Federal Court  Cour fédérale

Date: 20180426

Docket: IMM-4320-17

Citation: 2018 FC 451

Ottawa, Ontario, April 26, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

RICHARD OBIAJULU GBEMUDU

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

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 the decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [Board], dated September 14, 2017 [Decision], which confirmed the Refugee Protection Division's [RPD] determination that the Applicant is not a Convention refugee or a person in need of protection under ss 96 and 97 of the Act.

II. BACKGROUND

[2] The Applicant is a citizen of Nigeria who fears persecution on account of his alleged bisexuality.

[3] The Applicant lived in the United Kingdom [UK] from 2011 to 2016 while he completed three post-graduate programs. Though married, the Applicant's wife and two children initially remained in Nigeria and did not join him in the UK until 2014. While separated from his family, he began using the services of prostitutes in 2012. The Applicant says that he realized that he enjoyed having sex with men when a prostitute he had been seeing in London, Tony Black, revealed that he was a biological male who dressed as a woman. The Applicant claims that he believed that Tony was a woman during their initial oral sex encounters and that Tony's gender only became clear the first time he wanted to have intercourse with Tony. The Applicant says that he had had some attraction to male friends while in university in Nigeria, but that he had never acted on this impulse or revealed it to his friends because homosexuality is illegal in that country. The Applicant's relationship with Tony allegedly went on for about a year before they lost contact in 2013.

[4] The Applicant arrived in Canada in November of 2016 to attend a conference. He claims that the day after he arrived, he received a call from his cousin in Nigeria. His cousin informed him that an oracle had revealed the Applicant's bisexuality to his family and that he was now blamed for his aunt's recent death. The Applicant says that, as his status in the UK would expire upon his graduation in December 2016, he decided that he should not return to the UK as he had

planned, and thus risk having to return to Nigeria. Instead, the Applicant made a claim for refugee protection in Canada.

[5] On March 3, 2017, the RPD determined that the Applicant was neither a Convention refugee nor a person in need of protection because the Applicant's lack of credibility prevented the RPD from finding that he is either bisexual or perceived as such by people in Nigeria. The RPD found that the Applicant was inconsistent about describing how he learned that Tony was biologically male, had provided conflicting versions of how frequently he saw Tony, had omitted key instances of sexual attraction to men from his Basis of Claim [BOC] narrative, and did not reasonably explain his failure to claim refugee protection in the UK. The RPD was also unpersuaded that the documentary evidence submitted by the Applicant established his bisexuality. A psychological report by Dr. Gerald Devins might explain some of the problems with the Applicant's testimony, but the RPD found that it was insufficient to rehabilitate the Applicant's credibility. The RPD therefore rejected the Applicant's claim.

[6] The Applicant appealed the RPD's decision to the RAD.

III. DECISION UNDER REVIEW

[7] The RAD Decision confirms the RPD's determination that the Applicant is not a Convention refugee or a person in need of protection.

[8] While reviewing the background of the Applicant's claim, the RAD noted that the Applicant's status in the UK is unclear as he did not provide his UK residence card at the RPD hearing even though he claimed to have it with him in Canada.

[9] In conducting its analysis, the RAD first declined to admit new evidence submitted by the Applicant. The RAD rejected a treasury receipt, dated February 16, 2017, submitted by the Applicant to establish the legitimacy of the affidavit his brother swore on that date. The RAD found that the Applicant did not explain why the receipt was not reasonably available before his claim was rejected by the RPD. Therefore, the receipt did not meet the statutory requirements of s 110(4) of the Act.

[10] The RAD also rejected a new affidavit from the Applicant's brother, sworn after the RPD hearing, because the affidavit's source and circumstances of creation call into question its credibility. The RAD noted that the RPD also had concerns with an earlier affidavit purportedly sworn by the same brother. In addition to inconsistency in the spelling of the brother's name, the RAD found that it is unclear who the people are in the passport-sized photos attached to the affidavit, why the pictures were attached, and why a notary public would attach a photo of himself to the affidavit. One of the pictures also appears on two other affidavits submitted by the Applicant despite those affidavits being sworn before different notaries and having different affiants. The RAD also noted the availability of forged Nigerian affidavits described in the documentary evidence, the lack of supporting identification attached to the affidavit, and the lack of evidence about how the affidavit had arrived from Nigeria. And, the RAD did not find it credible that the Applicant's brother would swear an affidavit stating that the Applicant is

wanted by Nigerian authorities when the brother had purportedly sent very hostile and threatening correspondence to the Applicant saying that he was "a disgrace to our tradition and African race" and that he would "personally fetch [the Applicant] no matter the part of the earth you are…."

[11] Because the RAD rejected both pieces of new evidence submitted by the Applicant, it also declined his request for an oral hearing.

[12] After reviewing the RPD's findings, the RAD found that the Applicant was inconsistent in key areas and had failed to reasonably explain those inconsistencies. The RAD pointed to the statement in the Applicant's BOC narrative that he would meet with Tony "several times a week" after discovering that Tony was a man. In his testimony, however, the Applicant stated that he would see Tony weekly or biweekly and was unable to explain this inconsistency.

[13] The RAD also found that the Applicant's responses to questions about his relationship with Tony, and how his wife discovered the relationship, to be vague, evolving and inconsistent. The Applicant testified that he lost contact with Tony in 2013 but that his wife only found out about Tony in 2016 when a friend named "Emmanuel" disclosed the relationship.

[14] The RAD found that omissions from the Applicant's BOC regarding details of the same-sex attraction he felt while in university in Nigeria and his attempts to find same-sex partners after losing contact with Tony, were not peripheral as they go to the heart of the Applicant's claim. The RPD questioned the Applicant about his BOC statement that after his bisexuality was

revealed he admitted to his cousin that he was attracted to men while in university in Nigeria. The Applicant provided details of two classmates he had lived with but the RAD found he could not satisfactorily explain why they were not described in his BOC. The Applicant also testified that after losing contact with Tony he had tried to meet other men at a gay club, an allegation completely absent from his BOC. In addition to finding that these were not peripheral omissions, the RAD found that the Applicant's testimony about realizing that he was attracted to men in university contradicts the statement in his BOC that he was "very surprised" about enjoying sex with Tony.

[15] The RAD rejected the Applicant's argument that he gave a reasonable explanation for his failure to seek refugee protection in the UK and found that this failure undermines his subjective fear and overall credibility. The Applicant claimed that his life only became endangered when he learned that his sexuality had been exposed while he was in Canada. But the RAD found that the Applicant knew he had same-sex attractions in the 1990s while in university and had actively engaged in a same-sex relationship while in the UK in 2012. Given the Applicant's knowledge of the hostile treatment of sexual minorities in Nigeria, his wife's knowledge of his affair with another man, and his education and travel experiences, the RAD did not find it reasonable that the Applicant did not make a refugee claim in the UK.

[16] The RAD also found that the RPD had correctly given minimal weight to the Applicant's documents. Citing *Hamid v Canada (Minister of Employment & Immigration)*, [1995] FCJ No 1293 (QL) at para 21 (TD), the RAD accepted that it was open to the RPD to place little weight on the Applicant's documents after finding him not credible. The RAD states that "[t]he RPD

also considered and gave greater weight to the objective documentary evidence compared to the Appellant's vague responses." The RAD agreed that the Applicant's responses were vague about how he obtained the documents and why the affiants would be willing to swear affidavits that could place them at risk in Nigeria. In addition, the existing concerns about the Applicant's credibility and the documentary evidence about the availability of fraudulent documents in Nigeria also justified placing little weight on the documents, even without expert verification of their inauthenticity.

[17] In addition to noting that, contrary to the Applicant's assertion, the RPD did consider Dr. Devins' psychological report in its reasons, the RAD found that the RPD correctly placed minimal weight on the report. Not only were the allegations in the report self-reported by the Applicant, the Applicant did not elaborate on his allegation that he was exposed to traumatic events in Nigeria, and the allegations contradict his own claims. The RAD also found the Applicant's explanation for the vague allusions in the report to a romantic relationship he had had with a woman in Canada to be unpersuasive. Given the RAD's finding that the underlying facts of the Applicant's claim are contradictory, the RAD also gave little weight to Dr. Devins' conclusions about the Applicant's psychological condition and found that they were insufficient to overcome concerns about his credibility.

[18] The RAD also finds that the Applicant's attendance at Toronto community groups who service the LGBTQ community did not establish his sexual orientation or overcome the RAD's credibility concerns. The RAD noted that the Applicant had resided in the UK for five years,

during which time he alleges he was in a same-sex relationship and attended gay bars, but he did not provide any letters from LGBTQ groups in the UK.

[19] The RAD concluded that the Applicant had not provided sufficient credible and trustworthy evidence to establish that he is a bisexual man who faces a serious possibility of persecution if he is returned to Nigeria.

IV. ISSUES

[20] The Applicant submits that the following are at issue in this application:

1. Is the RAD's decision not to admit the Applicant's new evidence unreasonable?
2. Is the RAD's credibility assessment unreasonable?
3. Is the RAD's assessment of the documentary evidence unreasonable?

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] The RAD's decision on whether new evidence meets the requirements for admission in s 110(4) of the Act is reviewed under a reasonableness standard: *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29 [*Singh*].

[23] The standard of review applicable to the RAD's credibility findings and its assessment of the documentary evidence is also reasonableness: *Amiryar v Canada (Citizenship and Immigration)*, 2016 FC 1023 at paras 7-11.

[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, and *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 relevant in this application:

Convention refugee

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

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

(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.

Définition de *réfugié*

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

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

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

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

Personne à protéger

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) 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) soit à une menace à sa vie ou au risque de traitements ou

treatment or punishment if	peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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,	(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(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) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
…	…
Procedure	**Fonctionnement**
110 (3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a	110 (3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou

representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.

…

Evidence that may be presented

(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.

…

Hearing

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(b) that is central to the decision with respect to the refugee protection claim; and

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.

…

Éléments de preuve admissibles

(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.

…

Audience

(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

b) sont essentiels pour la prise de la décision relative à la demande d'asile;

c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

VII. ARGUMENT

A. *Applicant*

(1) New Evidence

[26] The Applicant submits that the new evidence he submitted meets the test in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, and should have been admitted. Although the treasury receipt is dated before the RPD hearing, the Applicant says that he could not anticipate that the RPD would take issue with the legitimacy his brother's first affidavit. As an official foreign document, the receipt is relevant to the RPD's credibility concern. The Applicant points out that the receipt bears the same receipt number as the affidavit.

[27] The Applicant says that the RAD analyzes the evidence in a microscopic manner that unreasonably focuses on superficial errors in a manner similar to *Ali v Canada (Citizenship and Immigration)*, 2015 FC 814 at paras 27 and 31 [*Ali*]. The misspelling of his brother's name on the second affidavit and other unidentified grammatical and spelling mistakes are minor administrative slips insufficient to undermine the credibility of the affidavit's contents. Similarly, the RAD's concern with the form of the affidavit ignores that it was sworn in another jurisdiction. The Federal Court of Appeal has cautioned that the Board should not act with "zeal to find the applicant unbelievable": *Attakora v Canada (Minister of Employment & Immigration)* (1989), 99 NR 168 (CA) [*Attakora*].

[28] The Applicant says that the RAD misinterprets the pictures on the affidavits. He says that his picture is attached on the right hand side of each affidavit and that it is the affiant, not the notaries public before whom the affidavits were sworn, whose picture is attached to the left hand side.

[29] While the Decision references the availability of fraudulent affidavits in Nigeria, this does not mean that every Nigerian affidavit is fraudulent. See *Lin v Canada (Citizenship and Immigration)*, 2012 FC 157 at para 55 [*Lin*]. The Applicant says that the RAD refers to no evidence showing that the affidavit was fraudulent and asserts that the appearance of irregularity does not mean that the affidavit is fraudulent. Furthermore, the RAD speculates about the brother's willingness to supply the affidavit, based on the brother's feelings towards the Applicant, but ignores that the brother deposed in his first affidavit that he was still concerned about his brother's safety. The Applicant submits that the RAD cannot ignore relevant documentary evidence which supports his position. See *Orgona v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 346 at para 31.

[30] The Applicant also says that the RAD's concerns with the credibility of his brother's second affidavit should have been tested by holding an oral hearing under s 110(6) of the Act. In *Tchangoue v Canada (Citizenship and Immigration)*, 2016 FC 334 at para 17 [*Tchangoue*], the RAD's decision not to exercise its discretion to hold a hearing, "so as to provide the Applicant the opportunity to address the RAD's concerns regarding the authenticity of the new documents," was held to be unreasonable. A similar result was reached in *Horvath v Canada (Citizenship and Immigration)*, 2018 FC 147 at para 25 [*Horvath*], because an oral hearing was

required “to address the serious issues of credibility that were central to the RPD decision.” The Applicant submits that, given the RAD’s credibility concerns related to his new evidence, and considering that the information contained in his brother’s second affidavit could have justified allowing his claim, the decision not to hold a hearing was unreasonable.

(2) Credibility

[31] The Applicant says that the RAD unreasonably focuses on inconsistencies between his testimony and BOC with regards to how often he saw Tony after discovering Tony’s gender. The Applicant notes that a claimant’s sworn testimony is presumed to be true unless there is a valid reason to doubt its truthfulness. See *Maldonado v Canada (Minister of Employment & Immigration)* (1979), [1980] 2 FCR 302 (CA). And in *Guney v Canada (Citizenship and Immigration)*, 2008 FC 1134 at para 17, Justice Zinn held that “it was not reasonable for the Board to conclude that because the Applicant fabricated one part of his story to bolster his claim, he was generally not a credible witness, especially where the fabricated part had little or no bearing on the remainder of his story.” The Applicant submits that he has been consistent about his story’s major aspects and that any inconsistency on this issue does not discredit him generally. Questions about how often he saw Tony amount to little more than an unreasonable “memory test.” See *Sheikh v Canada (Minister of Citizenship & Immigration)* (2000), 190 FTR 225 at para 28 (TD) [*Sheikh*].

[32] The Applicant also submits that there was credible documentary evidence capable of supporting his claim that the RAD fails to evaluate objectively because of its global credibility finding. In the context of determining whether there should be a separate s 97 analysis, the

Federal Court of Appeal has held that "where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim": *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at para 3; see also *Pathmanathan v Canada (Citizenship and Immigration)*, 2012 FC 519 at paras 52-57. The Applicant says, on this issue, that all the evidence must be considered "in its entirety, with an open mind, before making findings about the value to be placed on critical elements of the evidence": *Ruiz v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1339 at para 9 [*RER*].

[33] Despite the RAD's statement that it "independently reviewed the Appellant's documents" before finding that the RPD was correct to give them minimal weight, the Applicant says that the RAD did not consider "news articles, letters of support and the affidavits of the Applicant's brother and cousin."

[34] The Applicant also notes that he is not required to prove that persecution would be more likely than not. See *Adjei v Canada (Minister of Employment & Immigration)*, [1989] 2 FCR 680 (CA). He says that the objective evidence, documentary evidence and his own testimony all describe the risk he faces if returned to Nigeria. Since the documentary evidence establishes that bisexuality is effectively criminalized in Nigeria, the RAD's finding that he was not credible in a particular aspect of his claim does not prevent a finding that he is a person in need of protection since he fits the profile of persons at risk of persecution in Nigeria. See *Attakora*, above, at para 13.

[35] The Applicant says that, contrary to the RAD's finding, the transcript of the RPD hearing shows that he was not vague in his testimony about how his wife discovered his bisexuality, and that he clearly explained that she had been told by his friend, Emmanuel. The Applicant submits that the RAD provides no explanation about what it found vague about his response to the RPD's questions.

[36] Regarding the omission of details in his BOC about attending gay bars, the Applicant submits that it was unreasonable for the RAD to reject his explanation that he was merely adding details in relation to his claim. This Court has observed that "[w]hen [Personal Information Form] amendments do not in any way change an applicant's story, but simply provide more detail to information that is already on the record, this alone does not undermine the presumption that the testimony of the witness is true": *Diaz Puentes v Canada (Citizenship and Immigration)*, 2007 FC 1335 at para 18. See also *Singh v Canada (Minister of Employment & Immigration)* (1993), 69 FTR 142 at para 20 (TD). The Applicant says additional details he provided at the hearing did not significantly alter his story. Impugning a claimant's credibility based on mere omissions turns the determination of a claim into little more than a memory test, a practice criticized in *Sheikh*, above, at para 28.

[37] The Applicant also says that the RAD's finding that his testimony about his same-sex attraction during university is inconsistent with his BOC misapprehends his statements on the issue. He says that there is no inconsistency between his desire to have sex with a male friend in university and his later being surprised that he enjoyed having sex with a man after becoming intimate with Tony. In *Arfan v Canada (Minister of Citizenship and Immigration)*, 2003 FCT

806 at paras 27-29, the Board's misapprehension of evidence related to a claimant's injury led to an incorrect plausibility inference and contributed to an unreasonable result. The Applicant submits that the RAD's misconstruction of his testimony is sufficient to allow judicial review.

[38] The Applicant also submits that the RAD's finding that his failure to claim refugee status in the UK undermines his subjective fear and overall credibility and ignores his explanation for his delay in claiming. In his testimony, the Applicant explained that while he was living in the UK he did not perceive himself to be at risk because none of his extended family in Nigeria was aware of his sexuality. When a claimant provides a reasonable explanation that responds to the Board's concerns, the Board must consider that explanation in its assessment of the claimant's credibility. See *Kanapathipillai v Canada (Minister of Citizenship & Immigration)*, [1998] FCJ No 1110 (QL) at paras 8-9 (TD). See also *Angel Gonzales v Canada (Citizenship and Immigration)*, 2010 FC 1292 at para 14. And while a delay in making a refugee claim is relevant, it "is not a decisive factor in itself": *Huerta v Canada (Minister of Employment & Immigration)* (1993), 157 NR 225 (CA). See also *Hue v Canada (Minister of Employment & Immigration)*, [1988] FCJ No 283 (QL) (CA); *Gavryushenko v Canada (Minister of Citizenship & Immigration)* (2000), 194 FTR 161 at paras 10-11 (TD). The Applicant says the issue "is not whether the claimant had reason to fear persecution in the past, but rather whether he now, at the time his claim is being decided, has good grounds to fear persecution in the future": *Mileva v Canada (Minister of Employment & Immigration)*, [1991] 3 FCR 398 at para 8 (CA).

(3) Documentary Evidence

[39] The Applicant submits that the RAD unreasonably discounts the documentary evidence corroborating his claim by extending its global credibility finding to the documents. The Applicant reiterates that the proper approach is to assess the whole of the evidence before making a global credibility finding. See *RER*, above, at para 9.

[40] The Applicant notes that the affidavits of his brother and cousin contain corroboration of his claim. While the affidavits also contain irregularities, the Applicant submits that such irregularities do not necessarily mean that the affidavits are fraudulent. And the existence of fraudulent affidavits in Nigeria does not mean that all affidavits originating in Nigeria are fraudulent. See *Lin*, above, at para 55.

[41] The Applicant also submits that the RAD's concern about the unlikelihood of his being able to obtain an affidavit attesting to another person's bisexuality misinterprets the documentary evidence. The Applicant says that the concerns described in the Response to Information Request [RIR] NGA105379.E (7 January 2016), contained in the National Documentation Package for Nigeria, relate to instances of an affiant deposing to their own sexuality, not the sexuality of a third party. The RIR also implies that obtaining an affidavit could be more likely in instances where the affiant can be guaranteed confidentiality. But the Applicant also notes that the opinions reported in the RIR come from advocacy groups in Nigeria, and it is not clear that the individuals quoted are lawyers who would have direct knowledge of the possibility of obtaining such an affidavit.

[42] The Applicant says that the RAD unreasonably placed no weight on letters of support from Toronto LGBTQ organizations. These letters show the Applicant's participation in the LGBTQ community and that he is now open about his bisexuality. These organizations have no interest in the Applicant's claim and the Applicant submits that this Court has held that letters from community groups can be probative evidence of sexual orientation. See *Buwu v Canada (Citizenship and Immigration)*, 2013 FC 850 at paras 27-29, quoting *Leke v Canada (Citizenship and Immigration)*, 2007 FC 848 at para 33. The Applicant says that the RAD's approach to the documentary evidence does not take sufficient account of the difficulty of proving one's sexuality. See *Gergedava v Canada (Citizenship and Immigration)*, 2012 FC 957 at para 10 and *Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760 at para 42.

[43] The Applicant also submits that rather than using the report of Dr. Devins to guide its credibility analysis, the RAD instead used its credibility finding to reject the report. This is the type of mistake described in *Belahmar v Canada (Citizenship and Immigration)*, 2015 FC 812 at para 8: "The RPD essentially performed its analysis backwards: instead of using the medical reports to assess the applicant's credibility, the RPD drew conclusions about credibility and then used those conclusions to reject the reports." See also *Mendez Santos v Canada (Citizenship and Immigration)*, 2015 FC 1326 at para 19.

B. *Respondent*

(1) New Evidence

[44] The Respondent submits that the RAD's rejection of the Applicant's new evidence is reasonable and that significant deference is owed to the RAD's findings, including its decision not to admit new evidence on credibility grounds. See *Belek v Canada (Citizenship and Immigration)*, 2017 FC 196 at para 13 [*Belek*].

[45] Because the treasury receipt he submitted predated the RPD hearing, it was the Applicant's obligation to explain why it was not reasonably available before the hearing: Act, s 110(4) and *Singh*, above, at para 35. The Respondent points out that the Applicant's affidavit before the RAD does not provide an explanation as to why the receipt was not reasonably available. The argument presented in the Applicant's memorandum – that the Applicant could not reasonably anticipate that the RPD would take issue with his brother's affidavit's authenticity – does not overcome the receipt's statutory inadmissibility and should not be considered at this stage. The Respondent also submits that it was foreseeable that the RPD would assess the credibility of the brother's affidavit and that it was the Applicant's responsibility to provide all available evidence that would support its authenticity. See *Marin v Canada (Citizenship and Immigration)*, 2016 FC 847 at para 27.

[46] The Respondent says that the RAD gave reasons as to why the Applicant's brother's second affidavit was not admissible on credibility grounds. The Applicant is simply inviting the Court to reweigh the affidavit. To admit new evidence, the RAD must be satisfied that it is

credible. See *Singh*, above, at para 44. The RAD's decision not to ignore inconsistencies of spelling and photographs, documentary evidence about the availability of forged documents in Nigeria, and the apparent change in the Applicant's brother's willingness to support the Applicant is a cumulative analysis of irregularities resulting in a reasonable outcome. See *Aaron v Canada (Citizenship and Immigration)*, 2016 FC 1244 at para 26. The Respondent also says that the RAD did not suggest that the affidavit was fraudulent. Instead, reference to the availability of fraudulent affidavits was one concern among many the RAD expressed. The Respondent also notes that the Applicant's explanation about the photographs attached to the affidavits was not before the RAD, nor does it account for the affidavit's other deficiencies.

[47] The Respondent submits that the RAD could not hold an oral hearing after not admitting the Applicant's new evidence. See *Tota v Canada (Citizenship and Immigration)*, 2015 FC 890 at para 32; *Horvath*, above, at para 17; *Belek*, above, at para 20. The decisions relied on by the Applicant to argue that a hearing should have been held both involve the decision to not hold a hearing after new evidence was admitted. See *Horvath*, above, at para 8, and *Tchangoue*, above, at para 6.

(2) Credibility

[48] The Respondent says that the Applicant's arguments about the RAD's credibility findings simply attempt to have the Court rehear the Applicant's refugee claim. The Applicant's claim that documents were rejected on the basis of the RAD's general credibility finding is refuted by passages in the Decision where the RAD considers the documents and discounts them because of concerns inherent in the documents themselves.

[49] The Respondent also says that the Applicant's arguments about the risk he would face in Nigeria presume that his claim of bisexuality was found credible. Contrary to the Applicant's assertion that he was only found not credible about a particular aspect of his claim, the RAD finds the Applicant not credible about his bisexuality, which is the central aspect of his claim. Evidence about the risk faced by bisexuals in Nigeria is therefore irrelevant.

[50] The Respondent submits that a full reading of the transcript reveals that the RAD bases its conclusion about vagueness surrounding the Applicant's wife's discovery of his sexuality on a combination of factors weighed together. The RAD is entitled to reject the Applicant's explanations for inconsistency on this point and inconsistency about how often he met with his alleged same-sex partner. See *Hevia v Canada (Citizenship and Immigration)*, 2010 FC 472 at para 14 and *Sinan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 87 at para 10.

[51] Similarly, the Respondent says that the RAD draws reasonable conclusions about inconsistencies regarding the Applicant's realizations about his sexual orientation and the omission of details from his BOC about the individuals he was attracted to in university. And faced with competing narratives about the reasons for the Applicant's failure to make a refugee claim in the UK, the RAD reasonably expects that the dangers of possible exposure of his sexuality would lead to him claiming in the UK.

(3) Documentary Evidence

[52] The Respondent also submits that the RAD's treatment of the documentary evidence is reasonable. The RAD independently reviewed the documents, and the weight it placed on them

should not be interfered with by the Court. The Respondent says that the RAD could not have provided clearer or more cogent reasons for assigning no weight to Dr. Devins' report and is entitled to discount self-reported stories contained in a psychological report. See *Boyce v Canada (Citizenship and Immigration)*, 2016 FC 922 at paras 60-62. The RAD also weighed the content of the affidavits against the Applicant's inconsistent oral evidence. Its conclusion that they did not cure the problems with his testimony is entitled to deference. Evidence from community groups was similarly assessed and assigned a probative value that was weighed against the other evidence in the Applicant's claim. It was reasonable for the RAD to place little weight on the community group letters because they postdated the Applicant's arrival in Canada and the initiation of his refugee claim. The RAD also noted that the Applicant did not provide any letters from the UK, despite his awareness of his sexual orientation while living there.

VIII. ANALYSIS

[53] On the facts of this case, it was reasonable for both the RPD and the RAD to have credibility concerns regarding the Applicant's allegations that he faces future persecution and risk if he returns to Nigeria.

[54] The Applicant claims to be a bisexual man and both the RPD and RAD seem to have accepted that there is no state protection for sexual minorities in Nigeria and that, as the RPD put it, "Nigeria is a dangerous place for people who have had or will have same-sex relationships…." So the determinative issue was whether the Applicant is, indeed, bisexual.

[55] At the time of his hearing before the RPD, the Applicant was 40 years old. He had, apparently, lived in Nigeria without problems regarding his bisexuality and had then relocated to the UK in 2011 where he pursued educational and employment opportunities before coming to Canada in November 2016.

[56] The Applicant has been married to a woman since 2004 and has two children, but he and his wife have been separated since January 2016.

[57] During his time in the UK, there is no evidence that the Applicant associated with the bisexual or homosexual communities or groups. What is more, the Applicant did not claim refugee protection while he was in the UK, so that it can be assumed he did not fear returning to Nigeria at that time.

[58] In fact, the Applicant says that his life in Nigeria only became endangered after he came to Canada to attend a conference in November 2016. It appears that he did not come to Canada in order to seek refugee protection. He says, however, that on the day after he arrived a cousin called him from Nigeria to inform him that an oracle had said he had engaged in bisexual activities with men; it was this that placed him in danger, although the alleged bisexual inclination dates back to the Applicant's younger days in Nigeria.

[59] Clearly, then, given the Applicant's history, his marital status, and his coincidental appearance in Canada on the day before he learned of being outed by an oracle in Nigeria, the RPD and the RAD needed to assess whether the Applicant could be believed when he said he

was bisexual. They both decided that the Applicant lacked credibility on the central aspect of his claim that he was bisexual or would be perceived as such and as having engaged in same-sex relations if he returned to Nigeria.

[60] The RAD agreed with the RPD's credibility concerns but also conducted its own assessment and produced the Decision under review before me.

[61] As the Respondent points out, the RAD's Decision is based upon three primary areas of concern: inconsistencies and omissions with regard to material aspects of the claim; the Applicant's failure to claim asylum in the UK despite knowing he was bisexual and that, as a result, he faced risks in Nigeria; and insufficient documentary evidence. As I read the Decision, it is the cumulative effect of these concerns that leads to a negative credibility finding regarding the Applicant's claimed bisexuality.

[62] Notwithstanding the obvious need to test the Applicant's allegations, it is my view that the RAD's Decision contains several material errors that render it unsafe and require that it be returned for reconsideration.

A. *Failure to Claim in the UK*

[63] To begin with, the RAD's handling of the Applicant's failure to claim protection in the UK is problematic. The RPD addressed this issue in the following way:

> **3.4 The Claimant Does Not Reasonably Explain His Failure to Claim Asylum in the UK**
>
> [18] From May 2011 to November 2016, the Claimant lived in the United Kingdom. He did not seek asylum there, however, despite knowing since 2012 that he "enjoyed having sex with another male and … that this was something [he] really liked and had to fight for". When asked why he did not approach the British for refugee protection, the Claimant stated that he was not in danger until he was outed by the oracle. I do not accept that answer. The Claimant's own documents include articles with titles like: "Nigeria: Gay Men Dragged from Beds, Brutally Beaten by Angry Mob", "Nigerian Man Lynched to Death for Being Gay", and "Nigerian Authorities Arrest, Beat Men Suspected Being Gay". Anyone who merely "supports the registration, operation and sustenance of gay clubs, societies, organisations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment". In the face of this virulent homophobia, and the fact that he had disclosed his bisexuality to his estranged wife, the Claimant's alleged blasé attitude towards return to his country is, on a balance of probabilities, not credible.
>
> [19] While not determinative, I find that the Claimant's failure to seek asylum in the United Kingdom weighs against finding his claims trustworthy.
>
> [Footnotes omitted; emphasis in original.]

[64] The RAD's approach to this issue is somewhat different:

> *Delay, Failure to Claim Elsewhere*
>
> [28] The Appellant resided in the UK from 2011-16, but failed to seek asylum there. The RPD asked the Appellant to explain why he did not seek protection there. The Appellant responded he was not threatened until the oracle revealed his sexual orientation while he was in Canada. The RPD did not accept the Appellant's response to be reasonable and determined the Appellant's failure to seek asylum in the UK weighed against finding his allegations trustworthy.
>
> [29] The Appellant argues the RPD erred because he gave a reasonable explanation for his failure to seek protection elsewhere and earlier, as his life was only endangered when he was in Canada

> and it was therefore reasonable for him to seek protection in Canada only.
>
> [30] Upon its own independent review of the evidence, the RAD does not agree with the Appellant's argument. By his own evidence, the Appellant knew he had feelings toward the same-sex since university (during the period, 1995-1999). He was also actively in a same-sex relationship with another man in 2012. He also demonstrated knowledge of and submitted various country documents on the very hostile treatment by Nigerian authorities towards sexual minorities. He also confirmed his wife knew… about his affair with a man well before his visit to Canada. The RAD further notes the Appellant is a very well-educated man, fluent in English, and with diverse travel experiences. For example, he resided, studied and worked in the UK for several years (and had successfully researched and obtained a visa to do so). He also successfully obtained visas to the US and Canada. Accordingly, the RAD finds the Appellant's failure to seek protection earlier and elsewhere, and his corresponding reason for not doing so, undermines his subjective fear as well as his overall credibility and that of his allegations of persecution.

[65] The difficulty in both cases is that the RPD and the RAD do not really address the Applicant's explanation for his failure to claim in the UK which is clear and consistent: he did not feel he was in any danger because he had not been outed by the oracle so that, notwithstanding his bisexual inclinations and any past encounters (which were not extensive), he had no reason to fear persecution.

[66] Instead of addressing this explanation, both the RPD and the RAD embark upon speculative assessments of what they think the Applicant would have done had he truly been bisexual. In my view, the difficulty with these assessments is that they assume that any bisexual person from Nigeria would claim protection at the first opportunity irrespective of whether they have been outed. But there is no evidence to support this assumption. The Applicant's claim is not that he is in danger because he happens to be bisexual; he is in danger because he has

engaged in a same-sex relationship in the past and, unexpectedly, has now been outed. While he lived and worked in the UK he had not been outed as bisexual, and had no reason to think he ever would be. In Canada, he is a bisexual who has been outed in Nigeria and is now known to have engaged in same-sex relationships. In my view, the two situations are entirely different, even though both the RPD and the RAD attempt, unreasonably in my view, to obliterate those differences.

[67] The Applicant's claim is not that he is in danger in Nigeria because he is suspected of being bisexual. He says he is in danger because he has engaged in same-sex activities and has been outed while he was in Canada, and not in the UK.

[68] The Respondent's written submissions on this issue reveal, in my view, that there is no way that the RAD's findings on point can be reasonably supported:

> 16. Regarding the Applicant's failure to claim asylum in the UK, the RAD was faced with two competing narratives. First, the Applicant said no one was aware of his sexual orientation until he arrived in Canada. Second, the Applicant said he knew he was gay while he was in the UK and also knew of the severe treatment of homosexuals in Nigeria. This of course begs the question of what the Applicant was planning to do when he returned to Nigeria. If there was always a looming possibility of an Oracle outing the Applicant at any given moment, it cannot be unreasonable for the RAD to have expected the Applicant to claim asylum while in the UK.

[69] If a question was begging here, then it was a question that the RPD and the RAD never addressed. The Respondent is attempting to justify the failure of the RPD and the RAD to truly assess the Applicant's explanation. Neither the RPD or the RAD say that "there was always a looming possibility of an Oracle outing the Applicant at any given moment," and there is no

evidence that this "possibility" was ever put to the Applicant for a response. In fact, when he was asked why he did not anticipate anyone in Nigeria finding out about his bisexuality, he explained in response that he had kept his sexual orientation secret and did not believe that anyone knew about it. See Certified Tribunal Record [CTR], p 93, lines 16-25.

[70] In my view, the Applicant's response to the Respondent's "looming possibility" argument is persuasive:

> 44. With respect to the Applicant's failure to claim in the United Kingdom this was not an issue of the looming possibility of the oracle outing the Applicant at any given moment as noted in the Respondent's memorandum of argument which seems to suggest that the Applicant had [a] pre[-]formed idea that the issue regarding his bisexuality would become known by his family and community [after being] revealed by the oracle.
>
> 45. The facts according to the Applicant's narrative were that while he was in the United Kingdom, his extended family was unaware of his bisexuality. The Applicant stated in his basis of claim form that the issue regarding this information had not been disclosed at the time of his arrival in Canada and therefore there was no risk of persecution to him while he was in the United Kingdom since it was unknown that he was bisexual.
>
> 46. The question then is not whether the claimant had valid reasons to fear persecution in the past, but whether, at the time the claim is being assessed, the claimant has good grounds for fearing persecution in the future. *Mileva v. Canada (Minister of Employment and Immigration),* [1991] 3 F.C. 398 (C.A.). In the case at bar the Applicant fear[s] future persecution and his failure to claim in the United Kingdom when there was no risk and when he had no subjective fear should not have been a premise [for] impeach[ing] his credibility.
>
> [Reference omitted.]

[71] Also, the Applicant's evidence was that his friend Emmanuel reported his affair with Tony to the Applicant's wife, but that Emmanuel did not know that Tony was a man (CTR, p 89,

lines 4-7). So there was no danger of Emmanuel outing the Applicant as a bisexual. It was the Applicant himself who explained to his wife that Tony was a man, and there is no evidence that his wife threatened to out the Applicant. In his BOC form he just says "She thought that I was with another woman but I told her the truth about Tony and said that I was not sleeping with other women but he satisfied a different part of me" (CTR, p 61). His wife's reaction was that she walked out on him. So there is no evidence that the Applicant had anything to fear in Nigeria until he came to Canada and learned from his cousin that he had been outed, not by his wife, but by an oracle in Nigeria. The cousin did not believe the oracle, but the Applicant confessed that he was attracted to men. This is when the danger arose, and it was at this point, and not before, that the Applicant reasonably concluded he should seek refugee protection (CTR, p 99, line 33 to p 100, line 8).

[72] It is also not clear what the RAD perceives to be inconsistent about the Applicant's evidence about Emmanuel's disclosure of the affair with Tony to the Applicant's wife. The Decision does not specify. The BOC reads: "In January 2016 my wife found out that I was cheating on her <u>from a friend</u> who saw me and Tony in a bar together. She thought that I was with another woman but I told her the truth about Tony…" (emphasis added). The initial confusion seems to be that the RPD perceives the line in the BOC referring to "a friend" as referring to a friend of the Applicant's wife. But the Applicant clarifies that he meant "my friend" in the BOC, which is not inconsistent (CTR, p 89, line 1). He then goes on to describe why his friend, Emmanuel, would have believed that Tony was a woman. There is some vagueness to Emmanuel's identity, but I fail to see what is vague about the Applicant's response

at the bottom of p 89. I note that this is an original finding of the RAD, so it cannot simply be relying on the RPD's findings.

[73] The failure to claim in the UK is taken into account by the RAD in assessing the Applicant's subjective fear and overall credibility: "Accordingly, the RAD finds the [Applicant's] failure to seek protection earlier and elsewhere, and his corresponding reason for not doing so, undermines his subjective fear as well as his overall credibility and that of his allegations of persecution."

[74] In my view, it was not reasonable for the RAD to rely upon the Applicant's failure to claim in the UK for a conclusion that the Applicant's "failure to seek protection earlier and elsewhere, and his corresponding reason for not doing so, undermines his subjective fear as well as his overall credibility and that of his allegations of persecution." Refugee protection is not granted for persecution that may never materialize and where there is no evidence to establish that there is any real likelihood or possibility that it will.

B. *Brother's Second Affidavit*

[75] The RAD concedes that the brother's affidavit "appears to meet the statutory requirements to be admitted as new evidence," but excludes it on the basis of credibility concerns.

[76] These concerns are as follows:

> [16] The RAD has serious concerns with the credibility of the affidavit. The affidavit is purportedly from the Appellant's brother "Steve OgoGbemedu." The Appellant has previously submitted an affidavit from Steve, as well as copies of correspondence between them. The RAD notes the RPD had concerns as to the credibility of the brother's previous affidavit. The proposed new affidavit from him includes two passport sized photos of two different people. It is unclear who these individuals are and why their pictures are attached to the affidavit. It is also unclear whether one of the photos is of the person notarizing the document and, if so, why the notary public would provide his picture, especially considering the contents of the affidavit. Moreover, the RAD notes the exact same picture of one of the individuals appears on at least two of the Appellant's previously filed affidavits. However, despite those affidavits all having the same picture, the affiants and individuals notarizing the documents are different. Further, the letterhead and stamped names of the notaries are also different. The RAD also notes obvious spelling and grammatical errors in the documents. The RAD also notes the inconsistent spelling of the brother's name. For example, the Appellant spells his brother's name (Steve Ogo Gbemudu) differently as compared to how his brother spells his own name in his affidavit and other correspondence. It is reasonable to expect the Appellant to know how to spell his brother's name.
>
> [Footnotes omitted.]

[77] In addition, the RAD noted the availability of fraudulent documents in Nigeria, that no supporting identification was attached to the affidavit, that there was no envelope or emails or any other tracking of how the document purportedly arrived from Nigeria, and the "RAD does not find it credible under the circumstances that the brother would swear to an affidavit about and in support of the [Applicant]."

[78] I don't think the RAD can be faulted for having credibility concerns about the brother's affidavit. But some of those concerns could easily have been resolved by giving the Applicant an opportunity to address them and are not, *per se*, evidence that the affidavit is fraudulent. The

attachment of photos of people the RAD cannot identify does not mean the affidavit is fraudulent. The fact that the affiants and individuals notarizing the documents are different is not, *per se*, evidence that the affidavit is fraudulent. Nor are spelling and grammatical errors that often appear in documents before this Court. See *Ali*, above, at para 31, and *Mohamud v Canada (Citizenship and Immigration)*, 2018 FC 170 at para 3. The Respondent argues that, cumulatively, these matters give rise to credibility concerns. I cannot see how these factors that, individually, do not support that an affidavit is phony, can suggest fraud when considered together.

[79] The availability of fraudulent documents in Nigeria does not mean that all documents from that country are fraudulent and does not mean that the brother's affidavit should not be assessed on its merits. For example, the availability of fraudulent documents does not mean that an affidavit that contains photographs and grammatical and spelling errors is likely to be fraudulent.

[80] The RAD's reliance on the brother's change of heart is also selective in the evidence referred to. There are many reasons why the brother might present himself as being furious and unsupportive of the Applicant and threaten to "fetch for you no matter the part of the earth you are," (*sic*) not the least of which is the brother's concern with his own safety and the attitude of his family. The RAD fails to mention and address that in his previous affidavit the brother had made it clear that "I am still not happy with Richard because he has disappointed us, however, I do not want him to die," and "I have also advised Richard not to return to Nigeria as planned as his life is seriously under threat…." If the RAD wishes to use what the brother says to support a

negative credibility finding with regard to the affidavit, then it must look at and assess everything the brother says. It cannot just, as here, pick out the aspects of the evidence that it needs to support a negative conclusion. This is tantamount to deciding not to believe the Applicant and then looking for the bits of evidence that will support a conclusion already arrived at. The RAD's job is to objectively assess all of the relevant evidence before reaching a conclusion on credibility. See *RER,* above, at paras 9-10.

[81] The RAD also says that it "does not find it credible that he [the brother] would now submit a new affidavit supporting the [Applicant], while also risking himself to the other alleged agents of persecution, including the authorities." The RPD, but not the RAD, cites RIR 105653.E as support for the statement that swearing an affidavit in support of a family member "would also expose the affiant to the extrajudicial risks faced by people associated with homosexuality in Nigeria…": RPD decision at para 21. The RIR is, in part, directed at whether a lawyer would notarize a statement in which someone admits to knowledge of someone else's sexual orientation. It does quote a legal practitioner who states that:

> …it would be dangerous for someone to request such a service from a lawyer or a barrister even though lawyers/barristers are bound by confidentiality…. [Because] according to the provisions of the Same-Sex Marriage Prohibition Act, a lawyer/barrister will be required to report such a client to the authorities[,] otherwise, the lawyer/barrister is liable to some jail term for having such a knowledge and not reporting [it].
>
> (CTR, p 388)

But the information in the RIR all seems to be hypothetical, and is sceptical that such a document would be necessary. I cannot find any description of instances where individuals have actually been punished for swearing such an affidavit in the record. The evidence before the RAD was

that the new affidavit was, in any event, confidential and was only for use in these proceedings in Canada. It is also relevant that brother's second affidavit does not actually state that the brother has knowledge of the Applicant's sexuality. It merely recounts the police's allegation and the brother's denial that the Applicant is in Nigeria. I also note that the brother's first affidavit is more directed at the revelation of the Applicant's sexuality by the oracle, and is careful to denounce his behaviour along with instructing him not to return to Nigeria.

[82] It is also telling that the misspelling of the brother's name, which the RAD singles out for special notice, is the difference between "Steve Ogo Gbemudu" and "Steve OgoGbemudu." In my view, this is not sufficient evidence to support a conclusion that the Applicant does not know how to spell his brother's name. It is far too microscopic. See *Ali*, above, at para 31.

[83] In my view, the RAD's exclusion of this affidavit evidence on credibility grounds was unreasonable.

[84] The Applicant has raised other points of concern but there is no need to address them in full here. On the basis of these two important errors the matter must be returned for reconsideration. But I will give a few examples that puzzle me.

[85] I note that the RAD does not address the RPD's finding that the Applicant was inconsistent about how he learned Tony was biologically male. It is therefore not clear whether the RAD disagrees with the RPD's finding but, having reviewed the transcript, CTR, pp 86-87, against the BOC narrative, I struggle to see the inconsistency the RPD perceived. The RPD

seems to take an unreasonably narrow approach to the meaning of "admitted" in the BOC and then focusses on the Applicant's statement that Tony "did not say anything more" before they had sex (see the RPD decision at paras 8-9). But this ignores that the Applicant preceded this statement by explaining that after Tony undressed for the first time he "was a bit shocked and she was saying why am I perplexed, I said well I never knew you were a man. Well we started talking and she started having serious romance" and then "I can't believe it's a man so that is what we talked about" (emphasis added). And when the RPD puts this perceived inconsistency to the Applicant, he flatly states that the story matches. From this, the RPD finds that the Applicant "gave two very different versions." See RPD decision at para 11.

[86] The RAD also says that the "RPD also considered and gave greater weight to the objective documentary evidence compared to the Applicant's vague responses" and agrees that the Applicant's responses "were vague about how he obtained the documents (e.g. from his friend "Greg" in the UK)." However, I don't see how this finding by the RAD can be said to be based upon the RPD decision.

[87] The RAD seems to confuse which documents "Greg" provided to the Applicant. The discussion about Greg derives from the Applicant's explaining that he could not get all of his documents from the UK (CTR, p 70). The RPD later followed up and the Applicant explained how Greg got access to the documents (CTR, pp 73-74). The obvious implication is that these were the Applicant's educational credentials and employment documents that he had left in the UK. The Applicant never suggests that Greg sent him the affidavits, which logically would have come from Nigeria directly as they were sworn well after the Applicant arrived in Canada.

[88] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT in IMM-4320-17

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted RAD.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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