Ottawa, Ontario, January 31, 2018

PRESENT: **The Honourable Mr. Justice Ahmed**

BETWEEN:

BOLANLE REHANAT OYEJOBI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I.   Overview

[1]   This case concerns a decision (the "Decision") of the Refugee Appeal Division ("RAD") upholding a decision of the Refugee Protection Division ("RPD") to reject a claim for protection. The Applicant is a 28 year old citizen of Nigeria. Although she is married to a man, she claims to be bisexual and maintained a secret sexual relationship with a woman in Nigeria. During a visit to Canada, her same-sex partner was arrested in Nigeria and the Applicant's sexual orientation

was thereby exposed. As such, she fears that that she may be subjected to "ritual cleansings" and female genital mutilation at the hands of her father's family, and her husband's family, should she return to Nigeria.

[2]   When preparing to hear the Applicant's claim, the RPD member noticed similarities between the Applicant's Basis of Claim ("BOC") narrative and that of another claimant. The RPD member nevertheless began the hearing, adjourning shortly thereafter and citing a need to inform the Minister of a possible integrity issue relating to the Applicant's BOC narrative. Upon continuation of the hearing, the Applicant unsuccessfully brought a recusal motion, arguing that the RPD member had already decided that the Applicant was not credible.

[3]   In its decision, the RPD found the Applicant to lack credibility: it did not believe that the Applicant is a bisexual woman, based on the credibility of her oral testimony and supporting documentation. She appealed the RPD decision to the RAD. The RAD largely confirmed the credibility findings of the RPD, as it found them to be reasonable. It furthermore reviewed the Applicant's documentary evidence and again agreed with the RPD's conclusions. The RAD also dismissed the Applicant's arguments that the procedure before the RPD was tainted by bias and procedural unfairness.

II.   Facts

[4]   Bolayne Rehanat Oyejobi (the "Applicant") is 28 years old and a citizen of Nigeria. She is married to A.L., who presently lives in Shagamu, Nigeria. She has one daughter, Zainab, who was born on June 28, 2016.

[5]   The Applicant asserts that she is a bisexual woman, and began having feelings for girls in her class and community at around the age of 13 or 14. She began her first relationship with a girl, O.L., in her second year of high school. The relationship involved sexual intimacy and was kept secret, with the pair seeing each other every week or two weeks. In 2007, the Applicant broke off the relationship after O.L. admitted to dating another girl.

[6]   The Applicant had a second same-sex relationship during her studies at Bowen University with a woman named K.O.; again, the relationship involved sexual intimacy.

[7]   After graduating, the Applicant's family pressured her to marry. She met her current husband and began dating him while simultaneously maintaining her relationship with K.O. She eventually married A.L. on December 19, 2015, due to intense pressure by her family and the family of her husband.

[8]   The Applicant came to Canada on January 31, 2016 for holidays. During her visit, she was informed that K.O. had been arrested for the offence of homosexuality. The police had discovered text messages and suggestive photos of the Applicant on K.O.'s phone, and K.O. admitted that they are lovers. As such, the Nigerian police are reportedly searching for the Applicant, having visited her family's home on multiple occasions. She fears that she could face persecution, including female genital mutilation and "ritual cleansings" at the hands of her father's family or her husband's family, should she return to Nigeria.

III.   Decision Under Review

[9]   The Decision is organized around three issues, as advanced by the Applicant on appeal to

the RAD: the RPD breached the rules of natural justice by exhibiting a reasonable apprehension

of bias, the RPD erred in its credibility assessment, and the RPD failed to analyze the

Applicant's claim under s. 97 of the *Immigration and Refugee Protection Act,* SC 2001, c 27

("IRPA"). The RAD reframes the issue of natural justice as one of procedural fairness: namely,

whether the RPD exhibited an apprehension of bias.

[10]   The RAD found that the RPD member did not exhibit a reasonable apprehension of bias.

The RAD justifies the RPD's approach by citing the overlap in investigative and adjudicative

functions of the RPD, as well as the RPD's statutory obligation to inform the Minister of any

perceived integrity issues. The RAD dismisses the Applicant's argument that the RPD member

ought to have recused himself after stopping the hearing midway, stating that this interpretation

would require a *de novo* hearing anytime the RPD discovers an integrity issue during the course

of a hearing.

[11]   The RAD then reviews the RPD findings on credibility with respect to: 1) the Applicant's

circumstance and realization of bisexuality; 2) details of the Applicant's relationship with O.L.

and how it ended; 3) details of the Applicant's relationship with K.O.; 4) the veracity of the

Applicant's last communication with K.O.; 5) the circumstances surrounding the Applicant's

learning of K.O.'s arrest; and, 6) the lack of corroborating evidence. The RAD affirms the

majority of the RPD's findings, determining that the RPD erred only in its assessment of the

Applicant's last communication with K.O. The RAD then conducts review of the documentary evidence and affirms the RPD decision.

[12]   The RAD dismisses the Applicant's argument that the RPD erred in failing to conduct a s. 97 analysis, finding that the RPD's conclusion that the Applicant is not a bisexual woman meant that no further analysis was necessary.

IV.   Issues

[13]   In my view, there is one central issue raised in this appeal: did the RAD err in finding that the RPD did not commit a breach of procedural fairness?

V.   Standard of Review

[14]   The standard of review applicable to questions of procedural fairness is correctness: *Adedipe v. Canada (Citizenship and Immigration)*, 2017 FC 673 at para. 19. I shall adopt the correctness standard in the case at bar.

VI.   Analysis

[15]   The Applicant submits that the RAD erred in finding that the RPD committed no breach of procedural fairness. To support this argument, the Applicant asserts that the RPD member approached the hearing with a poisoned mindset, as evidenced by his conduct around the allegation that the Applicant copied her BOC narrative from elsewhere. The Applicant points to the RAD's conclusion that "[h]ad this finding [about the allegedly copied testimony] been the

sole basis for the RPD's negative determination, the Appellant's argument would be more convincing" as evidence that the RAD wittingly or unwittingly acknowledged the RPD's finding was erroneous. The Applicant submits that, if one accepts that the RPD approached the claim with a biased mindset, the other credibility findings are irrelevant.

[16]   In contrast, the Respondent argues that the hearing procedure was not unfair, and that there was no reasonable apprehension of bias present throughout the proceeding. The Respondent recalls the RPD member's explanation for not notifying the Minister immediately after noting similarities in the BOC narratives (i.e. he had not yet formed the opinion that the Minister's intervention was warranted). The Respondent further argues that even if the RPD member ought to have adjourned the hearing prior to taking any testimony, the Applicant has failed to demonstrate that a different outcome would have resulted had the alleged error not occurred. The Respondent submits that the RPD member's decision to hear the Applicant's testimony is actually evidence of the fact that he was unbiased in his treatment of her case.

[17]   In my view, the RAD failed to reasonably consider whether the RPD committed a breach of procedural fairness. The most obvious evidence of this error is the RAD's failure to fully analyze the RPD member's compliance with Rule 27 of the *Refugee Protection Division Rules*, SOR/2012-256. Rule 27 states:

Notice to Minister of possible integrity issues **before hearing**	Avis au ministre — questions concernant l'intégrité **avant l'audience**
27 (1) If the Division believes, before a hearing begins, that there is a possibility that issues relating to the integrity of the Canadian refugee protection	**27 (1)** Si la Section croit, avant le début d'une audience, qu'il est possible que des questions concernant l'intégrité du processus canadien d'asile

system may arise from the claim and the Division is of the opinion that the Minister's participation may help in the full and proper hearing of the claim, the Division must without delay notify the Minister in writing and provide any relevant information to the Minister.	soient soulevées par la demande d'asile, et qu'elle est d'avis que la participation du ministre peut contribuer à assurer une instruction approfondie de la demande d'asile, elle, sans délai, en avise par écrit le ministre et lui transmet tout renseignement pertinent.
Notice to Minister of possible integrity issues <u>during hearing</u>	**Avis au ministre — questions concernant l'intégrité <u>pendant l'audience</u>**
(2) If the Division believes, after a hearing begins, that there is a possibility that issues relating to the integrity of the Canadian refugee protection system may arise from the claim and the Division is of the opinion that the Minister's participation may help in the full and proper hearing of the claim, the Division must adjourn the hearing and without delay notify the Minister in writing and provide any relevant information to the Minister.	**(2)** Si la Section croit, après le début d'une audience, qu'il est possible que des questions concernant l'intégrité du processus canadien d'asile soient soulevées par la demande d'asile, et qu'elle est d'avis que la participation du ministre peut contribuer à assurer une instruction approfondie de la demande d'asile, elle ajourne l'audience et, sans délai, en avise par écrit le ministre et lui transmet tout renseignement pertinent.
[Emphasis added]	[Je souligne]

[18]   In my view, the RPD member ignored the provisions of Rule 27. The RPD member

claims to have not invoked the Rule 27(1) because he was not of the opinion that the Minister

could provide "meaningful assistance" when he was preparing for the hearing, and then invoked

Rule 27(2) once he determined that the allegedly copied passages "would need to be addressed

after all." This explanation is simply repeated in the Decision without further analysis. I find this

to be problematic for at least three reasons.

[19]   First, the standard for notifying the Minister is not when there is a belief that the Minister may provide "meaningful assistance;" rather, it is triggered as soon as the RPD is of the opinion that the Minister's participation "may help in the <u>full and proper</u> hearing of the claim" (emphasis added). As such, the standard is much lower than the one employed by the RPD member.

[20]   Second, I am unable to identify the precise testimony from the Applicant that caused the RPD member to change his mind and decide that the Minister's assistance would, after all, be necessary to ensure a full and proper hearing. I find this to be particularly troubling, considering that the integrity issue was discovered prior to the hearing and involved the copying of BOC narratives. In my view, it is not clear from the RPD reasons how such an integrity concern would be resolved (positively or negatively) through the Applicant's oral testimony. In other words, and contrary to the assertion of the RPD, the copying of BOC narratives would present a significant integrity issue <u>whether or not</u> this Applicant is believed to be bisexual.

[21]   Finally, my review of the transcript shows that the RPD member actually did not invoke Rule 27(1) immediately because he was trying to "give the client a chance." As the RPD member himself stated, he wanted to see if he could find the Applicant credible (specifically with regard to her sexual orientation) – in spite of the perceived integrity issue – such that he might grant the claim. While the RPD approach is laudable in that it was likely motivated by a desire to give the Applicant the benefit of the doubt, the RPD member did not do what Rule 27 requires him to do, and his actions cannot be cured by the *ex post facto* explanation provided in the RPD decision. In my view, the RAD's contemplation as to whether the Applicant's procedural fairness rights were

breached was thus unreasonable, as it failed to engage in any meaningful analysis of the application of Rule 27.

VII.   Conclusion

[22]   The RPD committed a breach of procedural fairness by failing to comply with its obligations under Rule 27 of the *Refugee Protection Division Rules*; this error engages the Applicant's procedural fairness rights, and was not given due consideration by the RAD. I find that the RAD's finding with respect to this issue alone constitutes a reviewable error of law, and therefore the Decision cannot stand.

VIII.   Certification

[23]   Counsel for both parties was asked if there were questions requiring certification, they each stated that there were no questions arising for certification and I concur.

<u>JUDGMENT in IMM-2967-17</u>

THIS COURT'S JUDGMENT is that:

1. The Application is allowed, the Decision is set aside and the matter is referred

back for redetermination by a differently constituted panel.

2. There is no question to certify.

<div align="right">

"Shirzad A."
_____
Judge

</div>

DOCKET:	IMM-2967-17
STYLE OF CAUSE:	BOLANLE REHANAT OYEJOBI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 17, 2018
JUDGMENT AND REASONS:	AHMED J.
DATED:	JANUARY 31, 2018

APPEARANCES:

Richard Odeleye   FOR THE APPLICANT

Bridget A. O'Leary   FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor   FOR THE APPLICANT
Toronto, Ontario

Attorney General of Canada   FOR THE RESPONDENT
Toronto, Ontario