to another document provided by a party or the Division.

d'une partie ou de la Section, cinq jours avant la date fixée pour l'audience.

...

...

Use of undisclosed documents

Utilisation d'un document non communiqué

36 A party who does not provide a document in accordance with rule 34 must not use the document at the hearing unless allowed to do so by the Division. In deciding whether to allow its use, the Division must consider any relevant factors, including

36 La partie qui ne transmet pas un document conformément à la règle 34 ne peut utiliser celui-ci à l'audience à moins d'une autorisation de la Section. Pour décider si elle autorise ou non l'utilisation du document à l'audience, la Section prend en considération tout élément pertinent, notamment :

(a) the document's relevance and probative value;

a) la pertinence et la valeur probante du document;

(b) any new evidence the document brings to the hearing; and

b) toute nouvelle preuve que le document apporte à l'audience;

(c) whether the party, with reasonable effort, could have provided the document as required by rule 34.

c) la possibilité qu'aurait eue la partie, en faisant des efforts raisonnables, de transmettre le document aux termes de la règle 34.

...

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Documents after hearing

Documents après l'audience

43 (1) A party who wants to provide a document as evidence after a hearing but before a decision takes effect must make an application to the Division.

43 (1) La partie qui souhaite transmettre à la Section après l'audience, mais avant qu'une décision prenne effet, un document à admettre en preuve, lui présente une demande à cet effet.

Application

(2) The party must attach a copy of the document to the application that must be made in accordance with rule 50, but the party is not required to give evidence in an affidavit or statutory declaration.

Factors

(3) In deciding the application, the Division must consider any relevant factors, including

(a) the document's relevance and probative value;

(b) any new evidence the document brings to the proceedings; and

(c) whether the party, with reasonable effort, could have provided the document as required by rule 34.

Demande

(2) La partie joint une copie du document à la demande, faite conformément à la règle 50, mais elle n'est pas tenue d'y joindre un affidavit ou une déclaration solennelle.

Éléments à considérer

(3) Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment :

(a) la pertinence et la valeur probante du document;

(b) toute nouvelle preuve que le document apporte aux procédures;

(c) la possibilité qu'aurait eue la partie, en faisant des efforts raisonnables, de transmettre le document aux termes de la règle 34.

VII. ARGUMENTS

A. *Issue 1 - Were the RPD's credibility findings unreasonable?*

(1) Applicant

[27] The Applicant submits that the RPD's negative credibility determination is unreasonable for four principal reasons. First, the Applicant argues that the details which the RPD found should have been included in the BOC narrative were elaborations, and no negative inference

should have been made from their omission. The failure to mention material or key allegations of persecution is a reasonable basis for concern, but the same cannot be said of the failure to mention peripheral details or technical facts: *Basseghi v Canada (Citizenship and Immigration)*, [1994] FCJ No 1867; *Feradov v Canada (Citizenship and Immigration)*, 2007 FC 101 at para 18. Furthermore, inconsistencies and contradictions are more reliable findings upon which to base negative credibility determinations: *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 45 [*Rahal*].

[28] The RPD found that the Applicant ought to have specifically named his same-sex partners in his BOC (including the senior student at his high school, Clive, and the man in Minneapolis, Benjamin). The Applicant submits that these omissions are technical rather than substantive, as the names in question correspond to individuals otherwise referred to in the narrative. Furthermore, the names were readily provided by the Applicant when questioned on them during the hearing.

[29] Second, the Applicant argues that the RPD unreasonably found that his description of Benjamin as “bisexual” as opposed to “straight with gay tendencies” constituted a contradiction. The Applicant says this inconsistency is one of semantics. Not only did the RPD ignore the fact that the Applicant’s description of Benjamin as “straight but with gay tendencies” was made with explicit reference to the fact that this is how Benjamin describes himself, but the RPD also ignored the Applicant’s assertion that the descriptions are in essence interchangeable. This is supported by the United Nations High Commissioner for Refugees (UNHCR)’s guidelines with respect to claims based upon sexual orientation.

[30] Third, the Applicant says that his testimony with respect to Benjamin was not “vague.” The RPD’s finding otherwise was unsupported and made without any examples – this does not meet the “reasonableness” standard and the Court should intervene.

[31] Fourth, as regards Michael and the RPD’s finding fault with the Applicant’s failure to mention him in the BOC, the Applicant says that a review of the Applicant’s testimony demonstrates that he never referred to Michael as his partner, and there was nothing to contradict the BOC narrative statement that his sexual relationships in Kenya were anything other than “no strings attached” arrangements. Furthermore, the Applicant was not, as the Decision says, “vague” in his descriptions of Michael. He provided specific details regarding the places they visited together, Michael’s education and his birthday. The Applicant submits that there is no valid reason for the RPD to have expected that the Applicant would have a specific recollection of the date he met Michael and what they discussed at their first meeting more than 12 years after the fact: *Sheikh v Canada (Citizenship and Immigration)*, [2000] FCJ No 568 at para 28; *Samseen v Canada (Citizenship and Immigration)*, 2006 FC 542 at paras 9, 33.

[32] The Applicant submits that the global negative credibility finding made against him was unreasonable. Even if the Court accepts that there were some credibility concerns, its intervention is nonetheless warranted as it is only on the basis of the cumulative credibility findings that the claim was refused: *Rusznayak v Canada (Citizenship and Immigration)*, 2014 FC 255 at para 47 [*Rusznayak*]; *Huerta v Canada (Citizenship and Immigration)*, 2008 FC 586 at para 21.

(2) Respondents

[33] The Respondents say that the RPD clearly did not rely solely on the absence of names in the BOC as the basis for its Decision. Rather, the RPD, which noted that the BOC form specifically indicates in its instructions that details such as dates, names and places be provided, found the Applicant's BOC to be generally lacking in information, specifically with regards to his alleged same-sex relationships.

[34] The RPD reasonably found that the Applicant had made material omissions in respect of his relationship with another individual in the US, as well as his second relationship in Kenya. This lack of specific details was in stark contrast to the Applicant's thorough descriptions of his heterosexual relationships.

[35] The Respondents say that the courts have found that questions of weight are solely within the jurisdiction of the RPD and that it is not the Court's function to reweigh evidence. Judicial intervention is not warranted simply because more than one conclusion can be drawn from the evidence: *Brar v Canada (Citizenship and Immigration)*, [1996] FCJ No 435 at paras 10-11 (CA); *Rincon v Canada (Citizenship and Immigration)*, 2006 FC 407 at para 19; *Medarovik v Canada (Citizenship and Immigration)*, 2002 FCT 61 at para 16.

[36] The Respondents also say that the presumption of the truthfulness of sworn testimony can be rebutted by a failure of the documentary evidence to mention what one would expect it to include: *Bhagat v Canada (Citizenship and Immigration)*, 2009 FC 1088 at para 13; *Adu v*

Canada (Citizenship and Immigration), [1995] FCJ No 114 at para 1. The RPD found that the Applicant had failed to provide sufficient credible evidence to support or corroborate his claim when such evidence was readily obtainable. This, and the Applicant's failure to adequately explain this lack of corroboration, justified an adverse inference: *Kanyai v Canada (Citizenship and Immigration)*, 2002 FCT 850; *Osman v Canada (Citizenship and Immigration)*, 2008 FC 921 at paras 38-39.

[37] The Respondents further submit that even where the RPD errs in a finding of implausibility, as long as the overall finding of a lack of credibility is not perverse, capricious or made without regard to the evidence, the Court should not intervene: *Pan v Canada (Citizenship and Immigration)*, 2007 FC 515. Furthermore, even if some of the credibility findings are in error, only where they were so wrong that they taint all other findings on credibility should they lead to a reviewable error: *Agbon v Canada (Citizenship and Immigration)*, 2005 FC 1573.

(3) Applicant's Reply

[38] In reply, the Applicant says that while the RPD's credibility findings are generally accorded deference, it does not have *carte blanche* to disregard the presumption of truthfulness of a refugee claimant's sworn testimony.

[39] Here, the RPD disbelieved the Applicant's claim that he was bisexual almost entirely because of what the BOC did not contain. The Court has said that contradictions and implausibilities are the most appropriate categories of credibility findings to underpin a global negative credibility finding. Omissions may also play a role, but it is "preferable if there are

additional objective facts to support the finding”; *Rahal*, above, at para 45. No such “additional objective facts” are present in this Decision to support its negative credibility findings. No implausibilities were identified and only one contradiction was discussed: the use of “bisexual” as a description of a past partner in the BOC versus “gay with straight tendencies” during oral testimony. Trivial or minute contradictions cannot be used to reject a claim: *Rahal*, above, at para 43. Furthermore, the Respondents failed to address the argument that the UNHCR guidelines on sexual orientation claims specifically warn against the assumption that “bisexual” means equal attraction to both sexes.

[40] The Applicant says that less deference should be accorded to the RPD’s findings based upon details left out of the BOC, or allegations that the Applicant was vague.

[41] The BOC does not ask for a detailed description of a claimant’s sexual history. It asks questions like “have you or your family ever been harmed, mistreated or threatened by any person or group?” and “If you returned to your country, do you believe you would be harmed, mistreated or threatened by any person or group?” These were answered by the Applicant in his narrative and there were no omissions with respect to the material aspects of the claim. The RPD concerned itself with facts and details that the BOC not only doesn’t ask for but that amount to background and context. The Applicant says that this resulted in the creation of arbitrary rules with respect to the level of detail expected.

[42] The Applicant says that because the RPD’s credibility findings were cumulative, if the Court finds that some of them are unreasonable, intervention is necessary because it cannot be

determined whether the RPD would have come to the same conclusion absent the unreasonable findings: *Rusznyak*, above, at para 47.

B. *Issue 2 – Was the Applicant denied procedural fairness?*

(1) Applicant

[43] The Applicant argues that he was denied procedural fairness because documents submitted by his counsel following the RPD hearing were not properly considered in accordance with the Rules. Rule 43 explicitly contemplates the admission of post-hearing evidence and requires the RPD, when confronted with such evidence, to consider the three enumerated factors listed at Rules 43(3): (a) relevance and probative value; (b) whether new evidence is brought to the proceeding; and (c) whether the party could have provided the document prior to the hearing. The Court has held that while the RPD has the discretion to admit or refuse post-hearing evidence, these factors must be considered when deciding to do so: *Cox*, above, at paras 26-27.

[44] By only considering whether the Applicant could have provided the documents as required, the RPD denied the Applicant procedural fairness by failing to consider the other two enumerated factors. The Applicant suggests that it is clear that the *New York Times* article on bisexuality could have satisfied the first two of the Rule 43(3) factors. The article underscores how the RPD erred by unreasonably focussing on a distinction between the labels of “bisexual” and “straight with gay tendencies” in an area of human sexuality that is fraught with fluidity and a lack of understanding.

[45] As regards the letter from the Applicant's aunt, the Applicant argues that its specific reference to his sexual orientation and the fact that this information had been communicated to family members in Kenya gives it relevant and probative value that was ignored by the RPD.

[46] The Applicant says it is trite law that, except where the matter on redetermination is a particular legal question with an inevitable answer, a denial of procedural fairness will almost always warrant setting aside a decision and returning the matter for reconsideration: *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 23. In terms of the two excluded documents, it cannot be said that they could not have altered the outcome. This is particularly so because the Decision was explicitly based on a global negative finding and the cumulative nature of the RPD's findings, as demonstrated by the Decision's statement that "the credibility concerns that arose taken individually may not be determinative or fatal to the [Applicant's] claim."

(2) Respondents

[47] The Respondents say that the Applicant's request for the RPD to accept post-hearing evidence did not comply with the Rules and, because of this, the RPD provided adequate reasons as to why the evidence was not accepted.

[48] The Respondents do not object to the Applicant's inclusion of new evidence in the Application Record (by way of the Navaneelan Affidavit that includes the aunt's letter and the *New York Times* article) to address the limited issue of procedural fairness. They do, however, object to paragraph 6 of the Affidavit as its information was never put before the RPD and should therefore be struck.

[49] In terms of the Applicant's argument that the RPD's failure to allow the submission of the aunt's letter and *New York Times* article into evidence presents a reviewable error, the Respondents say that it is clear that there is no duty on the RPD to allow such submissions after a hearing: *Farkas v Canada (Citizenship and Immigration)*, 2014 FC 542 at para 12.

[50] The Respondents say that the Applicant did not make a proper application to submit post-hearing evidence and, as a result, the RPD's decision not to accept the documents was not made in error. The Applicant only included a covering letter for the *New York Times* article, and not for the aunt's letter. The covering letter said that the article was submitted to address issues that arose at the hearing and that it is both relevant and probative, but it fails to explain how. The Respondents say it is not clear how the article addresses the Applicant's omissions and contradictions.

[51] Nothing was submitted to explain the relevance or probative value of the aunt's letter. As with the letter sent by the Applicant's mother that was considered by the RPD, the Respondents submit that the aunt's letter lacks features needed to authenticate it. Regardless, the Respondents say that the letter fails to explain how the Applicant's family in Kenya discovered that the Applicant was bisexual and does not cure the deficiencies in the Applicant's credibility.

[52] The Respondents submit that, given the limited submissions accompanying these documents, there was no breach of procedural fairness in the Decision not to admit the post-hearing evidence. Even if they had been admitted, a significant number of negative credibility findings based on the Applicant's omissions and inconsistencies would remain unchanged by the

documents. This matter should therefore not be sent back for redetermination on such a basis: *Yassine v Canada (Employment and Immigration)* (1994), 172 NR 308, 48 ACWS (3d) 1434 (FCA).

VIII. ANALYSIS

[53] The determinative issue for the RPD was credibility. The Applicant's credibility was found wanting in this case for the following reasons:

- a) The Applicant failed to provide Clive's name in his BOC "or any of the details of the relationship that the claimant testified at the hearing";
- b) The Applicant was "vague, evasive, and hesitant in describing his initial encounter with Michael" in Nairobi in 2002;
- c) When asked what he and Michael did together as a couple, the Applicant "proceeded to name several falls located in Kenya, including Thomson Falls, as well as national parks that he and Michael allegedly visited but gave no further details of how they spent their time together";
- d) The Applicant did "not mention Michael at all in his BOC" and did not "make any mention of any same-sex relationship in Kenya that was more than a casual encounter";
- e) The Applicant did not "testify in a fluid, spontaneous manner when describing his relationship with Michael" and "was vague and not forthcoming with details of how they spent time together and was only able to name national landmarks in Kenya";
- f) The Applicant did not provide Benjamin's name in his BOC and "Given that the [Applicant's] relationship with Benjamin was the one on-going relationship he had in the United States" it was "reasonable to expect that the [Applicant] would be able to testify to details of that relationship in a comprehensive, fulsome manner without hesitation or evasiveness...." Instead, the Applicant was "vague in his testimony and did not provide any details of Benjamin in his BOC and furthermore omitted basic details of his relationship with Benjamin including his name and dates, from his BOC";
- g) The Applicant described Benjamin as "bisexual in his BOC but stated in testimony that Benjamin is straight with gay tendencies." This is inconsistent and "given the context of the fact that Benjamin was the [Applicant's] only on-going same-sex relationship in the United States and given that this friendship lasted from 2009 to 2014, the panel finds it reasonable to expect that the [Applicant] knows and is consistent in his knowledge with respect to Benjamin's sexual orientation";

- h) The Applicant omitted his relationship with Jazmine from his BOC and failed “to provide a reasonable explanation for the omission of his relationship with Jazmine.” The Applicant’s “relations with Jazmine lasted two years, from 2011 to 2013 and ...the claimant found it significant enough to mention in his testimony”;
- i) In contrast to the same-sex relationship he alleges to have had, the Applicant provided the full names of the two women he had relationship with including “the dates and times (sic) frames of the relationship, and general details of his relationship with them in his BOC.” What is more, the Applicant “readily reiterated these details in his testimony in a consistent manner and was forthcoming and spontaneous in his testimony of his relationships with the women.” It would be “reasonable to expect that the [Applicant] could have and would have known to provide similar details of his same-sex relationships”;
- j) There was “insufficient persuasive evidence before the panel to establish that the [Applicant’s] family was in fact informed of the [Applicant’s] bisexual orientation.”

[54] The only inconsistency identified by the RPD is with regard to the Applicant’s “lack of consistency with respect to Benjamin’s sexual identity....” A review of the transcript reveals that there is no such inconsistency and that, in any event, the difference between “bisexual” and “straight but he has gay tendencies” is meaningless in the context of fluid sexual identities. The Applicant was simply providing Benjamin’s own view of his sexual orientation and was not being inconsistent himself.

[55] For the most part, then, the whole basis of the Decision is the lack of detail in the BOC as regards same-sex relationships and the Applicant’s failure to testify in a comprehensive, fulsome manner without hesitation or evasiveness when providing details at the hearing. This was all the more telling for the RPD when it is contrasted with details he provided in his BOC about his relationships with women and the fulsome nature of his testimony on these relationships at the hearing.

[56] The Applicant has asked the Court to examine the transcript and find that, in fact, his testimony was not vague or evasive about his same-sex relationships. The Applicant's manner of testimony is difficult to determine from a written transcript. You have to have been there to appreciate its nature and details, which is why the Court has always deferred to the RPD when it comes to the interpretation of testimony. See *Rusznayak*, above, at para 47; *Aguebor v Canada (Employment and Immigration)* (1993), 160 NR 315 (FCA) at para 4; *Palden v Canada (Citizenship and Immigration)*, 2015 FC 787.

[57] In the present case, it is not just the omission of detail in the Applicant's BOC that is relied upon to doubt his credibility. For example, in relation to the Applicant's testimony about his relationship with Benjamin, the RPD's reasoning is as follows:

Given that the [Applicant's] relationship with Benjamin was the "one on-going relationship" he had in the United States, the panel finds it reasonable to expect that the [Applicant] would be able to testify to details of that relationship in a comprehensive, fulsome manner without hesitation or evasiveness; however, the [Applicant] was vague in his testimony and did not provide a description of his relationship with Benjamin in a detailed manner and furthermore omitted basic details in his relationship with Benjamin, including his name and dates, from his BOC.

[58] So, it is not just the omission of Benjamin's name and details from the BOC that the RPD found problematic; it was also the manner in which the Applicant provided those details in his testimony at the hearing. And this is contrasted with the way the Applicant provided details and testified as to his relationship with women:

[12] The claimant provides details of two women, Vanessa Shakur and Evelyn Kamau, he has had relationship with in the United States. The claimant provides the full names of these women, the dates and times frames of the relationships, and general details of his relationship with them in his BOC. The

claimant readily reiterated these details in his testimony in a consistent manner and was forthcoming and spontaneous in his testimony of his relationships with the women. The panel finds the claimant's forthcoming manner and detailed description of his relationships with the two women is in marked contrast to his sparse descriptions of his relationships with the two women is in marked contrast to his sparse descriptions of his same-sex relationships he has had where the claimant omitted significant details from his BOC, including basic details such as the names of his same-sex partners and dates of his relationships. The panel finds this further undermines the claimant's previous explanations that he was not guided in writing his BOC narrative and that he did not know how much detail he was supposed to provide in his BOC. Given that the claimant provided comprehensive details of his relationships with Vanessa Shakur and Evelyn Lamau, including dates and names, the panel finds it is reasonable to expect that the claimant could have and would have known to provide similar details of his same-sex relationships. The claimant did not do so. The panel therefore finds on a balance of probabilities that there is sufficient persuasive evidence before the panel to conclude that the claimant is attracted to and has relationships with women but lacks credibility with respect to his allegations that he is bisexual.

[59] In other words, the RPD did not find the Applicant convincing about his same-sex relationship because he didn't provide the details he should have provided in his BOC, and the details he provided at the hearing were not convincing because they were not provided in a comprehensive and fulsome manner without hesitation or evasiveness in the way that he provided details about his relationships with women.

[60] In the end, this is a matter of the way the Applicant provided testimony at the hearing and, in that regard, it is difficult for the Court to say that the RPD was unreasonable because the Court wasn't there and cannot ascertain for itself whether the Applicant was vague, evasive or hesitating. The written transcript does not necessarily yield this kind of information. However, the hearing transcript is revealing in some ways. For example, when the RPD questions the

Applicant about Benjamin, he clearly answers all questions put to him. The RPD says his testimony was “vague,” but does not provide specifics. In fact, when I compare the Applicant’s testimony about Benjamin to his testimony about the female relationship referred to by the RPD, there is really no apparent difference in discernable vagueness.

[61] Over and above all of this, however, the Applicant has raised procedural fairness issues regarding documentation that he submitted after the hearing and which the RPD refused to admit.

[62] The 2014 *New York Times* article about the fluid nature of sexual identity only goes to the contradiction issue which I have referred to above and which I don’t think is material enough to set aside the whole Decision.

[63] But the Applicant also provided a letter from his aunt in St. Paul, Minnesota which corroborates the Applicant’s bisexual orientation and the threats against the Applicant’s life in Kenya. This evidence is central to the Applicant’s claim of what he faces if he is returned there.

[64] The RPD has discretion to admit or refuse post-hearing evidence but must do so in accordance with Rule 43. In the present case, the RPD simply excluded the aunt’s letter because it could have been provided in time for the hearing. But the RPD is required to go further than this when deciding how it should exercise its discretion to admit or exclude post-hearing evidence. The guidance of Justice Near in *Cox*, above, at paras 26-27 is helpful in this regard:

[26] I am not satisfied that the Board met its procedural fairness obligations in this case. While the Board did not simply ignore the

evidence submitted, like in *Nagulesan* and *Howlader*, above, it weighed only one factor listed in Rule 37(3). I agree with the Applicant that the documents' relevance and probative value were important facts that the Board should have considered in its treatment of the application to admit the post-hearing evidence, particularly given that the other basis for denying the Applicants' claim is related to the plausibility of their story.

[27] The Board acknowledged that the Applicants had been represented by counsel experienced in matters of refugee law at all material times throughout the procedure, had failed to give an explanation as to why the evidence was not provided at an earlier time, and failed to explain why they had not appeared to make reasonable efforts to obtain the documents until after the hearing – all considerations that fall within Rule 37(3)(c). Nonetheless, the Board was required to consider the relevance, probative value, and newness of the documents, i.e. the factors enumerated in Rules 37(3)(a) and (b). While the list of factors to be considered in Rule 37(3) is not exhaustive, the use of the word “including” rather than the words “such as” before the list of factors indicates the intent that each of the factors included in the sub-rule be considered. A failure to do so gives rise to a breach of procedural fairness.

[65] In the present case, the RPD was required to consider the relevance and probative value of the aunt's letter. In my view, its relevance and probative value for the central issue in this claim are high and, had they been considered, the RPD might well have admitted the letter.

[66] The Respondents argue that the Applicant failed to make a proper application to submit post-hearing evidence, but this places form ahead of substance. The Respondents also provide reasons as to why the aunt's letter should have been excluded and/or would have been discounted if considered, but these are not the reasons used by the RPD. It is the RPD's discretion that is at issue here, and the RPD excluded the letter on the basis of timing without addressing the issues of relevance and probative value. Also, it cannot be said that the RPD would have treated the direct evidence provided by the aunt in the same way as it treated the

mother's letter and, of course, had the aunt's letter been admitted, this may have affected the RPD's views on the mother's letter.

[67] All in all and quite apart from anything else, I think that there are enough concerns about procedural fairness to require reconsideration.

[68] Counsel agree that there are no questions for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is granted. The Decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.
2. There are no questions for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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CITIZENSHIP AND IMMIGRATION AND THE
MINISTER OF PUBLIC SAFETY AND EMERGENCY
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