Federal Court Cour fédérale

Date: 20190709

Docket: IMM-5288-17

Citation: 2019 FC 903

Ottawa, Ontario, July 9, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

OLABIMPE SALAMAT TEJUOSO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Olabimpe Salamat Tejuoso, is a citizen of Nigeria. She sought refugee protection in Canada on the basis that she had a well-founded fear of persecution in Nigeria because she is bisexual. The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] rejected her claim. The applicant appealed this decision to the

Refugee Appeal Division [RAD] of the IRB. In a decision dated November 9, 2017, the RAD dismissed the appeal and confirmed the decision of the RPD.

[2] The applicant now applies for judicial review of the RAD's decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. She submits that the RAD erred in refusing to admit new evidence, that the RAD applied the wrong standard of appellate review, and that the decision of the RAD is unreasonable.

[3] For the reasons that follow, the application for judicial review will be dismissed.

II. BACKGROUND

[4] The applicant was born in Nigeria in April 1998. She claims that as a teenager she discovered her bisexual orientation and developed a sexual relationship with her female best friend, Remi. At the same time, she was in a relationship with a young man, Pamilerin.

[5] According to the applicant, in August 2015 (when she was 17 years old) Pamilerin discovered sexual videos and photos of her and Remi. Pamilerin threatened to expose the applicant's bisexuality to her family and friends and to the police. He used this information to extort money from the applicant and to sexually coerce her.

[6] The applicant states that, at her mother's suggestion, she came to Canada in April 2016 to study. She alleges that Pamilerin became angry that she had left Nigeria without telling him and, as a result, he made her sexual orientation public. The applicant alleges that she fears returning

to Nigeria because the police would arrest her and her family would force her to undergo ritual cleansing to cure her bisexuality and would require her to marry an older man.

[7] The applicant claimed refugee protection on September 16, 2016. The RPD heard her claim on December 13, 2016.

[8] For reasons dated April 20, 2017, the RPD concluded that the applicant had established her national identity but she had not established her identity as bisexual or her subjective fear of returning to Nigeria. The RPD member did not find the applicant to be a credible witness. As a result, the RPD concluded that there was not a serious possibility that the applicant will be persecuted in Nigeria or that, on a balance of probabilities, she would be personally subjected to a danger of torture or would face a risk to life or a risk of cruel and unusual treatment or punishment if returned to Nigeria. Accordingly, the RPD rejected the applicant's claim for refugee protection.

[9] The RPD articulated several reasons for finding that the applicant was not a credible witness, including that she had submitted a fraudulent application for a study visa and that her account of her arrival in Canada was improbable.

[10] The RPD also gave several reasons for finding that the applicant was not bisexual and had not been in a same-sex relationship with Remi, including:

- The applicant could not recall the girls she was attracted to in high school, even though this was only four years earlier;

- The applicant gave the same generic description of the girls she had been attracted to in high school and of Remi, allegedly her long term partner;
- The applicant was unable to give any details of her relationship with Remi to show that it was more than just a friendship;
- The photos the applicant provided of Remi were of poor quality and did not suggest a romantic relationship;
- It was not credible Remi would make advances towards the applicant without warning, as the applicant claimed had happened, especially given the homophobic culture they lived in;
- The applicant did not provide evidence to corroborate her relationship with Remi such as messages between the two of them;
- The applicant's claim that she did not have access to her Facebook account or to email or messaging applications was not credible;
- The applicant did not express her sexuality in Canada until about one month after she made her refugee claim and shortly before the RPD hearing.

[11] The applicant had provided an affidavit allegedly from her mother in support of her claim to be bisexual. The RPD member found the affidavit was falsified because no government-issued identification was attached to it, because family members of LGBTQ people in Nigeria were unlikely to swear such an affidavit, and because fraudulent affidavits are widely available in Nigeria. The member found that the applicant's production of a falsified affidavit undermined her overall credibility.

[12] Finally, the applicant had provided a report from a psychotherapist to corroborate her sexual orientation. The member gave the report little weight because its author was not qualified to make the medical diagnosis he purported to make and because the report was based entirely on a one-hour interview with the applicant. No tests or other diagnostic tools were used in the formulation of the author's opinion.

III. DECISION UNDER REVIEW

[13] The applicant appealed the decision of the RPD to the RAD on three grounds which I would formulate as follows:

a) The RPD based its negative credibility findings on an incorrect assessment of the evidence and a "fixation" on tangential or peripheral issues;

b) The RPD breached procedural fairness by failing to consider the Chairperson's Guidelines regarding Women Refugee Claimants Fearing Gender-Related Persecution [Gender Guidelines]; and

c) The RPD erred in failing to take into account relevant evidence relating to the evolution of the applicant's sexual orientation.

[14] In addition, the applicant tendered a document purporting to be an "Invitation to the Police" dated March 2, 2017, "inviting" the applicant to attend an interview with Nigerian police on March 5, 2017, in relation to an unspecified investigation. The applicant sought the admission of this document under section 110(4) of the *IRPA.* She also requested a hearing before the RAD under section 110(6) of the *IRPA.*

[15] Looking first at the admissibility of the proposed new evidence, the RAD member applied the test set out in section 110(4) of the *IRPA* – namely, the evidence must have arisen after the refugee claim was rejected, or it was not reasonably available to the applicant before the claim was rejected, or the applicant could not reasonably have been expected to present the evidence at the time the claim was rejected. As the RAD member notes, section 3(3)(g)(iii) of the *Refugee Appeal Division Rules*, SOR/2012-257, provides that when the person who is the subject of the appeal is the appellant and he or she wishes to rely on documentary evidence, he or

she must provide "full and detailed submissions" regarding how that evidence meets the requirements of section 110(4) of the *IRPA* and how it relates to the appellant.

[16] In paragraph 16 of an affidavit sworn by the applicant on June 2, 2017, in support of her appeal to the RAD, the applicant states the following regarding the invitation from the Nigerian police:

> That I was recently provided with a letter on invitation from the Nigerian Police asking me to appear at a Police station in connection with the offence of same sex. I believe this is an attempt by the Nigerian Police to bring me to their station, interrogate me, detain me and torture me and eventually charge me to Court for committing an offence against the laws of Nigeria which forbids homosexuality.

[17] As the RAD member notes, the invitation appears to be dated March 2, 2017. While it thus arose after the applicant's hearing before the RPD (which was on December 13, 2016), it evidently existed prior to the rejection of the claim on April 20, 2017. However, as the RAD member also notes, the applicant did not provide any information regarding how she obtained the document. Nor did the applicant provide any explanation for why the document was not reasonably available to her before the RPD made its decision or why she could not reasonably have been expected to present it at the time her claim was rejected. The RAD member therefore concluded that the document did not meet the requirements of section 110(4) and refused to admit it. The RAD member also denied the request for an oral hearing.

[18] Turning to the applicant's grounds of appeal, the RAD member instructed herself in accordance with the decision of the Federal Court of Appeal in *Canada (Citizenship and*

Immigration) v Huruglica, 2016 FCA 93 [*Huruglica*] as well as the decision of the three member RAD panel in *X (Re)*, 2017 CanLII 33034 (CA IRB). As the member understood these authorities, "the RAD must review the RPD decisions on a correctness standard with respect to questions of law and findings of fact (and mixed fact and law) which raise no issue of the credibility of oral evidence." However, deference "may be required when the RPD is in an advantageous position with respect to the assessment of oral evidence." The member stated that she found that the RPD did have an advantage "with respect to some aspects of the Appellant's testimony, including issues such as vagueness and hesitation." Accordingly, the RPD's findings in these respects warranted deference from the RAD.

[19] The RAD rejected the applicant's contention that the RPD had used peripheral and irrelevant issues to impugn her credibility. The RAD confirmed the RPD's finding that the applicant had presented false documents relating to her student status when she arrived in Canada (a finding which the applicant did not contest on appeal in any event). While this did not relate to the central issue in the case – the applicant's sexual orientation – it was still integral to her claim. As the RAD explained, the applicant alleged that she had left Nigeria in part because of Pamilerin's discovery of her sexual orientation and her departure was the trigger for the exposure of her sexual orientation by Pamilerin. The applicant also recounted in her Basis of Claim [BOC] narrative that her plans to study in Canada were stymied when her parents refused to pay her fees after they learned she was bisexual. The applicant had confirmed that the contents of her BOC (including the narrative) were true and complete. The RAD therefore found that the fraudulent visa application was "seriously damaging" to the applicant's credibility on a matter that was neither peripheral nor tangential.

[20] Further, like the RPD, the RAD found the applicant's account that she had been allowed to leave the airport in Toronto without processing her study permit to be implausible. However, the RAD member cautioned herself that, since implausibility findings should only be made in the clearest of cases, she put only "limited weight" on this factor in assessing the applicant's credibility.

[21] The RAD did not agree with the RPD's reasons for finding that the applicant's mother's affidavit was falsified. The RAD member noted that it is not necessary for identification to be attached to Nigerian affidavits and it is possible for a family member to swear such an affidavit, even in the context of homophobic legislation in Nigeria. Nevertheless, the RAD member put "limited weight" on the affidavit and found that it did not "overcome the serious damage to the Appellant's credibility caused by her false study permit application."

[22] With respect to the ground of appeal relating to the Gender Guidelines, the RAD member noted that the applicant had not provided specific submissions to show why the RPD's decision was inconsistent with those guidelines. The member stated: "Based on my review of [the RPD's] reasons, and in the absence of any specific issues identified by the Appellant, I see nothing that is in conflict with the principles set out in the Gender Guidelines." This conclusion is not challenged on judicial review.

[23] With respect to the RPD's findings concerning the applicant's sexual orientation, the RAD disagreed with the RPD's assessment of the evidence bearing on this in one respect – namely, the negative inference the RPD drew from the applicant's relatively recent involvement

with the LGBTQ community. The RAD considered the adverse inference drawn by the RPD to be too strong. On the other hand, the RAD did find that the applicant's limited and recent involvement with the LGBTQ community meant that limited weight could be put on the support letters provided by organizations associated with that community. Otherwise, the RAD agreed with the RPD that the lack of detail in the applicant's evidence about her sexuality and relationships, the vagueness of her evidence concerning Remi, the applicant's doubtful explanations for why she had not provided any corroborative evidence, and the limited weight the psychotherapist's report deserved all supported the finding that the applicant had failed to establish her identity as bisexual, the cornerstone of her claim for protection.

[24] On the basis of the foregoing, the RAD dismissed the appeal and confirmed the determination of the RPD.

IV. STANDARD OF REVIEW

[25] The RAD's determinations of factual issues and issues of mixed fact and law are reviewed on a reasonableness standard (*Huruglica* at para 35). This includes the RAD's assessment of the RPD's credibility findings and the RAD's own credibility findings (*Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 at para 27). It also includes the RAD's assessment of the admissibility of new evidence (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29).

[26] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v*

Igloo Vikski Inc, 2016 SCC 38 at para 18). That is to say, the reviewing court must look at both the outcome and the reasons that are given for that outcome (*Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 27). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

V. ISSUES

[27] This application for judicial review gives rise to three issues:

a) Did the RAD err in refusing to admit the new evidence?

b) Did the RAD err in applying the wrong standard of review to the applicant's appeal?

c) Is the RAD's decision unreasonable?

VI. ANALYSIS

A. *Did the RAD err in refusing to admit the new evidence?*

[28] The applicant submits that the RAD's refusal to admit the letter from the Nigerian police is unreasonable because the member erroneously ignored the applicant's statements in her affidavit "that the fresh evidence was received after the RPD decision" and that "the fresh evidence post-dated the RPD's decision." I disagree.

[29] The applicant does state in paragraph 2 of the affidavit filed in support of her appeal that the evidence post-dates the RPD's decision but this is obviously incorrect (the letter is dated March 2, 2017; the RPD's decision is dated April 20, 2017). As well, contrary to her written submissions on this application for judicial review, the applicant does not state anywhere in her affidavit that she received the evidence after the RPD decision. All she says is that she was "recently provided with" the invitation letter. This is vague at best. Even giving the applicant the benefit of the doubt and accepting for the sake of argument that what she meant by this is that she received the letter after April 20, 2017, it is still the case that she says nothing about how this came about, nor does she offer any explanation for why she did not receive the letter sooner. The onus was on the applicant to establish that the letter is admissible under section 110(4) of the *IRPA*. The RAD's determination that she failed to do so is altogether reasonable.

B. *Did the RAD err in applying the wrong standard of review to the applicant's appeal?*

[30] Turning to the standard of review applied by the RAD to the RPD's determinations, the applicant argues that the RAD "cannot simply adopt a standard of reasonableness by simply finding the decision of the RPD was reasonable without conducting its own analysis of the evidence adduced before the RPD." This is true. It is also not what the RAD did in this case.

[31] As set out above, the RAD member stated the applicable standard of review correctly. There were points on which the RAD deferred to findings by the RPD because the RPD was in a more advantageous position to make that finding than the RAD. This is permitted under *Huruglica*. Doing so is not inconsistent with the independent assessment of the evidence the RAD is required to perform (*Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at paras 122-25). The RAD member's reasons clearly indicate when she has deferred to the RPD's findings and why. Equally importantly, the RAD member's reasons also clearly indicate when she does not agree with the RPD's findings and why.

[32] The applicant does not advance submissions challenging any particular determination by the RAD as being based on an undue degree of deference to the RPD. My own review of the RAD's decision and the record on which it is based does not disclose any reviewable error in the RAD's discharge of its appellate function. I am satisfied that the RAD member conducted a reasoned, independent analysis of the evidence and that she did not show unwarranted deference to the RPD's conclusions.

C. *Is the RAD's decision unreasonable?*

[33] Finally, the applicant argues that the RAD's decision is unreasonable. In particular, the applicant contends that the RAD's determinations with respect to her arrival in Canada, her application for a student visa, her sexual orientation, and the affidavit from her mother are unreasonable. I do not agree.

[34] Looking first at the applicant's arrival in Canada, the applicant testified before the RPD that when she arrived at Pearson International Airport on April 16, 2016, she simply identified herself as an international student to an immigration officer who then directed her out of the airport. According to the applicant, her study permit was never processed. She was simply allowed to enter Canada and sent on her way. The RPD member found this account implausible given standard practices for processing foreign nationals arriving at Pearson International Airport. For the RPD, the applicant's insistence that this is what happened "is not trustworthy and detracts from her overall credibility." The RAD member agreed with the RPD that the applicant's account was implausible but cautioned herself that, since implausibility findings should only be made in the clearest of cases, she should put limited weight on this in assessing the applicant's evidence. This finding was reasonably open to her.

[35] Turning, secondly, to the application for a student visa, the applicant stated in her BOC form that she had applied for a Canadian student visa in Lagos on an unknown date. She stated that it was issued on March 1, 2016, and was valid for three years. This application was not before the RPD or the RAD (or this Court) but the applicant's passport contained a student

visa consistent with information in the applicant's BOC as well as information in the Global Case Management System [GCMS]. According to the GCMS notes, a visa had been issued for the applicant on March 1, 2016, on the basis that she would be studying at Seneca College in Toronto. The difficulty for the applicant is that this visa was evidently obtained using fraudulent documents.

[36] This came to light when the applicant returned to the airport on May 20, 2016 (about one month after her arrival in Canada), ostensibly to obtain the study permit she had not been given when she first arrived. The applicant presented some documents to an immigration officer purporting to show that she had been admitted to Seneca College. However, upon inquiry with the school, it was determined that she had never been admitted. In fact, it did not appear from the school's records that the applicant had ever even applied for admission. The applicant did not dispute this before the RPD or the RAD. Rather, she claimed that an agent had submitted the visa application for her.

[37] On the basis of the applicant's evidence and GCMS notes relating to her encounter with the immigration officer on May 20, 2016, the RPD member concluded that the applicant had obtained the student visa fraudulently. This was judged to be damaging to the applicant's overall credibility. The RAD agreed with this assessment. Notably, there was no suggestion that the applicant was fleeing persecution in Nigeria at the time and had had to resort to a fraudulent student visa application in order to make her escape. Indeed, when she went back to Pearson airport to try to obtain the study permit, the applicant confirmed to the officer that she did not fear returning to Nigeria and planned to go there on a holiday.

[38] As the RAD member noted, the applicant did not contest the RPD's finding regarding the fraudulent nature of her student visa application when she appealed the decision to the RAD. The only issue, then, was whether it supported the RPD's finding concerning the applicant's credibility in seeking refugee protection. The RAD concluded that it did. This conclusion was reasonably open to the RAD given the nexus between fraudulent application and the claim for protection. There is no basis to interfere with it.

[39] Thirdly, the applicant contends that it was unreasonable for the RAD to uphold the RPD's negative findings concerning the applicant's claim to be bisexual. I disagree. On the basis of its own review of the evidence (including the audio recording of the RPD hearing), the RAD accepted some of the RPD's reasons for rejecting the claim but also found that the RPD erred in certain respects in its analysis of the evidence. In particular, the RAD member found that the RPD should not have drawn the negative inference it did from the applicant's recent involvement in the LGBTQ community. Nevertheless, the RAD agreed with the RPD's overall determination with respect to the applicant's claim to be bisexual.

[40] That determination was based on several adverse considerations regarding the applicant's evidence. For example, the RAD, like the RPD, found that the absence of corroborative evidence was a significant shortcoming in the applicant's claim. The RAD member considered the applicant's explanation for why she had not produced any evidence to corroborate her claim to have been in a romantic relationship with Remi. The RAD member did not draw an adverse inference simply from the absence of corroboration. Rather, the member was not persuaded by the applicant's explanation for why there was no corroborative evidence – namely, that she had

never had an email account (despite having a Facebook account) and that something had gone wrong with her phone shortly after she arrived in Canada so she could not access any messages on it. If there are valid reasons to question a claimant's truthfulness, a panel may also consider the claimant's failure to provide corroborative evidence, but only where the claimant could not give a reasonable explanation for the absence of such evidence (*Dundar v Canada (Citizenship and Immigration)*, 2007 FC 1026 at para 22, citing *Amarapala v Canada (Minister of Citizenship and Immigration)*, 2004 FC 12 at para 10).

[41] On the record before her, it was reasonably open to the RAD member to reach the conclusions she did regarding the applicant's claim to be bisexual. There is no basis for this Court to interfere with them.

[42] Finally, the RAD member gave little weight to the affidavit purporting to be from the applicant's mother. Unlike the RPD member, the RAD member did not find that the affidavit was "falsified." Nevertheless, the RAD member found that it was insufficient to overcome the serious problems with the applicant's credibility. The RAD member did not dismiss the affidavit simply because it was a family member. Nor did she diminish its value simply because the applicant was not credible (cf. *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 at para 20). Rather, the member assessed the applicant's credibility in light of the entirety of the evidence, including the affidavit. It was reasonably open to the member to conclude that the affidavit did not restore confidence in the applicant's evidence given the serious, well-founded grounds for doubting her credibility.

[43] In summary, the RAD member's detailed reasons exhibit justification, transparency and intelligibility. The result, in my view, falls within the legally and factually defensible range of possible, acceptable outcomes. The standard of reasonableness is met (*Dunsmuir* at para 47). There is no basis for interfering with the RAD's decision.

VII. CONCLUSION

[44] For these reasons, the application for judicial review is dismissed.

[45] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-5288-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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