

Federal Court



Cour fédérale

Date: 20170117

Docket: IMM-2462-16

Citation: 2017 FC 55

Toronto, Ontario, January 17, 2017

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

JOSEPH BITA OUYA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant has applied for judicial review of a Decision of the Refugee Appeal Division [RAD] dated May 18, 2016 upholding the Refugee Protection Division [RPD]'s finding that the Applicant is not a Convention refugee or a person in need of protection. This application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

[2] The Applicant is a 37 year old citizen of Kenya who alleges that he is bisexual. His former partners are called Thomas and Ben. He dated Thomas when he was either 19 or 21. He dated Ben from 2007 to 2015. However, in December 2013 he married his wife Sheila in an arranged marriage. On May 17, 2015, Sheila caught the Applicant in bed with Ben. Thereafter they were not on speaking terms. Nevertheless, she wrote a detailed support letter for the Applicant's Canadian visa application. On July 25, 2015, Sheila found a text message from Ben on the Applicant's phone. She then told her father and the Applicant's brother that the Applicant had slept with a man. The Applicant went into hiding and then fled Kenya .He arrived in Canada on August 4, 2015 and claimed refugee protection.

[3] On November 18, 2015, the RPD denied the Applicant's claim due to credibility concerns.

[4] On January 9, 2016, a warrant for the Applicant's arrest dated January 8, 2016 [the Warrant] was served on his wife in Kenya.

I. The Documents

[5] The RPD had before it the material which included:

- An affidavit from the Applicant's wife Sheila Ngele Kirangu [the Kirangu affidavit] describing his behaviour with Ben. It was sworn on August 18, 2015, by advocate and Commissioner SW Ndegwa.

- An affidavit from the Applicant's friend Geoffrey Nyamuro sworn on August 18, 2015 by advocate and Commissioner SW Ndegwa [the Nyamuro Affidavit]
- An affidavit from William Nyakundi sworn on August 21, 2015, before Andambi Chabala, Commissioner for Oaths [the Nyakundi Affidavit].
- These will be referred to collectively as the Affidavits.
- A document on the letterhead of the National Police Service, Nyayo Stadium Police Station, dated July 29, 2015 [the Police Department Notice].
- A document on the letterhead of the Office of the President, Provincial Administration and Internal Security (the Security Notice) dated July 28, 2015.
- These will be referred to collectively as the Notices.

[6] Before the RAD the following additional documents were accepted as new evidence:

- The Warrant together with its envelope.
- An affidavit from the Applicant's wife sworn on February 9, 2016 describing the service of the Warrant [the Wife's Affidavit].

II. The RAD Decision

[7] The appeal to the RAD was limited to the RPD's treatment of the documents, and in particular, the Affidavits and the Notices described above. The RAD was concerned that the

Kirangu and Nyakundi Affidavits have similar signatures, similar handwriting and similar wording. As well, no supporting identification was attached to the Affidavits.

[8] Regarding the Notices, the RAD concluded:

- That they are letters.
- That they should therefore have been addressed to the Applicant and not “To Whom It May Concern”.
- That the Security Notice includes a significant typo - “CONCERN” is written “CONERN” in the heading.
- That both Notices include grammatical and typographical errors.

[9] The RAD also spoke of the cumulative credibility concerns raised by the RPD which were not appealed [the Additional Concerns]. They included the fact that in his BOC and to his psychologist he said he had his first sexual encounter with Thomas at age 19. At the hearing he said he was 21 and he then explained that he was dating Thomas at 19 but was not sexually active. The RPD rejected this explanation.

[10] The RPD also found that the Applicant’s credibility was undermined by the fact that his BOC made no reference to his evidence that he wanted to come to Canada to see the Pam Am Games. Yet his wife’s letter of support mentioned the games. Lastly, the RPD did not understand

why his wife would write a supporting letter when they weren't on speaking terms due to her discovery of Ben. The RAD shared these views.

[11] The RPD also repeatedly criticized the Applicant for vague and evasive testimony and this was accepted by the RAD.

III. The Issues

[12] In spite of the Additional Concerns it is my view that the determinative aspect of the RAD Decision was its conclusion that the Affidavits and Notices were not genuine and were to be given no weight. It was for this reason that the RAD disregarded the Warrant and the Wife's Affidavit. Both of those documents are fundamental to the Applicant's claim

[13] In this regard the RAD said:

In light of numerous uncontested credibility findings...the finding that the Appellant has tendered non-genuine police letters...the finding that his general credibility has been undermined and that he has not tendered trustworthy or reliable document to support his allegations, the RAD finds that the Appellant's allegations that he is being pursued by the police in Kenya because of his sexual orientation not credible. The RAD finds that the warrant for arrest and accompanying affidavit from the Appellant's wife do not overcome the overwhelming cumulative adverse credibility findings noted in these reasons.

[14] Accordingly the issue is whether the RAD's conclusion that the Affidavits and the Notices were not genuine was reasonable.

IV. Discussion and Conclusions

[15] In my view the RAD's treatment of the Affidavits and Notices was unreasonable.

[16] There is no negative inference which can reasonably be drawn based on the fact that the Nyamuro and Kirangu Affidavits have similar wording, handwriting and signatures. This is explained by the fact that they were both sworn by the same lawyer on the same day. It is obvious that they were both prepared by Mr. Ngwega. In these circumstances similarities in wording are to be expected and the handwriting on the commission is the same on both affidavits because the writer was the same person. Finally, contrary to the RAD's conclusion, the signatures are not similar – one is largely vertical and the other is substantially horizontal.

[17] The RAD's conclusion about the Affidavits is also unreasonable because there is no requirement to attach an identification document to a sworn affidavit. The deponents all identify themselves and provide their addresses under oath. In the absence of some evidence contradicting these statements, that is sufficient to establish identity.

[18] Turning to the Notices, the important point is that the RPD misdescribed them as letters and the RAD followed suit. The transcript shows that they were initially called "documents" and that it was the RPD Member at page 46, of the transcript who first described them as letters. This was a fundamental error which led to mistaken concerns about the fact that they were not addressed to the Applicant. It is obvious that the Notices are directed to the public who are being warned about the Applicant and asked to report his whereabouts. That being the case, the fact that they include typos and bad grammar says very little about whether they are genuine. It is not

reasonable to expect that Public Notices will receive the same attention as private correspondence.

[19] These conclusions lead to a finding that it was also unreasonable of the RAD to disregard the Warrant and the Wife's Affidavit.

V. Certification

[20] No question was posed for certification for appeal.

VI. Conclusion

[21] The application will be allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed.

The appeal is to be reconsidered by a different Member of the Refugee Appeal Division.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2462-16

STYLE OF CAUSE: JOSEPH BITA OUYA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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APPEARANCES:

Sina Ogunleye

FOR THE APPLICANT

Lori Hendricks

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sina Ogunleye
Barrister and Solicitor
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of
Canada

FOR THE RESPONDENT