Federal Court  Cour fédérale

**Date: 20200121**

**Docket: IMM-3131-19**

**Citation: 2020 FC 90**

**Winnipeg, Manitoba, January 21, 2020**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**GABRIEL OLADELE ABOLUPE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

[1] This is the judicial review of a decision by the Immigration and Refugee Board of Canada, Refugee Appeal Division (RAD), dated April 29, 2019, confirming the decision of the Refugee Protection Division (RPD), pursuant to s 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), and concluding that the Applicant is neither a Convention Refugee nor person in need of protection pursuant to ss 96 and 97 of IRPA, respectively.

**Background**

[2] The Applicant, Gabriel Oladele Abolupe, is a citizen of Nigeria. He claimed refugee protection in Canada based on his alleged sexual orientation.

[3] In his Basis of Claim form, the Applicant claimed that in February 2016, he attended a party with his boss, with whom the Applicant was in a same-sex relationship. The host of the party was later arrested because of his sexual orientation. In a raid of the host's home, the police found photos of the partygoers, including the Applicant. Having been tortured, the host confessed that all of the partygoers were all either gay or bisexual. In late March 2016, the Applicant confessed to his wife that he was bisexual, and fled his home to stay with a friend.

[4] The Applicant alleges that after he left Nigeria in August 2016, the police frequented his home and asked his wife for his whereabouts. Further, that they informed his wife that the Applicant had engaged in a same-sex relationship and showed her the photos from the party where the Applicant is pictured.

[5] The RPD denied the Applicant's refugee claim in a decision dated May 29, 2018. The RPD found that the determinative issues were credibility and the Applicant's sexual orientation. It concluded that there was insufficient evidence to establish the Applicant's sexual orientation on a balance of probabilities and that the Applicant's credibility was impugned. As such, the RPD found that the Applicant was neither a Convention refugee nor person in need of protection.

[6] The Applicant appealed the negative RPD decision, however, the RAD dismissed the appeal and confirmed the decision of the RPD. This is the judicial review of the RAD's decision.

**Decision under review**

[7] The RAD noted that the Applicant's testimony was that, while in hiding for 5 months with his friend, the Applicant continued to work as head of operations in a major Nigerian bank. The RAD found that it was not consistent that the Applicant would claim to be in hiding yet continue to work at a public place, and that this was a central flaw in the Applicant's account of events in Nigeria. The Applicant's story that he continued to work daily at the same bank where he had worked for the prior 12 years, after being identified as a member of the LGBTIQ community, without being found by the police, weighed against a finding in support of the Applicant's account of events and his claim that he had been identified as a member of the LGBTIQ and that police were seeking him. The RAD concluded that this was central to the Applicant's claim, that it undermined his credibility, and that it was an implausible story. The RAD also found that although the Applicant's friend deposed that the Applicant stayed in the friend's home, the Applicant testified that he slept in a car, which was also an inconsistency.

[8] The RAD found that there were also other concerns which, while they may not have been as significant as the Applicant's claim about being in hiding, also weighed against his credibility. Specifically, concerning the Applicant's marriage certificate, the RAD noted that the Applicant's home address on the marriage certificate was inconsistent with his Schedule A Form; the dates of birth for the Applicant and his wife did not match up with their ages as stated on the certificate; and, that the Applicant provided inconsistent testimony as to the date of their marriage.

[9] The RAD addressed the affidavits the Applicant submitted from his wife and from his friend, again noting that the Applicant's claim that he continued to work at the bank after the police had identified him as having been involved in same sex activities was not consistent with his statements that the police were still looking for him. The RAD also referred to Immigration and Refugee Board Response to Information Requests (RIRs), in which sources state that people in Nigeria are unlikely to swear to another person's membership in the LGBTIQ community. The RAD also noted that country condition documentation indicates that fraudulent affidavits are easily available in Nigeria. In this context, the RAD afforded the affidavits little weight and found that they did not provide sufficient evidence to address the flaws in the Applicant's testimony. It also noted that the affidavit of the Applicant's friend was inconsistent with the Applicant's account of events.

[10] Because of these and other stated concerns, the RAD found that there was insufficient credible evidence to find that the Applicant's narrative of events in Nigeria was credible and had occurred.

[11] As to whether the Applicant had residual claim, the RAD assessed two letters from the Metropolitan Community Church (MCC), an affidavit from a man in Canada with whom the Applicant is allegedly in a relationship, pictures of two men together, and a letter of support from the 519 Community Centre (519 Centre) in Toronto. In sum, the RAD found that the evidence was vague and, even when considered on a cumulative basis, it was not sufficient to establish that it was more likely than not that the Applicant is a member of the LGBTIQ community.

[12] Further, because the Applicant had failed to establish that he faced more than a mere possibility of persecution, there was also insufficient evidence to support his claim that he was a person in need of protection pursuant to s 97 of the IRPA.

**Issues**

[13] The Applicant identifies two issues, being that the RAD erred in its credibility assessment and in its assessment of his residual claim. In my view, these issues are subsumed within the over arching question of whether the RAD's decision was reasonable.

**Standard of review**

[14] Subsequent to the parties filing their written submissions, the Supreme Court of Canada issued its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*) in which that Court revisits the standard of review applicable to administrative decisions. Accordingly, at the hearing of this application for judicial review, I inquired if the parties wished to make any additional submissions arising from *Vavilov* and concerning the standard of review applicable in this matter.

[15] Counsel submitted, and I agree, that reasonableness continues to be the appropriate standard of review for this Court when assessing the merits of the RAD's decision.

[16] *Vavilov* established a presumption that reasonableness is the applicable standard whenever a Court reviews an administrative decision (*Vavilov* at paras 16, 23, 25). That

presumption can be rebutted in two types of situations. The first being where the legislature explicitly prescribes the applicable standard of review or where it has provided a statutory appeal mechanism from an administrative decision to a court. The second being when the rule of law requires the application of the correctness standard. This will be the case in certain categories of questions, namely, constitutional questions, general questions of law of central importance to the legal system as a whole, questions regarding jurisdictional boundaries between administrative bodies, or any other category that may subsequently be recognized as exceptional and also requiring review on the correctness standard (*Vavilov* at paras 17, 69).

[17] The majority in *Vavilov* held that, "it is the very fact that the legislature has chosen to delegate authority which justifies a default position of reasonableness review" (*Vavilov* at para 30). In this matter, the presumptive reasonableness standard applies because the RAD has the delegated authority to make the decision under review and because none of the circumstances exist which might rebut the presumption.

[18] The Supreme Court in *Vavilov* also addressed how a reasonableness review is to be conducted by a reviewing court (paragraphs 73-145). In that regard, it held that "[i]n order to fulfill Dunsmuir's promise to protect 'the legality, the reasonableness and the fairness of the administrative process and its outcomes', reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28" (*Vavilov* at para 12). The reviewing court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified (*Vavilov* at para 15). And, when a decision is based on an internally coherent and

rational chain of analysis and is justified in relation to the facts and the law that constrain the decision maker it be reasonable and is to be afforded deference by a reviewing Court (*Vavilov* at para 85).

**Analysis**

*The Applicant's testimony*

[19] The Applicant submits that the RAD's finding that it was implausible for the Applicant to continue to go to work for 5 months if the police were searching for him ignored his sworn testimony. The Applicant testified that he left his friend's home early in the morning (approximately 4:30 am) and returned at midnight to avoid detection by the police. Further, that his friend did not disclose to the police where the Applicant worked. The Applicant asserts that the RAD missed this evidence, and that it should have benefited from the presumption of truth (*Maldonado v Canada (Minister of Employment and Immigration),* [1980] 2 FC 302 (CA)(QL/Lexis) (*Maldonado*)).

[20] The Respondent submits that the RAD did not ignore evidence that the Applicant evaded the police by going to work early. Further, that the RAD acknowledged the Applicant's evidence that his friend did not disclose the Applicant's place of employment to the police. However, the RAD's finding was that it was reasonable to expect that if the police were looking for the Applicant then they would easily have located him at his place of employment.

[21] I note that *Maldonado* states that when a refugee applicant swears to the truth of certain allegations that they are presumed to be telling tell the truth. *Maldonado* qualified this, however,

by saying that this is so unless there is reason to doubt their truthfulness (*Maldonado* at para 5; *Adebayo v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 330 at para 37). Thus, the presumption is rebuttable, for example, when the evidence is inconsistent with the applicant's sworn testimony or where the decision maker is unsatisfied with the applicant's explanation for those inconsistencies (*Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 21 (*Lawani*).

[22] As to implausibility:

> [26] Finally, the RPD is also entitled to draw conclusions concerning an applicant's credibility based on implausibilities, common sense and rationality. It can reject evidence if it is inconsistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence (*Shahamati v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 415 (FCA) (QL) at para 2; *Mohamed v Canada (Citizenship and Immigration)*, 2015 FC 1379 at para 25; *Yin v Canada (Citizenship and Immigration)*, 2010 FC 544 at para 59; *Lubana* at para 10). A finding of implausibility must however be rational, sensitive to cultural differences and clearly expressed (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319…at para 44). The RPD's conclusions and inferences on a claimant's credibility must always remain reasonable and the analysis must be formulated in "clear and unmistakable terms" (*Hilo v Canada (Minister of Employment and Immigration)* (1991), 130 NR 236 (FCA) [*Hilo*] at para 6; *Cooper* at para 4; *Lubana* at para 9). Situations where implausibility findings can be made include where the applicant's testimony is outside of the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have taken place as alleged. Conversely, merely casting a "nebulous cloud" over the reliability of the evidence will be insufficient, as the RPD must state why credibility is affected in more than vague and general terms (Hilo at para 6).
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> (*Lawani* at para 26)

[23] In my view, against this legal backdrop and given the evidence in the record, there is no merit to the Applicant's submission that the RAD erred in its treatment of his testimony.

[24] First, the RAD found that the Applicant's testimony that he slept in a car to avoid detention was inconsistent with the affidavit evidence of his friend, who deposed that the Applicant stayed in his house while in hiding. This serves to rebut the presumption that the Applicant's evidence was truthful.

[25] Further, the Applicant submits that the RAD ignored his evidence that, to avoid detection by the police the Applicant left to go to work very early in the morning and returned very late at night. However, the RAD stated that it had conducted an independent assessment of the evidence and arguments, including review of the RPD hearing transcripts provided by the Applicant and listening to portions of the recording of the hearing. Nor do the reasons given for a decision have to include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred (*Vavilov* at para 91).

[26] In any event, and more significantly, the fact that the Applicant left for work early and came back late was not relevant to and does not address the RAD's plausibility finding. The RAD reasonably found that it was inconsistent and implausible that the Applicant, who claimed he was in hiding from the police who were searching for him because he had been identified as a member of the LGBTIQ community, would continue to go to the same job at the bank that he had held for the prior 12 years for another 5 months until he fled Nigeria. The RAD found that it was improbable that in a country that is intolerant of members of the LGBTIQ community, and in a circumstance where the Applicant testified that the police were so intent on finding him that they had continued to search for him and had gone to his home looking for him on at least 3 occasions, that the Applicant would expose himself to the risk of being caught by the police by

continuing to go to work each day in a public place after he was exposed to the authorities as a member of the LGBTIQ community and after he claimed to be in hiding.

[27] The RAD also found that it was not probable that the police would not be able to locate the Applicant's place of work and apprehend him there. The RAD found that the Applicant's explanation to the RPD, when confronted with this, was that he had slept in a car. The RAD found that this did not explain how the Applicant could attend work daily for months without any authority finding him and that it was not reasonable to expect that someone who was hiding from the authorities would travel hours to go to the same place of work that he had worked at for years given the risk that he would be traced to his place of work.

[28] In my view, the RAD's implausibility finding was reasonable as the Applicant's testimony defied common sense and was outside of the realm of what could reasonably be expected in the prevailing circumstances. The Applicant's continued daily attendance at work at the bank was also put to the Applicant and was not reasonably explained by him. I see no error in the RAD's conclusion that this gave rise to a negative credibility finding that was central to the Applicant's claim.

*The marriage certificate*

[29] The Applicant submits that the inconsistencies related to the date of his marriage, his home address, and the inaccuracy of the transcript he provided were insignificant and the RAD erred by failing to give the Applicant an opportunity to make submissions on those issues. Further, that the RAD should not have drawn an adverse credibility finding based on the

inaccuracy of the transcript because the Applicant did not prepare the transcript. Making a conclusion that the transcript was not accurate amounts to impermissible speculative reasoning.

[30] The Respondent submits that there were inconsistencies in the marriage certificate that reasonably undermined the Applicant's credibility. And, contrary to the Applicant's submissions, the Applicant was given an opportunity to respond to those inconsistencies. The Respondent also disputes that the RAD was merely relying on peripheral inconsistencies.

[31] The Federal Court of Appeal in *Armson v Canada (Employment and Immigration)*, 9 Imm LR (2d) 150, [1989] FCJ No 800 (CA) (QL/Lexis) held that a decision maker should not draw adverse credibility findings unless evidence is either contradicted, inconsistent, or inherently suspect. Further, this Court has held that adverse credibility findings should not be based on inconsistencies that are peripheral to an applicant's claim (*Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 11 (FCTD); *Lawani* at para 23).

[32] Here, however, and as discussed above, the RAD reasonably found that the Applicant's evidence about going into hiding was central to his claim, being that he is a bisexual man who is being sought by the Nigerian police, and was not credible. Further, the RAD explicitly acknowledged that the other inconsistencies in the Applicant's evidence were as not as significant as the Applicant's evidence about being in hiding, but found that that they also weighed against his credibility. Thus, these were secondary credibility concerns and were identified as such by the RAD. For example, as to the inconsistent dates of birth for the Applicant and his wife and their ages as between the marriage certificate and the Applicant's

testimony, the RAD weighed the alleged error in marriage certificate dates "in the context of other errors that weigh against the Applicant's credibility". Further, the Applicant submitted the marriage certificate as documentary evidence supporting his claim, which included that the police had gone to his home and advised his wife that the Applicant was involved in a same sex relationship and that the police were seeking his whereabouts. Given this, inconsistencies about the date of his marriage and his home address were relevant to the assessment of the credibility of his claim as a whole. The RAD considered the evidence in whole and did not dismiss the Applicant's claim based on peripheral inconsistencies.

[33] The RAD also noted that there was an inconsistency in the Applicant's testimony about the date of his marriage. At the RPD hearing, he testified that he was married on April 24, 2012. When the RPD pointed out that this was not consistent with his marriage certificate, which indicated that the date of his marriage was April 21, 2012, the Applicant testified that he thought he had stated the latter date. The RAD noted that the RPD had accepted this as a plausible explanation. However, despite this, the Applicant had continued to argue the point before the RAD, quoting transcripts that he had provided that state he had testified that he was married on April 21, 2012. The RAD found, having listened to the recording of the RPD hearing, that it was clear that the interpreter stated April 24, 2012 and that there had been no objection to the translated date. The RAD went on to say that it was unclear why the Applicant was raising the issue, given that the RPD had accepted his explanation. However, as he had raised it, the RAD pointed out that his transcript was not accurate on the point. The RAD found that the Applicant may not have been clear in his testimony and this may not have been a significant point,

however, it was confirmation that there were errors in the transcripts and that this also did not enhance his credibility.

[34] The Applicant submits that the RAD was wrong to have made a negative credibility finding on its "assumption that the transcript submitted was not accurate" and failed to consider that the transcript was not prepared by the Applicant but by "a certified personnel". Further, that making a conclusion that the transcript was not accurate amounts to speculative reasoning, which is not a legitimate basis upon which a credibility finding can be made.

[35] In my view, these arguments are also of no merit. The RAD did not assume that the transcript submitted by the Applicant was inaccurate. The RAD compared the transcript to the actual recording of the RPD hearing and found that it was inaccurate. Moreover, it was the Applicant and his counsel who caused the transcript to be prepared and submitted. The fact that the Applicant now asserts that it was not him, but an unidentified "certified personnel" who prepared it, does not change the fact that he was responsible for the document that he submitted. Nor does he actually assert that his version of the transcript was, in fact, accurate. In this circumstance, I do not agree with the Applicant that the RAD erred in failing to provide him with an opportunity to be heard on this point. The recording and the inaccurate transcript spoke for themselves.

[36] Nor is it clear that the RAD actually drew an adverse credibility inference based on the inconsistency with the transcript submitted by the Applicant. Rather, the RAD found that the submission of an inaccurate transcript did not enhance his credibility, which it had already found

to have been negatively impacted by his evidence as to a central aspect of this claim, going into hiding.

[37] Additionally, I note that the Applicant does not contest the RAD's finding that when asked by the RPD about the difference in the Applicant's home address as between his marriage certificate and his application, the Applicant responded that houses are normally renumbered and that this could probably be the explanation. When asked if his house had been renumbered, the Applicant responded only to say that houses are renumbered a lot. The RAD found that this was not a reasonable explanation given that the Applicant had lived in his home for 4 years and that it was more likely than not that he would remember whether his home was renumbered.

*The supporting affidavits*

[38] The Applicant submits that the RAD erred by discounting the affidavits of his wife and his friend on the basis that, in Nigeria, it is unlikely that someone would swear an affidavit to another's LGBTIQ status (*Gbemudu v Canada (Citizenship, Refugees and Immigration),* 2018 FC 451 at para 81(*Gbemudu*)). The Applicant also submits that the prevalence of fraudulent documents in Nigeria does not mean that all documents are fraudulent and should not be assessed on their merits (*Gbemudu* at para 79). Rather, the affidavit evidence creates a presumption of truth and that the RAD should have relied on the affidavits. The Applicant submits that the RAD erred by relying on the generalization as to the availability of fraudulent documents and in failing to assess the affidavits for their worth and with an open mind.

[39] The Applicant also submits that his wife's affidavit establishes that the police in Nigeria now believe the Applicant to be bisexual, which is a criminal offence in Nigeria, and seek to arrest him. He submits that this goes to his risk upon return as he is now perceived to be a bisexual.

[40] The Respondent submits that the RAD did not dispute whether it was possible for a family member or friend to swear an affidavit to someone else's LGBTIQ status. Rather, the RAD merely commented on the likelihood that someone would swear such an affidavit and that *Gbemudu* is distinguishable. Nor did the RAD reject the affidavits based on the fact that fraudulent documents are widely available in Nigeria. The RAD assessed the affidavits in light of its overall finding that the Applicant's story lacked credibility. The Respondent submits that the RAD was entitled to give no weight to evidence that merely corroborates a story already found to be not credible. Further, that it was reasonable for the RAD to rely on an Immigration and Refugee Board RIR when assessing the weight to be given to affidavit evidence (*Ikheloa v Canada (Citizenship and Immigration),* 2019 FC 1161 (*Ikheloa*)).

[41] I note that, with respect to the supporting affidavits, the RAD stated that it had considered the evidence supporting the Applicant's claim. This included two affidavits from the Applicant's wife stating that the Applicant told her that he was a bisexual and that the police are still looking for him. The RAD again noted that the Applicant's claim that he remained in Nigeria for 5 months and worked in the same place after the police knew of his bisexuality was not consistent with the statements that the police are still searching for him. The RAD also noted that the record contained a RIR in which sources confirm that it is unlikely that someone would swear an

affidavit regarding another person's membership in the LGBTIQ community. Further, that there are also two other RIR's that address the likelihood of an affidavit where someone in Nigeria swears to a person's membership in that community. In the second of these, a source reported that it would be very unusual for a barrister to swear such an affidavit and that the majority of the sources indicate that it is unlikely that a person would swear to another person's membership in the LGBTIQ community. The RAD stated that it had weighed all of the available evidence and found that it was more likely than not that it is unusual for an affidavit in Nigeria to be sworn on this issue. And, even if the Applicant's wife swore the affidavit, the RAD must still weigh the content of it in the context of all of the evidence on record. On that basis, the RAD gave the affidavit little weight.

[42] The RAD also noted that fraudulent documents are easily available in Nigeria and, considering the affidavits in the context of the evidence on rampant forgery, the RAD was unable to give them weight. Nor did the affidavits provide sufficient evidence to address the flaws in the Applicant's evidence.

[43] As to the affidavit of the Applicant's friend, the RAD again noted that it was unlikely that anyone in Nigeria would swear such an affidavit, that fraudulent affidavits are widely available and that the affidavit was inconsistent with the Applicant's account that he slept in a car while the friend deposed that the Applicant stayed in the friend's house. The RAD stated that RIR reference sources indicate that it is not a standard practice in Nigeria for a Commissioner of Oaths to swear an affidavit regarding a person's gender or sexual orientation.

[44] A review of the RAD's reasons and the record that was before it demonstrates that the RAD referenced RIR NGA105379.E, dated January 7, 2016, which concerns whether a Commissioner of Oaths or a notary public would notarise a statement or swear an affidavit in which an individual admits to being a bisexual, or to knowing of someone's sexual orientation. The RIR states that other sources indicated it would be strange for a person to swear to an affidavit about sexual orientation because this would amount to reporting themselves under Nigerian laws, which make homosexuality illegal. As to family members making such an affidavit, a source gave an opinion that the situation would be the same as that of an individual seeking an affidavit about sexual orientation – that this would be unusual and amount to reporting the person to the law. Family members would be unlikely to swear such an affidavit, but may be more willing if the LGBTIQ individual was guaranteed absolute confidentiality or security. RIR NGA105653.E, dated November 18, 2016, also speaks the unlikelihood of a barrister or solicitor would swear to such an affidavit and was referenced by the RAD.

[45] In this regard, the Applicant submits that the fact that a person would be unlikely to swear an affidavit to show another person's membership in the LGBTIQ community does not means it is impossible, and that the RAD made an assumption and selectively used evidence to support this assumption. Further, that it is a settled principle that family members can depose an affidavit in support of their bisexual family member's claim.

[46] In my view, this argument cannot succeed. First, the RAD was entitled to rely on the RIRs and, unlike *Ikheloa*, here the Applicant submitted no opinion or other evidence intended to bring into question the reasonableness of that reliance (*Ikheloa* at paras 20-22). Second, the RAD

accurately stated that the majority of the sources referenced in the RIRs indicated that it was unlikely that individuals, who are members of the LGBTIQ community, or their family members, would swear affidavits deposing to the sexual orientation of such individuals because it would put the individual at risk. The RAD made no assumptions and did not selectively use the RIR evidence. Moreover, the onus was on the Applicant to establish that it was more probable than not that such an affidavit would be sworn. The mere fact that it was not impossible for the Applicant's wife and friend to swear such an affidavit does not meet that burden. Further, while the Applicant submits that the affidavit was only intended to be used in Canada, as the Respondent points out, the risk arises from the making of the affidavit in Nigeria, not where it will be used.

[47] I am also of the view that *Gbemudu,* relied upon by the Applicant, does not assist him. While in that case, in analysing the RIR 105653.E, Justice Russell stated his view that the information contained in the RIR seemed hypothetical and skeptical that such an affidavit would be necessary, and that he could not find any instances where individuals had been punished for swearing an affidavit (*Gbemudu* at para 81), Justice Russell ultimately found that the RIR was not relevant to the application before him. This was because the affiant in that instance was promised confidentiality, the affidavit was only for use in the proceedings in Canada, and the affiant did not actually swear knowledge of the applicant's sexuality (*Gbemudu* at para 81). Thus, *Gbemudu* is distinguishable on its facts. Here, the facts are more similar to *Ikheloa* given that the affiants, the Applicant's wife and friend, deposed actual knowledge of the Applicant's sexuality and there is no evidence that they sought or were guaranteed confidentiality. Like in *Ikheloa,* the RAD weighed the available evidence and concluded that it was more likely than not

for an affidavit to be unusual. In my view, the RAD's analysis based on the RIRs was reasonable.

[48] The RAD also considered the affidavits in view of the documentary evidence as to the availability of fraudulent documents and its other concerns with the affidavits, including that the affidavit of the Applicant's friend was inconsistent with the Applicant's version of events. In that context, the RAD afforded them little weight.

[49] I agree that the easy availability of fraudulent documents in Nigeria does not mean that all documents from that country are fraudulent and, therefore, on that basis, the affidavits from Nigeria need not be assessed on their merits. However, it was open to the RAD to afford no weight to evidence which serves to corroborate a story already found not to be credible, which is the circumstance in this case (*Lawani* at para 24; *Lawal v Canada (Citizenship and Immigration)*, 2010 FC 558 at para 22; *Jia v Canada (Citizenship and Immigration)*, 2014 FC 422 at para 19). Here, the RAD found that the central aspect of the Applicant's claim lacked credibility, it was therefore entitled to afford little weight to affidavits presented to corroborate that version of events. Further, the RAD also assessed the supporting affidavits, finding that they did not provide sufficient evidence to address the flaws in the Applicant's evidence.

[50] As to the Applicant's argument that the evidence establishes that he will be perceived as bisexual in Nigeria, the RAD found that the Applicant's narrative about what happened to him in Nigeria – being sought by the police because of his orientation – was not credible. In so finding, the RAD dispensed with any issues related to his bisexual identity and any perception of his

sexual identity. Put otherwise, the RAD did not believe the central element of the Applicant's claim that the police in Nigeria were pursuing him because of his sexual orientation and therefore the RAD afforded the affidavit evidence little weight. Accordingly, this is not a case, such as *Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760, relied upon by the Applicant, where the evidence established that the authorities in Nigeria believed that the applicant therein was a homosexual and he was, therefore, at risk as a result of that perception.

*Residual claim*

[51] The Applicant submits that the letter from 519 Centre, the MCC letters, and the affidavit from the Applicant's same sex partner in Canada were unreasonably dealt with by the RAD. He submits that attendance at the MCC and at the 519 Centre demonstrates membership in the LGBTIQ community and the letters from those entities are probative evidence of sexual orientation. Further, that the affidavit from his same sex partner should have benefited from the presumption of truth found in *Maldonado*, and his partner's failure to testify at the RPD hearing should not diminish the weight or content of his evidence.

[52] The Respondent takes the position that neither letter from the MCC nor the 519 Centre letter constitute evidence of the Applicant's sexual orientation. Further, the letter from the 519 Centre only states that the Applicant attended a meeting in October 2016. The Respondent submits that the RAD reasonably found that the affidavit from the Applicant's same sex partner was vague. He also did not appear to be questioned by the RPD. The Respondent submits that the RAD reasonably found that the affidavit did not provide sufficient evidence to conclude that it is more likely than not that the Applicant is a member of the LGBTIQ community.

[53] Here, the Applicant has submitted a letter of support from the 519 Centre, dated October 26, 2016 which states that the Applicant is a member and completed a newcomer orientation session in October 2016 and has since been attending and participating in weekly support group meetings and LGBTIQ related workshops. The RAD accepted that the Applicant had some involvement with the 519 Centre but noted that this could only have been for a few weeks, given that the letter was dated October 26, 2016. The RAD also noted that there was no updated evidence from the 519 Centre. The RAD acknowledged that the Applicant had testified that he had gone to a meeting the week before the hearing in April 2018, but found that there was still not a clear picture of the Applicant's actual level of activity with the 519 Centre. The RAD distinguished *Leke v Canada (Citizenship and Immigration)*, 2007 FC 848 and *Diallo v Canada (Citizenship and Immigration)*, 2012 FC 562, which had been relied upon by the Applicant. The RAD also considered the affidavit from a man with whom the Applicant claims to be having a relationship in Canada, noting that it states that he and the Applicant attend the 519 Centre, but found that it was vague because it did not say how often they attended. Nor did the deponent come to the RPD hearing to afford the RPD an opportunity to question him.

[54] The original MCC letter dated October 9, 2016 confirms that the Applicant attended the MCC seeking support for his claim to remain in Canada due to his sexual orientation. The letter states that he has attended since September 25, 2016, attended one monthly Refugee Peer Support meeting and showed an interest in volunteering. The letter goes on to say that by engaging with MCC the Applicant has shown his willingness and level of comfort in being a part of its community as a bisexual man. A more recent letter from MCC, dated February 11, 2018, states essentially the same thing, varied to the extent that it states that the Applicant has attended

"several" monthly meetings and has volunteered his time and services at the MCC information centre. No information is provided as to how often this has occurred. The RAD addressed this evidence, as well as the Applicant's testimony that he usually goes to church at MCC. It also noted the affidavit evidence of the man with whom the Applicant alleges he is in a same sex relationship in Canada. The RAD found that the affidavit does not indicate the frequency of attendance, that the Applicant's testimony was vague, especially considered in the context of the later MCC letter. The RAD also found that the MCC letters did not provide an opinion as to the Applicant's sexual orientation. The RAD found that the MCC evidence was not sufficient to address the flaws with the Applicant's claim. As to the affidavit from the person said to be in a same sex relationship with the Applicant in Canada, dated January 30, 2018, the RAD also found this to be vague.

[55] The RAD concluded that the evidence provided by the Applicant, including the 519 Centre letter and MCC letters, simply established he had some involvement or level of activity in the LGBTIQ community, but not that he was an active member. The RAD found the evidence to be vague as to the type, frequency and level of commitment to the organization. Further, that this was not a case where there was sufficient credible evidence of an applicant's membership in the LGBTIQ community to overcome a finding that the applicant's narrative was not credible. Further, that the Applicant's testimony as to his relationship in Canada, which would have been ongoing since December 4, 2016, was also vague and the deponent of that affidavit did not testify. The RAD found that, even on a cumulative basis the evidence was not sufficient to establish that it was more likely than not that the Applicant was a member of the LGBTIQ community. The evidence regarding his sexuality was vague and, even considering the

supporting documentary evidence on it own merits, it was afforded little weight and it was not sufficient to establish that it is more likely than not that he is a member of the LGBTIQ community.

[56] As a preliminary observation, while the RAD characterizes this part of its analysis as addressing the Applicant's residual claim, it is not residual in the sense that this aspect of the Applicant's claim concerned other or different alleged grounds of persecution. Rather, the RAD noted that the Applicant's position before it was that, simply because he may have lied about one part of his claim, it did not necessarily follow that his entire story was not credible and, in essence, he asked the RAD weigh the credible evidence against the other evidence. This appears to be the analytical approach taken by the RAD.

[57] And while, in my view, it is possible to take issue with some points in the RAD's assessment, such as that the 519 Centre letter did, in fact, indicate the type of involvement of the Applicant, viewed in whole, the RAD's conclusion that the evidence as to the Applicant's sexual orientation was vague is supported based on a review of the evidence before it, which is found in the record. The onus was on the Applicant to establish the residual claim with convincing evidence.

[58] Nor is this a situation such as *Buwu v Canada (Citizenship and Immigration)*, 2013 FC 850, relied upon by the Applicant. There, the applicant was not in a same sex relationship in Canada, and therefore, her evidence as to her active involvement in LGBTIQ communities was essential to her claim. Here, the Applicant claims to be in a same sex relationship in Canada and

his evidence as to the extent of his involvement with the MCC and 519 Centre was limited and did not suggest an active role, as found by the RAD. Further, while such membership is one factor that may be considered by the RAD when assessing whether an applicant has established his or her claimed sexual orientation, it will seldom be sufficient on its own to establish this.

[59] In this case, the Applicant claims to have been involved in a same sex relationship in Canada since December 2016. Yet, his own testimony and the affidavit of his alleged partner lacked detail concerning this relationship. His alleged partner's affidavit is brief. As to the relationship, its states the dates when he and the Applicant met and were first intimate, that they spend quality time together when they are free, they shop, worship at MCC and attend functions at the 519 Centre on Wednesdays. The affidavit essentially hits on the points raised by the Applicant, but provides no other insight or level of detail that might be expected to flow from a couple's day to day life together. This lack of detail potentially could have been cured had the Applicant's alleged partner attended to testify before the RPD as he indicated in his affidavit he was willing to do. The transcripts indicate, however, that the Applicant stated that the deponent did not attend the hearing held on April 16, 2018 because he has a new job, because of the nature of his work, because of his schedule and because they were short of staff. He did not attend the hearing held on May 29, 2018 because he had lost his father a month ago and he had been ill. There is no evidence that the Applicant sought an adjournment so that his alleged same sex partner could testify.

[60] The RAD found that the supporting evidence was not sufficient to establish that it was more likely than not that the Applicant is a member of the LGBTIQ, which I take to mean that he

had failed to establish his sexual identity and, therefore, that he would be at risk upon return to Nigeria. I see no reviewable error and, in effect, the Applicant is now asking this Court to reweigh the evidence, which is not its role (*Qaddafi v Canada (Citizenship and Immigration)*, 2016 FC 629 at para 59).

*Section 97*

[61] The Applicant submits that notwithstanding its negative credibility findings, the RAD was obligated to consider whether objective country condition evidence established that he was at risk as a member of the LGBTIQ community.

[62] The Respondent submits that the RAD found there was insufficient credible evidence that the Applicant was a member of the LGBTIQ community. Further, the RAD specifically addressed and reasonably concluded that the Applicant was not at risk pursuant to s 97.

[63] Case law cited by the Applicant establishes that even though an applicant may not be credible, the underlying decision maker still needs to assess whether removal would subject the applicant personally to the risks stipulated in s 97 of IRPA (*Odetoyinbo v Canada (Citizenship and Immigration)*, 2009 FC 501 at paras 6-8 (*Odetoyinbo*)). Here, however, the Applicant's sexual identity is the basis for both his s 96 and s 97 claims. The RAD concluded that the Applicant was not a member of the LGBTIQ community on a balance of probabilities. It found that the burden of proof necessary to establish that a person is in need of protection pursuant to s 97 is higher than for establishing that one is a Convention refugee under s 96. As there was insufficient evidence to establish the risk under s 96, then it followed that there was also insufficient evidence to establish the same risk and that the Applicant was a person in need of

protection under s 97. This is unlike *Bastien v Canada (Citizenship and Immigration)*, 2008 FC 982, relied on by the Applicant, where the applicant's gender was an evident form of membership in a possibly persecuted group and was separate from her central claim (at paras 10-11), or *Odetoyinbo* where the RPD failed to make an explicit determination about whether the applicant was bisexual, and therefore erred in failing to conduct a separate s 97 analysis (at para 8). Here, the RAD made its conclusion that the Applicant had not established that he was a part of the LGBTIQ community before concluding that a s 97 claim grounded on the same risk was similarly not made out. No error as arises in its treatment of s 97.

**Conclusion**

[64] In conclusion, having considered the outcome of the RAD's decision in light of its underlying rationale, I find that the decision as a whole is transparent, intelligible and justified (*Vavilov* at para 15). Accordingly, the RAD decision was reasonable.

**JUDGMENT in IMM-3131-19**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3131-19 |
| **STYLE OF CAUSE:** | GABRIEL OLADELE ABOLUPE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JANUARY 9, 2020 |
| **JUDGMENT AND REASONS:** | STRICKLAND J. |
| **DATED:** | JANUARY 21, 2020 |

**APPEARANCES:**

| | |
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| Hillary Adams | FOR THE RESPONDENT |

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