

Federal Court



Cour fédérale

Date: 20190430

Docket: IMM-3862-18

Citation: 2019 FC 547

Ottawa, Ontario, April 30, 2019

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

SAMUEL NNAEMEKA OGAULU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a citizen of Nigeria who seeks judicial review of the decision of the Refugee Appeal Division (RAD) that upheld the decision of the Refugee Protection Division (RPD) in denying his claim for protection in Canada. He claims to be at risk in Nigeria because he is a supporter of LGBT rights through his religious ministry.

[2] For the reasons that follow, this judicial review is dismissed as the decision of the RAD is reasonable and the Applicant has not identified any errors meriting this Court's intervention.

Background

[3] The Applicant alleges a fear of persecution in Nigeria due to his support for gay and lesbian persons through his religious ministry in South Africa. He alleges that, due to this, he was attacked several times in South Africa and once in Nigeria. Although he has been living with his wife and children in South Africa for many years, he says he was attacked during a short stay in Nigeria in May 2016. The Applicant alleges that, because of his support for and protection of the LGBT community, he is perceived as being a member of the LGBT community.

[4] Although both South Africa and Nigeria were analyzed in determining the Applicant's claim, the RPD and the RAD focused only on Nigeria as a country of reference. The Applicant did not raise any objection to this approach.

[5] The RPD rejected the Applicant's claim because of various inconsistencies and omissions in his testimony. The RPD determined that he lacked subjective fear. He appealed to the RAD.

Decision Under Review

[6] At the RAD, the Applicant did not make a request to admit new evidence nor did he ask for an oral hearing. In considering the appeal from the RPD, the RAD considered the *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression (SOGIE)*.

[7] The RAD noted that there were significant inconsistencies surrounding the alleged May 2016 attack in Nigeria, which is at the core of the Applicant's claim. The RAD found that the Applicant's evidence on certain aspects of the attack was evasive and lacking in detail. The RAD agreed with the RPD finding that the Applicant had not established on a balance of probabilities that he was attacked in Nigeria or that he would face any sort of risk in Nigeria.

[8] The RPD made a negative credibility finding against the Applicant for his failure to mention in his Basis of Claim (BOC) form that his brother was present during the May 2016 attack. His testimony and supporting affidavits state that his brother was present. In considering this omission, the RAD found that this was not a minor detail or immaterial omission, as the brother was not only allegedly present at the time of the attack but, according to the Applicant's testimony and his brother's affidavit, the brother played a central role in the events. Therefore, the Applicant's explanations for his failure to mention this in his BOC were insufficient.

[9] On the attacks that the Applicant allegedly suffered in South Africa, he provided few details in his BOC. In particular, he did not provide the dates of the attacks or when he began counselling and supporting LGBT persons through his ministry which is allegedly the activity that put him at risk. Given that these attacks caused the Applicant to flee South Africa, the RAD agreed with the RPD that these were material omissions that further impacted the Applicant's credibility.

[10] Other minor details that the Applicant failed to mention in his BOC were the name of a friend who allegedly died, and the calls made to his wife and friend during the attack. While

minor, within the context of the other more significant inconsistencies and omissions, the RAD found that they supported the RPD's credibility findings.

[11] In assessing subjective fear, the RPD noted that the Applicant held a valid visitor's visa to the United States and traveled there in October 2016 (after the May 2016 attack) but failed to make a claim for refugee status there. As well, he returned to South Africa and remained there for nine months despite allegedly being attacked and harassed there as well. The RPD found that these actions demonstrated a lack of subjective fear. On appeal, the RAD agreed.

[12] The documentary evidence relied upon by the Applicant included: affidavits from his wife, brother, two friends; photos from a pride parade; photos with the pastor of a church in Toronto; and, a letter from the Toronto pastor. However, given the serious inconsistencies and omissions in the Applicant's testimony and evidence regarding the central event to his claim, these supporting documents were given little weight.

[13] While the RAD's analysis differed, it reached the same conclusion as the RPD that the Applicant had not established that he was attacked in South Africa or Nigeria, and he had not established that he would face a serious possibility of persecution, a risk to his life, or a risk of cruel and unusual treatment or punishment if he were to return to Nigeria.

Issues

[14] The Applicant raises various issues with the RAD decision which can be addressed as follows:

- a) Was the RAD reasonable in its credibility findings on the BOC omissions?
- b) Did the RAD engage in a microscopic analysis on the BOC omissions?

Standard of Review

[15] The standard of review for the RAD's application of the law to the facts and the RAD's decision regarding the RPD's credibility findings is reasonableness (*Siddiqui v Canada (Citizenship and Immigration)*, 2015 FC 1028).

Analysis

Was the RAD reasonable in its credibility findings on the BOC omissions?

[16] The Applicant argues that the RAD erred in making a negative credibility finding on his failure to mention that his brother was present during the attack in Nigeria in his BOC. According to the Applicant, the presence of his brother is mentioned in other materials filed in support of his refugee claim, and those materials needed to be considered as part of his overall claim. In any event, the Applicant argues that this omission in his BOC is not an error because the focus in his BOC narrative was the attack itself.

[17] In fact, in his BOC the Applicant states that none of his family was present with him during the attack. However, this was in direct contradiction to his oral testimony that his brother was present. He explained that he was referring to his immediate family members who were not present but were in South Africa at the time. This explanation was not accepted as the Applicant

made mention of a friend who was present at the attack in his BOC but failed to mention his brother who, according to his testimony, played a more central role in this event.

[18] The requirements for the completion of a BOC form are outlined in the *Refugee Protection Division Rules*, SOR/2012-256 and referenced in the *Refugee Appeal Division Rules*, SOR/2012-257. The BOC is intended to provide details about the claimant, his or her family, related documents, travel history, and most importantly the reason refugee protection is being sought. This Court has confirmed on numerous occasions that all the important facts and details of a claim must be included, and failing to do so can affect the credibility of all or part of a claimant's testimony (*Zeferino v Canada (Minister of Citizenship and Immigration)*, 2011 FC 456 at para 31).

[19] The Applicant argues that his oral testimony simply provided additional details to his BOC narrative and he relies upon *Selvakumaran v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 623 [*Selvakumaran*] at paragraph 21 to argue that this should not be a basis for impugning his credibility. However, *Selvakumaran* explicitly states at paragraph 20 that, although oral testimony may provide details not included in a personal information form, this will not serve to impugn an applicant's credibility unless the omitted incident is significant to the claim.

[20] Here, details of the attack are significant as they go to the very core of the Applicant's claim. Therefore this omission from the BOC is not a minor detail or collateral information, but rather, is important to the Applicant's claim. Omissions and contradictions are a reasonable

basis for doubting an applicant's credibility (*Jele v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 24 at para 50).

[21] Combined, the significant omissions and inconsistencies reasonably led the RAD to conclude that the Applicant's claim lacked credibility.

Did the RAD engage in a microscopic analysis on the BOC omissions?

[22] The Applicant argues that the RAD undertook a microscopic assessment of the evidence and unreasonably expected him to recall exact details. He relies upon *Sheikh v Canada (Minister of Citizenship and Immigration)*, 190 FTR 225 (FC) [*Sheikh*] at paragraph 28 to argue that his refugee claim should not be determined on the basis of a memory test on the ability to recall exact details.

[23] Here the RAD found that the Applicant's failure to provide consistent evidence about the alleged attacks in South Africa and the central event in Nigeria lacked credibility. Aside from the more significant omission discussed above, the Applicant also failed to mention the relevant dates of alleged attacks in South Africa, when he started ministering to LGBT persons, or what triggered the alleged attack in Nigeria.

[24] This type of analysis cannot be characterized as a "memory test", rather the RAD was properly assessing the details and the evidence in support of his claim. In assessing a refugee claim, this is an appropriate and necessary exercise, and fits squarely within the discretion of the RAD.

[25] Having undertaken this analysis, the RAD was entitled to draw a negative inference because of the Applicant's failure to recall significant details of the events accurately and consistently. The RAD's questioning was not done in the same vein as in *Sheikh*, as the questions here were material and were directed to the core of the Applicant's claim.

[26] Further, this is not a situation where the RAD failed to assess the evidence. Here the documentary evidence was considered and assessed but it was insufficient to overcome the significant credibility concerns with the Applicant's evidence. Evidence is not assessed in isolation from the overall claim, and where the Applicant's personal testimony and evidence is not credible it is reasonable for the RAD to have credibility concerns with the supporting documentary evidence, especially when considered against the BOC. Here the RAD also considered the affidavits but accorded them minimal weight.

[27] On judicial review, is it not the role of this Court to reweigh the evidence or apply a different interpretation to the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61).

[28] This judicial review is therefore dismissed.

JUDGMENT IN IMM-3862-18

THIS COURT'S JUDGMENT is that the judicial review is dismissed. There is no question for certification.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Nicholas Owodunni
Matthew Tubie

FOR THE APPLICANT

Meva Motwani

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Matthew Nicholas LLP
Barristers & Solicitors
Toronto, Ontario

FOR THE APPLICANT

Attorney General of Canada
Department of Justice Canada
Ontario Regional Office
Toronto, Ontario

FOR THE RESPONDENT