

Federal Court



Cour fédérale

Date: 20211230

Docket: IMM-1060-21

Citation: 2021 FC 1481

Ottawa, Ontario, December 30, 2021

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

PAUL UDEOZOH ONWUAMAIZU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [“*IRPA*”] of a decision rendered on January 13, 2021 by the Refugee Appeal Division (“RAD”). The RAD confirmed the decision of the Refugee Protection Division (“RPD”), which determined that the Applicant was neither a *Convention* refugee, nor a person in need of protection, as contemplated by sections 96 and 97 of the *IRPA*.

The determinative issue before the RPD and the RAD was the Applicant's credibility. For the reasons set out below, I dismiss the application for judicial review.

II. Summary of alleged facts

[2] Paul Udeozoh Onwuamaizu (the "Applicant") is a citizen of Nigeria. He claims that he would be subjected to a risk in Nigeria because of his sexual orientation.

[3] The Applicant is married to a woman. However, he claims that he was involved in an intimate relationship with a man, by the name of Eric, in Nigeria. The Applicant claimed he kept this alleged relationship secret until such time as his wife discovered conversations between him and Eric, on the Applicant's cell phone. The Applicant's spouse then shared this information with her pastor. The Applicant says that once confronted, he had to disclose his bisexuality. As will be shown, this narrative is inconsistent with the Applicant's assertion that his spouse knew of his bisexuality at the time of their marriage.

[4] The Applicant claims that the Nigerian authorities arrested Eric on October 15, 2017, at which time the police found explicit photographs and videos of the Applicant and Eric, on Eric's cell phone. Convinced that the authorities would recognize him from the pictures and videos and fearing the treatment of homosexuals in Nigeria, the Applicant fled for the United States on November 3, 2017. A few months later, he irregularly entered Canada and applied for asylum.

[5] The RPD found that the Applicant was not credible with regard to his sexual orientation.

This conclusion is based in part on the following:

- The Applicant indicated in his Basis of Claim form (“BOC form”) that he kept his relationship with Eric discreet and that they would disguise their communications. The RPD found that the fact that he kept intimate text messages on his phone and that he agreed to let Eric take explicit photos and videos of the two of them, contradicts these statements. The RPD also found that assertions that they regularly met in hotels contradicts the contention they were discreet about their relationship. Furthermore, the fact that the Applicant voluntarily gave his spouse his cell phone, which contained text messages and intimate photos, militated against the Applicant’s claims of discretion.
- The Applicant indicated in his BOC form that when his wife discovered his text messages with Eric, she visited their pastor. The Applicant claims that the pastor “read all his texts with Eric”. He, however, later states that he confessed his homosexuality to the pastor but “lied about his relationship with Eric”. The RPD found that it is contradictory that the Applicant would claim to have lied to the pastor about Eric after stating that the pastor read all his texts “with Eric”.
- An Inland Enforcement Officer (the “Officer”) interviewed the Applicant upon his arrival in Canada. The Applicant stated to the Officer that he did not know how the police came to arrest Eric. However, in his BOC form, he states that the police apprehended Eric during a routine check.
- The Applicant informed the Officer that his wife knew about his bisexuality before they married in 2012. However, in the BOC he states that she discovered his bisexuality in 2017.

[6] The Applicant submitted a letter from his spouse dated June 17, 2019, in which she declares that she is aware of her husband's bisexuality. The RPD did not give it any weight. The Applicant also submitted an alleged newspaper article, which reports about his relationship with Eric and how the latter was apprehended by the police. The RPD did not give any weight to this article, finding that it was not genuine. The RPD noted that the article, dated two years after Eric's alleged apprehension, named neither the journalist nor the newspaper.

[7] The RPD also found that the failure to make an asylum claim in the United States militated against his claim of subjective fear.

III. Decision under review - RAD

[8] The RAD dismissed the Applicant's appeal of the RPD's decision that he is neither a *Convention* refugee nor a person in need of protection. The RAD concluded that the Applicant lacked credibility as to his sexual orientation and the risk to which he would be subjected, if returned to Nigeria.

[9] The RAD agreed with the RPD's finding that the statements made to the Officer contradict the Applicant's statements in the BOC form and undermines his credibility. The RAD found that the RPD did not err by giving significant weight to the statements made to the Officer. The RAD noted that the Applicant understands and speaks English well. The Applicant certified that his statement to the Officer was true and correct.

[10] The RAD also agreed with the RPD's finding that the Applicant's use of cellphones for photographing his relationship and meetings in hotels, both militate against claims of discretion.

[11] The RAD, like the RPD, gave no probative value to the purported newspaper article.

[12] The RAD found that the RPD failed to provide sufficient reasons for concluding that the letter from the Applicant's wife was not credible. The RAD however concluded that the admission of that letter is insufficient to restore the Applicant's credibility, and that the totality of the evidence casts doubt on the genuineness of the letter.

[13] The RAD agreed with the Applicant that his failure to apply for asylum in the United States is not determinative of the analysis of subjective fear. The RAD however concluded that the Applicant failed to establish the allegations forming the basis of his refugee claim. The RPD's error regarding the failure to claim asylum in the United States was therefore not a determinative factor in either the RPD's or the RAD's decision.

IV. Relevant Provisions

[14] The relevant provisions are sections 96, 97 and 111 of the *IRPA*, and s. 7.4.1 of the Chairperson's Guideline 9 titled *Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression, and Sex Characteristics* ("Guideline 9"), all of which are attached hereto as Schedule A.

V. Issue

[15] The only issue before the Court is whether the RAD decision meets the test of reasonableness as enunciated in (*Canada (M.C.I.) v Vavilov*, 2019 CSC 65, 441 DLR (4th) 1 [“Vavilov”]). A decision is considered reasonable if it is one that is “based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). None of the exceptions to reasonableness review apply in the circumstances (*Vavilov* at para 17).

VI. Analysis

A. *Reasonableness of the decision*

[16] The Applicant contends that the RAD failed to proceed to its own independent assessment of the case, contrary to the principles set out in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157 [“Huruglica”].

[17] The Applicant also submits that the RAD erred when assessing his credibility by failing to apply the Guideline 9, despite the fact that it was argued on appeal. He argues that the failure for the RAD to consider a key argument renders a decision unreasonable (*Vavilov* at para 128).

[18] The Applicant says that when he was interviewed by the Officer, he did not know that he was making a statement for his refugee claim. He also claims that the Officer was speaking very quickly and that he was unable to fully understand what was being said. He claims that he was terrified during the interview, which compromised the information he provided, because the Officer asked if he could contact the Nigerian police. The Applicant further contends that he

first learned about the Officer's declaration containing his statements on the day of the first RPD hearing, and that he was not provided with the opportunity to make amendments to it. He claims that he tried to explain what happened with the Officer before the RPD, but his explanations were dismissed. He also states that he has self-acceptance issues, which affected the consistency of the information provided to the Officer and contained in his BOC form.

[19] The Applicant also submits that while the RAD made negative credibility findings because of the contradictions pertaining to his use of cellphones and his frequent hotel meetings with Eric, it failed to adequately justify those findings. He contends that the RAD's reasons do not demonstrate that it adequately considered the consequences of its decision on the Applicant's life, liberty and dignity.

[20] Finally, the Applicant contends the RAD should have deferred the matter to the RDP for re-determination. He submits that in instances where the credibility of the oral testimony is determinative of the issue, which he alleges is the case here, the RAD should exercise its power to refer the case back to the RPD, pursuant to s. 111(2) of the *IRPA (Ogbonna v Canada (Citizenship and Immigration))*, 2020 FC 180 at para 69).

[21] The burden of proving that a decision is unreasonable rests upon the Applicant. An applicant must establish, among others, that there are "sufficiently serious shortcomings in the decision", and that they are not merely "superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[22] The standard of review that the RAD must apply on appeal of RPD decisions, as set out in *Huruglica*, was summarized in *Guo v Canada (Citizenship and Immigration)*, 2017 FC 317, citing *Ghauri v Canada (Citizenship and Immigration)*, 2016 FC 548, [2016] FCJ No 529:

[17] The gist of *Huruglica* was aptly summarized by Justice Gleeson in *Ghauri v Canada (Citizenship and Immigration)*, 2016 FC 548, 267 ACWS (3d) 423, as follows:

[23] The RAD must apply the correctness standard of review with respect to reviewing findings of law, as well as findings of fact and mixed fact and law of the RPD that raise no issue of credibility of oral evidence and must take a case-by-case approach to the level of deference it owes to the relative weight of testimony and their credibility or lack thereof (*Huruglica* at paras 37, 69-71, 103).

[18] Furthermore, in cases which raise issues as to the credibility of oral evidence, of which this case is one, the RAD may apply a more deferential approach if “the RPD enjoys a meaningful advantage over the RAD in making findings of fact or mixed fact and law” (*Huruglica* at para 70).

[23] In the present case, the RAD opted not to show deference to the RPD’s credibility findings, instead applying the correctness standard to the entirety of the RPD’s decision (see, *Huruglica* at para 103).

[24] An examination of the RAD decision shows that it carefully considered the RPD’s findings, followed by its own analysis of the record. The RAD’s concurrence with many of the findings of the RPD does not constitute proof that it failed to proceed to its own assessment of the case (*Kayitankore v Canada (Citizenship and Immigration)*, 2016 FC 1030, [2016] FCJ No 1034 at para 23). Furthermore, the fact the RAD disagreed with the RPD’s conclusions regarding the Applicant’s failure to apply for asylum in the United States and the weight accorded to the

spouse's letter, belie the Applicant's contention that the RAD did not conduct an independent assessment.

[25] It is only in exceptional circumstances that a reviewing court will interfere with factual findings made by the decision-maker (*Vavilov* at para 125). I am satisfied that it was reasonable for the RAD to find that the Applicant's behaviour did not reflect the behaviour of someone who claimed to be discreet. I am also satisfied that it was reasonable for the RAD to conclude that the many contradictions in the Applicant's evidence undermine his credibility and cast doubt on his alleged story of persecution. Contrary to the Applicant's assertions, I find that the RAD adequately justified its conclusions on the issue of credibility.

[26] The Applicant's assertions with respect to the alleged failure to apply Guideline 9 have no merit. At paragraph 17 of its decision, the RAD stated that it considered Guideline 9. While such a blanket statement will not suffice to establish a policy or guideline was considered if the analysis is lacking, such is not the case in the circumstances (*Bains v Canada (Minister of Employment & Immigration)* (1993), 63 F.T.R. 312, [1993] F.C.J. No. 497; *Hagos v Canada (Citizenship and Immigration)*, 2021 FC 720 at para 23; *Somal v Canada (Citizenship and Immigration)*, 2021 FC 630 at para 11).

[27] Section 7.4.1 of the Guideline 9 provides as follows:

Cases involving individuals with diverse SOGIE are no different from other cases before the IRB in that decision-makers may draw a negative inference from material inconsistencies or contradictions in the evidence that have no reasonable explanations. Decision-makers should examine whether there are

cultural, psychological or other barriers that may reasonably explain the inconsistency. [Emphasis added]

In the present case, the RAD's analysis shows that it considered whether any barrier could explain the contradictions in the Applicant's evidence. It concluded there was no reasonable explanation for the contradictions between the Applicant's statements made to the Officer and those contained within the BOC form. An allegation of persecution based upon sexual orientation cannot be a basis for ignoring serious discrepancies in an applicant's evidence.

[28] The Applicant advanced numerous reasons why there were inconsistencies between his statements to the Officer and his BOC form. These, however, are raised for the first time before this Court. An issue not raised before an administrative tribunal cannot be examined in judicial review proceedings (*Mohajery v Canada (Minister of Citizenship and Immigration)*, 2007 FC 185, [2007] FCJ No 252 at para 28; *Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321, 476 FTR 314 at para 23; *Zahid v Canada (Citizenship and Immigration)*, 2021 FC 466 at para 12). I therefore decline to consider the numerous excuses advanced by the Applicant, for the first time before this Court, to justify his apparent untruthfulness.

B. *Should the RAD have referred the matter back to the RPD?*

[29] The Applicant asserts the RAD should have referred the matter back to the RPD. Section 111 of the *IRPA* reads as follows:

Decision

Décision

111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:

111 (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.

[...]

(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

(2) The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that:

(2) Elle ne peut procéder au renvoi que si elle estime, à la fois :

(a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and

a) que la décision attaquée de la Section de la protection des réfugiés est erronée en droit, en fait ou en droit et en fait;

(b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.

b) qu'elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen des éléments de preuve qui ont été présentés à la Section de la protection des réfugiés.

[Emphasis added]

Even where an applicant establishes that the necessary conditions exist, the RAD retains a discretion about whether to refer a matter back to the RPD. It is under no obligation. (*Huruglica* at para 78; *Canada (Citizenship and Immigration) v Alazar*, 2021 FC 637 at para 70).

[30] Regardless, I am not satisfied the RAD could, in the circumstances, have referred this matter back to the RDP. The test set out in s. 111(2)a) and b) is conjunctive (*Javed v Canada (Citizenship and Immigration)*, 2021 FC 574 at para 10). In order to meet the criteria set out in s. 111(2)b), the RAD must conclude that the RPD had a meaningful advantage regarding findings of credibility (*Huruglica* at paras 69-70). The Applicant in his written submissions categorically states that the RPD “did not have a meaningful advantage”. Furthermore, many of the contradictions found in the Applicant’s case do not implicate his oral testimony before the RPD. Many of those contradictions arise from documents such as the Officer’s declaration containing the Applicant’s statements and the BOC form. The RPD did not have a “meaningful advantage” when it comes to making credibility findings based upon those documents.

[31] It was entirely open to the RAD to confirm the RPD decision, rather than refer the matter back for re-determination.

VII. Conclusion

[32] I am of the opinion that the RAD’s decision meets the test of reasonableness. There is no justification to interfere with the credibility findings. There is no merit to the argument that the RAD failed to apply Guideline 9. There is no merit to the argument that the RAD should have

referred the matter to the RPD for re-determination. The within application for judicial review is dismissed.

JUDGMENT in IMM-1060-21

THIS COURT'S JUDGMENT is that the Application for judicial review is dismissed, without costs. There is no question certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"

Judge

SCHEDULE A

Immigration and Refugee Protection Act, SC 2001, c 27***Loi sur l'immigration et la protection des réfugiés, LC 2001, c 27*****Convention Refugee****Définition du réfugié**

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection**Personne à protéger**

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Decision

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Décision

111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:

111 (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.

(a) confirm the determination of the Refugee Protection Division;

(b) set aside the determination and substitute a determination that, in its opinion, should have been made; or

(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

(2) The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that:

(2) Elle ne peut procéder au renvoi que si elle estime, à la fois :

(a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and

a) que la décision attaquée de la Section de la protection des réfugiés est erronée en droit, en fait ou en droit et en fait;

(b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.

b) qu'elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen des éléments de preuve qui

ont été présentés à la Section de la protection des réfugiés.

Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics

Directives numéro 9 : Procédures devant la CISR portant sur l'orientation et les caractères sexuels ainsi que l'identité et l'expression de genre

7.4 Inconsistencies

7.4 Incohérences

7.4.1 Cases involving SOGIESC individuals are no different from other cases before the IRB in that members may draw a negative inference from material inconsistencies, contradictions or omissions that have no reasonable explanation. When assessing the reasonableness of an explanation given for an identified credibility problem, members should consider the personal, cultural, social, economic, and legal realities of SOGIESC individuals as well as their mental well-being, language barriers, and the impact of trauma. For instance, it may be difficult for an individual who has concealed their SOGIESC to disclose and discuss it with government authorities at a port of entry, which may give rise to an inconsistency between information from the port-of-entry interview and testimony at a hearing. As another example, SOGIESC identities may be fluid and an individual may self-identify as a gay man at the port of entry and as a trans individual

7.4.1 Les cas concernant des personnes dont les OCSIEG doivent être pris en considération ne diffèrent pas des autres dossiers dont est saisie la CISR, c'est-à-dire que les commissaires peuvent tirer une conclusion défavorable des incohérences, des contradictions ou des omissions importantes dans la preuve à défaut d'explication raisonnable. Au moment d'évaluer le caractère raisonnable d'une explication donnée pour un problème de crédibilité cerné, les commissaires devraient tenir compte des réalités personnelles, culturelles, sociales, économiques et juridiques des personnes dont les OCSIEG doivent être pris en considération, ainsi que de leur bien-être mental, des obstacles linguistiques et des répercussions d'un traumatisme. À titre d'exemple, il peut être difficile pour une personne qui a caché ses OCSIEG de les dévoiler et d'en parler avec les autorités gouvernementales au point d'entrée, ce qui pourrait

later in a Basis of Claim Form (BOC). Inconsistencies in terminology may also be reasonably explained. For example, letters of support reflect the perspectives of individuals who write them. The letter writer may not use the same terms or describe the person's identity in the same way as the person themselves.

entraîner des incohérences entre les renseignements fournis dans le cadre de l'interrogatoire au point d'entrée et ceux présentés dans le cadre du témoignage à l'audience. À titre d'autre exemple, les identités définies par les OCSIEG peuvent être fluides et une personne peut se désigner comme un homme gai au point d'entrée et comme une personne trans plus tard dans son formulaire Fondement de la demande d'asile. Les incohérences terminologiques peuvent également être expliquées de façon raisonnable. À titre d'exemple, les lettres d'appui reflètent les points de vue des personnes qui les rédigent. Il se peut que l'auteur de la lettre n'utilise pas les mêmes termes ou ne décrive pas l'identité de la personne de la même façon que la personne elle-même le fait.

FEDERAL COURT
SOLICITORS OF RECORD

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