Federal Court  Cour fédérale

**Date: 20210723**

**Docket: IMM-1307-20**

**Citation: 2021 FC 787**

**Toronto, Ontario, July 23, 2021**

**PRESENT: Mr. Justice Diner**

**BETWEEN:**

**ALEXANDER EBIALA OMIRIGBE**
**PORTIA ISIMEMEN OMIRIGBE**
**DESTINY OGAR OMIRIGBE**
**VICTORIA ORJI OMIRIGBE**
**TREASURE ENEYI OMIRIGBE**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] This application judicially reviews a decision of the Refugee Appeal Division ("RAD") dated January 28, 2020, which confirmed under s 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] the finding of the Refugee Protection Division ("RPD")

that the Applicants are neither Convention Refugees nor persons in need of protection. For the reasons that follow, I find no reviewable error and I will therefore dismiss this application.

## II. Background

[2] The Applicants are a husband (the "Principal Applicant") and wife and three minor children.

[3] The Principal Applicant alleges that, because he is bisexual, he would be killed if he were to return to Nigeria, as would his wife and children, due to their relationship with him. He alleges to have been in at least two homosexual relationships in Nigeria, the first of which was with a man ("M1"), who was the Principal Applicant's first homosexual partner, and the last of which was with a another man ("M2"), who may have revealed the Principal Applicant's sexual orientation to state authorities under questioning. The Principal Applicant's relationship with M2 ended abruptly due to this incident, and prompted his flight from Nigeria.

[4] The Principal Applicant provides the following version of events surrounding these two relationships. Regarding the first, in 1995, while a student at what I will refer to as High School 1, another student observed the Principal Applicant and M1 engaging in sexual activity in the school's washroom. As a result, the school expelled him so he enrolled at another school ("High School 2") that same year. He claims to have attended High School 2 from 1995 to 1998.

[5] The incident involving M2 happened two decades later when he states that a group of young people tortured an ex-boyfriend ("Ex") of M2 in September 2017, forcing the exposure of

names of other homosexual people. After this incident, the Principal Applicant states that he began fearing for his life in Nigeria, having potentially been included amongst these names.

[6] The RPD, and later the RAD, found a number of inconsistencies in the Principal Applicant's account, and both ultimately rejected the claim on the basis of credibility. Although it is the RAD's decision that is the subject of this judicial review, the RPD's decision is important to review because the Applicants allege that given that the RAD found some errors in the RPD's decision, it was unreasonable for the RAD to conclude that that decision was nonetheless correct. I will begin with a summary of the RPD's decision, and then move on to that of the RAD.

A. *The RPD's decision*

[7] The RPD pointed out a number of inconsistencies in the Principal Applicant's narrative. First, the RPD challenged the Principal Applicant on the fact that his school certificate from High School 2 states that he attended it from 1992 to 1998, that is, for the duration of his high school years. The certificate also states that the Principal Applicant began his studies there at the JS1 level, the first year of high school in Nigeria. These findings contradict the Principal Applicant's assertion that he started attending High School 2 after the incident with M1 in 1995.

[8] The Principal Applicant responded to the RPD that "he had a certificate from that institution because he had graduated from there". However, the panel rejected this explanation because it failed to explain why the certificate states that he began his high school studies there,

beginning at the JS1 level in 1992, at a time when, in his account, he was studying at High School 1 with M1.

[9] The contradiction led the RPD to conclude, on a balance of probabilities, that the Principal Applicant did not change schools in 1995 after being discovered in the washroom with M1. In turn, this finding led to the RPD's broader finding that, on a balance of probabilities, the Principal Applicant did not have a romantic relationship with M1.

[10] The panel found further problems with the Principal Applicant's narrative regarding his relationship with M2. Specifically, the Principal Applicant stated that, at the time of the September 2017 attack on the Ex, he was supposedly in a Lagos hotel room with M2, where they received the phone call about the attack. However, the RPD pointed out that the Principal Applicant's passport stamps suggest that he had left Nigeria on July 28, 2017, and returned on November 8, 2017. When asked to explain the contradiction between his account and the stamps in his passport, the Principal Applicant stated that "perhaps he had mixed up the dates, that he was discouraged and unwell at the time, and that he may have gone to Egypt".

[11] The RPD found that this absence from Nigeria also contradicted the Principal Applicant's account of what he did in the two months between the September 2017 events and his flight from Nigeria in November 2017. The Principal Applicant had explained that he dedicated those two months to raising the funds needed to flee Nigeria, while continuing to work and making travel arrangements to leave Nigeria.

[12] Finally, the Principal Applicant also wrote in his Basis of Claim that he had gone to Cairo from January 2017 to July 2017, but that he had remained in Lagos for the four months until his departure in Nigeria in November 2017. The PRD found that this statement, which was contradicted by the evidence, further undermined the Principal Applicant's overall credibility.

[13] Given the inconsistencies, the RPD found that, on a balance of probabilities, he did not have a romantic relationship with M2 and was not bisexual. The panel also raised a number of other issues with the evidence that the Principal Applicant had submitted. It gave no weight to various documents presented for the following reasons.

[14] First, in an e-mail from M1 dated November 2018 (the "E-mail"), M1 stated that he had been trying in vain to reach the claimant since the attack and that he had learned that the Principal Applicant had left for the United States a year earlier. However, during the hearing, the Principal Applicant testified that he had contacted M1 while he was still in the United States, where he was only briefly between arriving from Nigeria in November 2018 and travelling to Canada to claim refugee status. While the RPD did not raise this apparent contradiction, it explained in its reasons that it had already disbelieved there was any relationship with M1, and so gave the E-mail no weight as evidence that the claimant is bisexual.

[15] Second, a death notice presented by the Principal Applicant stated that the Ex died on September 20, 2018. However, the Principal Applicant testified in the hearing that M2 informed him of the Ex's death when the Principal Applicant had fled to the United States in 2017. When asked about the discrepancy in dates, the Principal Applicant stated that he had received the

death notice from M1 and that it was possible that the date had been changed by mistake by those responsible for writing death notices. Counsel for the Applicants also stated that M1 may have fabricated the death notice to help the Principal Applicant's claim. The RPD rejected these explanations.

[16] Third, a letter from the local government youth council denounced the Principal Applicant's homosexual activities. However, the RPD noted that the letter refers to the Principal Applicant as "Alexandra" and not "Alexander". When asked why this letter contained an error in his name, the Principal Applicant stated that he did not know. Other documentation presented also contained similar misspelling of the Principal Applicant's name.

[17] Fourth, transcriptions of text messages referred to threats with respect to his sexual identity. The RPD could not verify via the provenance of these given a lack of date or sender.

[18] Fifth, a letter from the Montreal LGBTQ+ Community Centre confirmed the Principal Applicant's membership. The RPD noted that these documents could be obtained by anyone, and one did not need to belong to a sexual minority group to join the Centre.

B. *The RAD*

[19] The Applicants appealed to the RAD. As before this Court, they argued that the RPD committed two breaches of natural justice by failing to give them the opportunity to address the credibility issues it found with the transcript of text messages and the E-mail from M1. They also argued that the RPD erred by unreasonably (i) failing to consider material evidence, and (ii)

being microscopic in its findings, which like the RPD, found inconsistencies and contradictions in between the evidence and testimony of the Principal Applicant.

[20] In terms of evidence presented before the RAD, it refused to admit two documents that the Applicants had tendered, namely (i) an identification certificate from High School 1, and (ii) a letter from High School 2. The RAD refused to accept these under *IRPA* s 110(4) on the basis that both were previously available, and were being provided in order to counter the negative credibility findings noted above.

[21] Although the RAD ultimately found that the RPD decision contained certain errors – most significantly failing to assess all of the documentary evidence before making its credibility conclusions – it rectified these by assessing all of that evidence independently. After conducting its own review of the evidence, and listening to the hearing, it found that the RPD's outcome was correct, in that credibility was the determinative issue, and that the Applicants had failed to establish their claim with adequate evidence.

[22] Regarding the allegation of procedural unfairness, the RAD found that the RPD did not breach natural justice principles when by failing to explain its specific concerns it had with the weaknesses in the text messages and E-mail provided. The RAD agreed that, generally, inconsistencies in a claimant's evidence should be put to the claimants before the decision-maker relies on these inconsistencies to impugn a claimant's credibility. However, the RAD noted that the RPD's decision was based on numerous contradictions, and not on the texts or E-mail, to which it gave little weight.

## III. Issues and Standard of Review

[23] The Applicants claim that the RAD decision was both unreasonable and unfair.

[24] The parties agree that the standard of review is that of reasonableness, as none of the circumstances that rebut the presumptive standard arise in this case: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[25] In terms of the procedural fairness argument, there is no allegation here of a breach by the RAD. Rather, the Applicants allege the procedural unfairness occurred at the RPD. This Court has held that reasonableness also applies to the review of RAD determinations on whether the RPD process was procedurally fair. In *Ahmad v Canada (Citizenship and Immigration)*, 2021 FC 214 at para 13, Justice Walker confirmed that RAD determinations on allegations of procedural fairness violations by the lower tribunal (i.e. the RPD), are to be reviewed on a reasonableness standard, as follows:

> The RAD's determination of whether there was a breach of procedural fairness before the RPD is one aspect of the merits of its decision and is presumptively subject to review for reasonableness, consistent with *Vavilov*. None of the exceptions identified by the Supreme Court for departing from the presumptive standard of review apply in this case. A number of recent decisions of this Court have confirmed reasonableness as the standard of review of the RAD's consideration of the fairness of the RPD's process (*Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24; *Ibrahim v Canada (Citizenship and Immigration)*, 2020 FC 1148 at para 11). In contrast, if an applicant questions the fairness of the RAD's process, no standard of review is engaged and the Court reviews the RAD's process to determine whether it was fair to the applicant having regard to all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[26] More recent cases have confirmed this approach, including *Muamba v Canada (Citoyenneté et Immigration)*, 2021 FC 388 at paragraphs 8-10, as well as in *Guerrero Jimenez c Canada (Citoyenneté et Immigration)*, 2021 FC 175 at para 10. Thus, I will review the RAD's Decision a reasonableness standard.

[27] To be clear, reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where necessary to safeguard the legality, rationality, and fairness of the administrative process, and finds its starting point in the principle of judicial restraint and respect for administrative decision makers: *Vavilov* at para 13. To determine whether a decision is reasonable, the Court must ask whether it bears the hallmarks of justification, transparency and intelligibility in light of the relevant factual and legal constraints that bear on it (*Vavilov* at paras 99 and 101).

## IV. Analysis

### A. *The Decision was reasonable*

[28] The Applicants have not convinced me that the RAD made any reviewable error. First of all, in light of the hearing below, the RAD selected the appropriate standard of review – correctness – to review the RPD (*Citizenship and Immigration) v Huruglica*, 2016 FCA 93, *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 [*Rozas del Solar*]). This included its assessment of both the credibility and procedural fairness allegations.

[29] Regarding the substantive findings of the RAD Decision, which were based on numerous inconsistencies and contradictions including the five described above, as well as the rejection of the "new" evidence that was reasonably available prior to the RPD hearing. A RAD appeal is not a second chance to submit evidence to answer weaknesses identified by the RPD: *Abdullahi v Canada (Citizenship and Immigration)*, 2016 FC 260 at para 15.

[30] At the hearing before this Court, the Applicants argued that the RAD erred by giving unreasonable weight to the E-mail and text messages. Specifically, counsel cited various cases for the principle that decision-makers cannot cite authenticity concerns of documents such as e-mail and text messages, as a basis to give them "low weight", which was succinctly explained by Justice Mactavish in *Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 20:

> [20] This Court has, moreover, previously commented on the practice of decision-makers giving "little weight" to documents without making an explicit finding as to their authenticity: see, for example, *Marshall v. Canada (Citizenship and Immigration)*, 2009 FC 622 at paras. 1-3, [2009] F.C.J. No. 799 and *Warsame v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1202, at para. 10. If a decision-maker is not convinced of the authenticity of a document, then they should say so and give the document no weight whatsoever. Decision makers should not cast aspersions on the authenticity of a document, and then endeavour to hedge their bets by giving the document "little weight". As Justice Nadon observed in *Warsame*, "[i]t is all or nothing": at para. 10.

Applicants' counsel also pointed to other decisions including *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 27 for the same principle.

[31] I acknowledge and accept the Applicants' argument that the RAD cannot shirk making a credibility assessment to hide behind a finding of low probative value. However, I do not agree that the principle applies here, because the panel did not assign low weight based on authenticity or provenance concerns. Rather, it decided that the E-mail and texts did not cure the various inconsistencies and contradictions the Principal Applicant himself made in his testimony, vis-à-vis his narrative and other documentation, that led both tribunals to determination that he was not bisexual.

[32] Indeed, the text messages and E-mail were submitted to corroborate the Principal Applicant's story. The RAD effectively found that they were insufficient to overcome the fundamental issues with that story itself, including the schooling issues, passport stamps showing he was out of the country during the alleged attack against the Ex, inconsistency in dates of the Ex's death certificate, and name misspellings on two key documents (amongst other negative credibility findings of the RAD). When confronted, the Principal Applicant was unable to overcome these determinative issues.

[33] There was nothing inappropriate about the RAD placing low weight on the printouts of the E-mail and text messages. The RAD found the problems lay in the story itself, and the evidence was simply inadequate to establish otherwise, including the fact that it was unable, from the quality of the texts and E-mail, to glean sufficient information to place anything but little weight on them. The RAD did not make a finding of the credibility of the E-mail or texts.

[34] The RAD may assess a document's probative value without assessing its credibility. See for instance Justice McHaffie's decision in *Arsu v Canada (Citizenship and Immigration)*, 2020 FC 617 at para 41, relying on the oft-cited paragraphs 26-27 of *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 in which Justice Zinn wrote:

> If the trier of fact finds that the evidence is credible, then an assessment must be made as to the weight that is to be given to it. It is not only evidence that has passed the test of reliability that may be assessed for weight. It is open to the trier of fact, in considering the evidence, to move immediately to an assessment of weight or probative value without considering whether it is credible.

[35] The RAD agreed, finding that "I have reviewed the text messages and concur that given the lack of information as to when these texts were sent and by whom, the texts are not reliable evidence and are given little weight" (Decision at p 6). The same weaknesses were apparent in the E-mail.

[36] In short, the evidence was inadequate to overcome the numerous inconsistencies and evolving testimony of the Principal Applicant when confronted on them (RAD Decision at p 10), which, after a review of the record, was a reasonable finding of the RAD.

[37] The procedural fairness arguments raised also focus primarily on the E-mail and text messages. Specifically, the Applicant claims that the RAD erred in finding no breach of procedural fairness before the RPD, because he was never properly informed of RPD's concerns as to the authenticity and reliability of the evidence.

[38] Once again, no reviewable error occurred: I am simply not persuaded that the RAD erred in finding that the RPD did not breach procedural fairness or natural justice.

[39] First, as explained above, the E-mail and text – as much as the Applicants would have liked them to be – were not determinative of the claim. To the contrary, the RAD had plenty of other concerns regarding the testimony and narrative, which the E-mail and text did not overcome.

[40] Second, and notably, the Applicants presented both pieces of evidence themselves. This was not a case of extrinsic evidence being used to undermine the credibility of the Applicants, which triggers the right to be confronted (*Moïse v Canada (Citizenship and Immigration)*, 2019 FC 93 [*Moïse*] at paras 9-10; *Akanniolu v Canada (Citizenship and Immigration)*, 2019 FC 311 [*Akanniolu*] at paras 45-47).

[41] Here, in my view, the RAD reasonably determined that no breaches of natural justice occurred at the tribunal below. Noting that the RPD's decision did not relate to any contradiction coming out of the text messages or E-mail, the RAD appropriately followed this Court in *Ngongo v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1627, 1999 CanLII 8885 (FC), which establishes the factors regarding confronting the applicants with evidence and which is still good law (see more recently, for instance, *Abiodun v Canada (Citizenship and Immigration)*, 2021 FC 642 at para 7).

[42] Third, beyond the E-mail and text messages, the RAD indeed found one issue where the RPD had fallen short procedurally, in that it did not properly consider the medical report that the Principal Applicant presented in light of the *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* ("SOGIE Guideline"). However, as with its documentary assessment, the RAD undertook the assessment of the SOGIE Guideline independently. In determining that no breach occurred, the RAD arrived at a reasonable conclusion about the claims in the medical report regarding the Principal Applicant's mental state, as opposed to how he had conducted himself during the hearing.

[43] Finally, the Applicants pointed out that when a hearing is conducted by way of reverse order questioning (*i.e.*, the decision-maker asking questions first and counsel questioning the applicant afterward), the person with the onus is no longer in control of the process and there is an increased burden on the Board to ensure that issues which are determinative of the claim are raised at the hearing (*Sarkar* at para 19).

[44] The Applicants were well aware of the case to be met; they were given ample opportunity to make submissions on the material issues and had a fair hearing and appeal – even in light of the "reverse order questioning" that counsel for the Applicants noted occurs in refugee hearings before the RPD (*Sarkar v Canada (Citizenship and Immigration)*, 2014 FC 1168 [*Sarkar*] at paras 15 and 19). Despite this standard procedure before the tribunal, the Applicants provided the documents in question themselves, and I agree with the Respondent that the panel did not have any onus to point out weaknesses that were, or should have been, obvious (*Akanniolu* at paras 45-47). As Justice Leblanc pointed out in *Moïse* at paragraph 9, procedural fairness does not

require claimants to be confronted about information of which they are aware, and in fact provided themselves.

[45] Overall, the RAD was justified in finding that the Applicants benefited from a fair hearing at the RPD, including the manner in which the hearing was conducted, the Applicants' participation in it, and their having been provided every opportunity to be heard. Its determination on procedural fairness was reasonable.

## V. Conclusion

[46] After conducting its own review of the case, identifying and correcting certain errors committed by the RPD, the RAD came to the same conclusion as the RPD: the Applicant's claim failed on credibility. In my view, considering the record as a whole, the RAD reasonably concluded that the Principal Applicant failed to establish the key elements of his claim. Furthermore, no procedural fairness breaches occurred. The RAD's findings, viewed holistically, were justifiable, transparent, and intelligible. The RAD made no reviewable error. I will thus not intervene. The parties proposed no certified question, and none arises.

**JUDGMENT in IMM-1307-20**

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

1. The judicial review is dismissed.

2. No certified question was proposed and none arises.

3. There is no order as to costs.

"Alan S. Diner"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1307-20 |
| **STYLE OF CAUSE:** | ALEXANDER EBIALA OMIRIGBE, PORTIA ISIMEMEN OMIRIGBE, DESTINY OGAR OMIRIGBE, VICTORIA ORJI OMIRIGBE, TREASURE ENEYI OMIRIGBE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HEARD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | JULY 13, 2021 |
| **JUDGMENT AND REASONS:** | DINER J. |
| **DATED:** | JULY 23, 2021 |

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