Federal Court Cour fédérale

Date: 20210108

Docket: IMM-5621-20

Citation: 2021 FC 32

Ottawa, Ontario, January 8, 2021

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ADENIRAN OYEWALE ADEKOLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The Applicant brings this motion dated December 17, 2020 seeking an Order staying the removal of the Applicant to Nigeria. It is scheduled to take place on January 9, 2021, pending a determination by this Court of his application for leave and for judicial review of a negative Pre-Removal Risk Assessment (PRRA) decision by an Officer of Immigration, Refugees, and Citizenship Canada in September 2020.

[2] The Applicant is a 39-year-old national of Nigeria. He entered Canada on March 19, 2012 and submitted a claim for refugee protection April 16, 2012 claiming that he was bisexual and that he was engaged in the same sex relationship with a man in Nigeria. He moved to the United Kingdom to begin a master's degree program at a university in Scotland.

[3] On March 19, 2012, he came to Canada to attend a wedding. At that time, he alleges his homosexual lifestyle had become known in Nigeria. Among other claims, he alleges that this caused his grandmother's health to worsen contributing to her death. This in turn led his uncle to blame him for her death thereby demanding that he return to Nigeria for a ritualistic spiritual cleansing.

[4] On November 30, 2012, the Refugee Protection Division (RPD) rejected the Applicant's refugee claim. The Applicant did not seek a judicial review of the RPD decision.

[5] The RPD found significant omissions in his Port of Entry notes, implausibilities in his claims about a same-sex relationship in Nigeria, and too many coincidences between the timing of his arrival in Canada for a wedding and his alleged sexuality being revealed in Nigeria.

[6] In addition, the RPD found that the Applicant had provided inconsistent testimony about whether he was homosexual or bisexual. The RPD noted the Applicant could not provide any reasonable explanation as to why he never expressed his alleged sexuality while living in the United Kingdom prior to coming to Canada, or why he failed to seek protection in the United

Kingdom. The RPD concluded that, on a balance of probabilities, the Applicant was not homosexual or bisexual.

[7] On March 21, 2013, one month after the rejection of his refugee claim, the Applicant entered into a same-sex marriage with a partner (the second partner). The second partner sponsored his application to become a Permanent Resident in Canada. The application was compromised following his arrest for attempting to solicit sexual services from a 16-year-old girl. He pled guilty to the charge and was convicted on June 21, 2017 of obtaining sexual services. The Applicant was sentenced to a 90-day intermittent sentence. In 2018, a new sponsorship application was submitted which is currently pending.

[8] The Applicant submitted a PRRA application in March 2018. In September 2020, the Senior Immigration Officer (the "Officer") denied the application on the basis that the evidence was insufficient to overcome the RPD's credibility findings or persuade the Officer that the Applicant is homosexual or bisexual. Additionally, the Officer found that the evidence was insufficient to show that the Applicant's mental health would constitute a risk if he is removed to Nigeria.

[9] In November 2020, the Applicant filed an Application for Leave and for Judicial Review of his negative PRRA decision, which represents the underlying decision supporting the within motion. He then received a Direction to Report for his removal to Nigeria on January 9, 2021.

[10] It is common ground that the applicable tripartite test is that stated in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA): that there is a serious issue to be tried, that the applicant would suffer irreparable harm by reason of his deportation, and that the balance of convenience lies in the applicant's favour and that the applicant must satisfy each branch of the test. Similarly, a stay is considered extraordinary equitable relief.

[11] In consideration of the first factor of a serious issue, this Court has held that interim relief should be granted only when the applicant can demonstrate that the proceedings are not frivolous or vexatious, or not manifestly without merit: *Sowkey v Canada (Minister of Citizenship and Immigration)*, 2004 FC 67.Additionally, the Supreme Court has ruled that findings of fact considered in judicial review applications can only be set aside in exceptional circumstances: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 125–26 [*Vavilov*]. The motions Court cannot engage in a less strict standard that permits a reweighing of evidence that supports a factual finding based on some probative evidence, and not exceptionally in error, or clearly speculative.

I. Treatment of the Evidence

[12] The Applicant submits that there are serious arguable issues regarding the Officer's treatment of his new evidence in attributing it insufficient probative value to overcome the RPD's adverse credibility finding that he is bisexual or homosexual.

[13] Credibility findings are most often derivative decisions in the sense that they derive from other contributing or foundational credibility factual findings considered together. That is the case here in that the adverse credibility finding depends on a series of evidentiary assessments that tended to undermine or support the Applicant's sexual orientation claim. It is important to recognize that factual review principles enunciated in *Vavilov* prohibiting reweighing of evidence and limiting intervention to exceptional circumstances, apply both to each of the underlying factual conclusions and the overall credibility assessment. This differentiation was recognized by the Officer when he stated that "I have considered all the evidence submitted before me individually and in its totality."

[14] In this case, the Officer started from the adverse credibility findings of the RPD that were based upon a series of issues that the RPD found undermined the credibility of the Applicant's claimed sexual orientation. This is an appropriate starting point where credibility issues involve the same determination.

[15] There is no error in principle in the Officer's conclusion that the new evidence was of insufficient probative value to overcome the RPD's credibility findings concerning the Applicant's sexual orientation. The Applicant can only argue that while accepting the RPD's findings on this issue, they should be modified based on his new evidence. Thus, when the issue is the same in both venues, the outcome depends on whether the assessment of the probative positive value of the new evidence is sufficient in a global assessment to overcome the RPD's negative findings. The entire exercise is one of assessing all the evidence and weighing it individually and globally to determine the outcome—an exercise which can only be overturned

in exceptional circumstances. This does not discount other reviewable or process errors, such as not considering relevant evidence that could affect the outcome of the case as a ground to set aside the decision.

[16] The Applicant cites the decision of *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 [*Magonza*], particularly the Court explanations of the term "sufficiency" vis-à-vis circumstantial evidence. Two respectful comments are offered regarding *Magonza*. First, it preceded *Vavilov*, which imposes a strict non-interventionist approach to the judicial review of facts, similar to that imposed on appellate courts reviewing decisions of trial courts in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]. Indeed, *Vavilov* references paragraphs 16 and 17 of *Housen* in adopting the same policy considerations supporting a non-interventionist approach followed by appellate courts.

[17] Second, some respectful comments may be offered regarding the teachings in *Magonza* relied upon by the Applicant concerning its discussion about the concepts of "probative value", "weight" and "sufficiency". Most of evidentiary first instance decision-making is a matter of scaling the "sufficiency" of the "probative value" or "weight" of the "assessed" evidence to determine whether it achieves the required factual threshold of proof as a probability or likelihood, i.e. 50+1 %.

[18] "Probative value" and "weight" are usually considered synonyms, both entailing assessment findings of the value of the evidence to prove the fact in issue. "Weight" tends to be the preferred term in comparing the probative value of different factual findings supporting

higher-level factual conclusions, such as those supporting the adverse credibility finding in this matter, but "probative value" can serve the same purpose.

[19] No benefit is apparent in attempting to create a strict distinction in the use of the two terms when both are fundamentally scaling estimates of the value of the evidence to prove a fact, or to compare the value of proved facts. The rule against "reweighing" the evidence is also a rule against reassessing the probative value of the evidence, and not simply a limitation on comparing the probative values of different assessed facts. It would be too fine and impractical a distinction of the two terms, and would serve only to undermine the non-interventionist policies intended to strictly limit reviewing courts interfering in assessment findings of fact by adding confusion where none is warranted.

[20] In addition, it is respectfully submitted that the term "sufficiency" cannot be considered "a word used by decision-makers to say they are not convinced" or the equivalent to a corroboration requirement (Magonza at para 33). As noted, the term "sufficiency" refers to the scaling of the probative value or weight of the evidence. This accords with the reference in Magonza at para 32 that "sufficiency" could be applied to inferences of fact, that is, "whether the cumulative weight of all the evidence is sufficient to warrant a finding that the disputed fact exists." Normally, the salient issue is described as whether the drawing of the inference is speculative or not. Nonetheless, this use of "sufficiency" bears the same scaling attribute which decision-makers advert to in rendering factual findings to determine whether the probative value or weight of the evidence is sufficient to prove the probability or likelihood of the disputed fact. This is how it is understood when the Officer in this matter used the term in relation to the

weight or probative value of the evidence to uphold the adverse credibility findings of the RPD, including for comparative purposes in assessing the weight of the different proved new facts relating to the credibility of the Applicant's claimed sexual orientation.

II. Analysis

[21] The Court concludes that the Applicant has not established the existence of a serious issue regarding the factual finding of the Officer that the new evidence is insufficient to overcome the RPD's credibility finding that the Applicant is neither bisexual or homosexual.

[22] The Officer's reasons were detailed and comprehensive in support of a decision that was both justifiable and justified in considering all aspects of the Applicant's submission regarding the treatment of the evidence. A reviewing court would essentially be requested to reweigh the evidence, which it is prohibited from doing.

[23] The Officer concluded based on assessment of all of the evidence submitted individually and in its totality that it was insufficient to overcome the RPD's credibility findings that the Applicant is, on a balance of probabilities neither bisexual or homosexual.

[24] Credibility findings are recognized as the heartland of the RPD's jurisdiction. In attempting to repudiate a negative credibility finding of the RPD, the probative value of the evidence presented to the Officer should be considerable. The RPD's findings are based on a form of objective evidence in the sense that the member's conclusions are drawn from the Applicant's testimony and his evidence as assessed and weighed in a real time, actual setting.

[25] The Officer's assessment of problematic issues relating to the Applicant's new evidence is justified in two respects. First, the Applicant failed to lead evidence before the RPD of his same-sex relationship with the second partner that had begun in August 2012. It began some three months before the RPD hearing. The Officer indicated

> "that there is no explicit mention of [the second partner] before the RPD, which would have been reasonably expected if the two have been in a relationship since … August 2012. In fact, the applicant has submitted a letter of support from [the first partner], whom he indicated was his sexual partner at the time, and not from [the second partner]. [Emphasis added]

[26] This inferential conclusion is founded on the Applicant's evidence and cannot be considered speculative. Moreover, there is a well-established rule that parties must put their best foot forward in proceedings. The failure to submit the evidence regarding the second homosexual relationship undermines the Applicant's efforts to prove his alleged sexual orientation. The submission suggesting the evidence of the first partner was not diametrically opposed to the reality that the Applicant was also dating the second partner at that time does not explain the failure to bring the evidence forward in the RPD hearing.

[27] Second, the Applicant argues that the Officer's approach is problematic when referring to the Applicant being convicted of attempting to solicit sexual services from a female minor. The Officer found this evidence to be inconsistent with his prior testimony before the RPD whereby he advanced that he was a homosexual and seemingly un-attracted to women. In this regard, he had previously testified that he was usually "switched off" whenever alone with his then girlfriend. After his first homosexual encounter, he stated before the RPD that he misled his girlfriends telling them to wait until the wedding night before having sex, and that he had

girlfriends “as a face-saving measure among [his] peers at university.” Soliciting sex from underage girls is clearly inconsistent with this evidence. This is in addition to the RPD’s finding that it was not probable that the Applicant, a well-educated man in his then late 20s, was not aware that he was a homosexual until his hearing for refugee protection. A reviewing Court would find no exceptional or unreasonable error in pointing out this inconsistency as a further ground to uphold the RPD’s conclusion regarding a lack of credibility.

[28] In any event, the Applicant’s submissions on this issue were directed at the RPD’s perceived inconsistency finding, when the Applicant’s explanations before the RPD were completely reasonable, which he alleges the Officer completely ignored. The Applicant did not seek leave to judicial review the RPD decision. Nevertheless, he is prohibited from attempting a collateral attack on the RPD’s decision before the PRRA Officer, and as such this submission must be rejected.

[29] The Officer’s foregoing two adverse findings based on the Applicant’s acknowledged conduct sufficiently supplement the weight of the evidence supporting the RPD’s conclusion that the Applicant was not credible in his claim to be either bisexual or homosexual. They would be sufficient in themselves to support the Officer’s conclusion rejecting the application.

[30] Nonetheless, considering the Applicant’s other submissions, there would be no basis for the reviewing Court to interfere in the decision assigning lesser weight to the various new evidence provided the Officer. This includes the legal and joint banking documentation pertaining to his marriage that the Officer found did not prove the Applicant’s sexual orientation.

Similarly, the Applicant would be requesting that the reviewing Court reweigh the Officer's findings that his Facebook profile and letters from his spouse, siblings and friends, were of lesser weight, and insufficient to overcome the RPD's adverse credibility findings.

[31] The diminished weight the Officer assigned to the letters of suspension issued to the Applicant and his father by his church in Nigeria due to knowledge of his sexual orientation is similarly not a matter that is subject to the reviewing Court's intervention. The fact that there is no evidence pertaining to how the author of the letters came about the information pertaining to the Applicant's sexuality is a pertinent consideration. In any event, the Officer accepted the suspensions of the Applicant and his father, but determined that the evidence was insufficient to overcome the RPD's credibility findings, a weight assessment finding that the reviewing Court is barred from considering.

[32] A reviewing court similarly has limited scope to consider the Officer's conclusion according the psychological reports little weight, and also not assisting in overcoming the RPD's credibility findings regarding the Applicant's sexuality. The Officer pointed out that the reports were based upon the Applicant's information and, moreover, in some respects was inconsistent with information contained in the PRAA file. There is also an absence of evidence of additional treatment. Finally, the report was advocating for the Applicant that he should be allowed to remain in Canada.

III. Failure to hold a hearing regarding credibility

[33] The Officer was not required to hold an oral hearing as his analysis did not turn on credibility, but rather rests on an insufficiency of evidence to overcome the negative credibility concerns of the RPD (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at paras 25–27). This Court has found that credible evidence can be assigned little weight and that a weighing of the evidence is not necessarily considered a credibility finding, as is the case in this matter (*Mudiyanselage v Canada (Citizenship and Immigration)*, 2018 FC 749 at para 31). There is no basis to suggest that the Officer should have held a hearing regarding the Applicant's credibility, particularly when no issues have been raised that would benefit from a hearing.

THIS COURT ORDERS that the motion for a stay of removal is dismissed as the Applicant has not established a serious issue.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5621-20
STYLE OF CAUSE:	ADENIRAN OYEWALE ADEKOLA and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 7, 2021
JUDGMENT AND REASONS:	ANNIS, J.
DATED:	JANUARY 8, 2021

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