

Federal Court



Cour fédérale

Date: 20180315

Docket: IMM-3196-17

Citation: 2018 FC 301

Ottawa, Ontario, March 15, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

OLADOYIN DEBORAH FAROMINIYI

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP CANADA**

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], for judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD or the Board], dated June 29, 2017 [Decision], which confirmed the Refugee Protection Division's [RPD] determination that the Applicant is not a Convention refugee or a person in need of protection under ss 96 or 97 of the Act.

II. BACKGROUND

[2] The Applicant is a citizen of Nigeria. She claims that she is bisexual and that her family's discovery of her sexual orientation shortly before she left for Canada puts her at risk of persecution in Nigeria.

[3] The Applicant alleges that she became aware of her bisexuality when she was thirteen years old and began a sexual relationship with a classmate, Olayinka, at her boarding school. The relationship ended in 2009 when the Applicant and her classmate graduated from school. The Applicant claims that her next sexual relationship with a woman occurred while she attended university in another city from 2011 to 2015. Despite her partner, Mariam Yusuf, having a boyfriend, that relationship lasted until after the Applicant had graduated and moved home. The Applicant says that Mariam eventually broke off the relationship in November 2015 when she accepted her boyfriend's marriage proposal.

[4] Mariam's impending marriage led the Applicant to pursue going to school in Canada. She applied for a student visa on April 21, 2016 and learned that it had been granted later that June.

[5] Before leaving for Canada, the Applicant claims that she met a new girlfriend, Arewa, in March of 2016. The Applicant says that, as they became friends, she suspected that Arewa might be bisexual and that they began a sexual relationship in late April 2016.

[6] Since her departure for Canada was scheduled for August 13, 2016, the Applicant says that she met Arewa to say goodbye on August 4, 2016. As a parting gift, Arewa gave the Applicant a card and a photo of the couple kissing. The Applicant alleges that she hid the card and picture in her suitcase at home and that it was the discovery of this card and picture by her uncle and mother while they were repacking her suitcase two days later that revealed her sexual orientation to her family. The Applicant says that she was out shopping when the discovery occurred but was warned not to come home thanks to a phone call from her sister. The Applicant alleges that after she did not return home, her uncle called her and threatened to go to the police.

[7] The Applicant claims that she already had her passport with her since she had gone to do some banking, and had already bought a plane ticket. Therefore, rather than returning home, the Applicant stayed at a friend's house before leaving Nigeria on August 13, 2016. She arrived in Canada on August 15, 2016. She says that her sister informed her that her uncle had, in fact, gone to the police and that Arewa had been arrested.

[8] The Applicant made a claim for refugee protection in early September 2016, after being advised about the refugee process by a lawyer. Before her hearing at the RPD, the Applicant claims that she met another Nigerian refugee claimant, Victoria, and began a relationship with her. As part of the Applicant's refugee claim, Victoria provided a letter describing her relationship with the Applicant but did not attend the RPD hearing to testify.

[9] On December 29, 2016, the RPD rejected the Applicant's claim on credibility grounds. The Applicant appealed the RPD's determination to the RAD.

III. DECISION UNDER REVIEW

[10] The Decision confirms the RPD's determination and dismisses the Applicant's appeal.

A. *New Evidence*

[11] After recounting the background of the Applicant's claim, the RAD instructs itself as to the law relating to new evidence. The RAD then determines that the new evidence submitted by the Applicant does not meet the requirements of s 110(4) of the Act.

[12] The RAD finds that an affidavit submitted by the Applicant, which attempts to correct information and justify other issues from the RPD hearing, mostly contains information with no relevance and would not justify allowing the Applicant's claim. The RAD specifically notes that the Applicant's explanation in the affidavit about why Victoria could not attend the RPD hearing contradicts the explanation she gave during her testimony. The RAD finds that the affidavit is not probative because of this inconsistency, and does not admit it as new evidence.

[13] That RAD also rejects an affidavit from Victoria that was attached as an exhibit to the Applicant's affidavit. In the affidavit, Victoria swears that she intended to attend the hearing, but fell ill the day before and could not attend. The RAD points out that, as with the Applicant's affidavit, this explanation is inconsistent with the Applicant's testimony from the hearing that Victoria could not attend because she had an appointment. Because of this inconsistency, the RAD finds that Victoria's affidavit is not credible and does not admit it as new evidence.

Because the documents submitted by the Applicant were not accepted as new evidence, the RAD rejects the Applicant's request for an oral hearing under s 110(6) of the Act.

[14] The RAD also considers two more documents submitted by the Applicant after she had perfected her appeal record on February 15, 2017. The first is a copy of an affidavit sworn by the Applicant's sister, Folekemi Abolarinwa, dated February 25, 2017. The RAD finds that the information contained in this document is consistent with the Applicant's Basis of Claim [BOC] narrative, but notes that it omits "one very important detail" in that it does not describe Arewa's arrest. The RAD finds that it would have been reasonable to expect that the Applicant's sister would have included information on Arewa's arrest because she "was allegedly involved in the scenario with her uncle, and the police." The RAD also points out that according to the Applicant's BOC narrative and testimony, her sister was the one who warned her not to come home and informed her of Arewa's arrest once the Applicant arrived in Canada. Yet the Applicant testified that her sister was devastated by the revelation of her sexual orientation and had initially been unwilling to provide an affidavit. Rejecting the Applicant's explanation for the affidavit's lateness, the RAD finds that it was reasonably available before the RPD hearing and therefore does not meet the requirements of s 110(4) of the Act and Rule 29(4)(c) of the *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules]. The RAD also finds that, since the document is a copy and no explanation was given for the unavailability of the original, there is no way to determine its genuineness and that, on a balance of probabilities, the document is not genuine. The RAD further finds that information contained in the sister's affidavit was already before the RPD and therefore rejects the document as irrelevant under RAD Rule 29(4)(a).

[15] The second document is an affidavit sworn by Mariam Yusuf, the Applicant's partner from university, dated March 1, 2017. The RAD accepts that the information contained in the affidavit is consistent with the Applicant's BOC narrative and notes that the Applicant submitted that the document was not provided to the RPD because she had only recently been able to speak with Mariam. The RAD rejects Mariam's affidavit, however, as it finds that the document reasonably could have been acquired and that the Applicant "gave no reason for not contacting her alleged lover prior to submission of this document." Nothing in the Applicant's affidavit supporting admission of the document indicated prior attempts to contact Mariam.

[16] Because the RAD does not accept either affidavit as new evidence, it again rejects the Applicant's request for an oral hearing.

B. *Credibility*

[17] The RAD rejects the Applicant's submission that the RPD provided no evidentiary basis for its finding that the Applicant's testimony was hesitant and evasive and gives deference to the RPD's finding. The RAD states that it reviewed the recording of the RPD hearing and finds that "the transcript does not give a true picture of the hearing." The RAD gives no weight to a letter from the Riverdale Immigrant Women's Centre because the letter's description of the Applicant as "quiet and reticent, and unsure of what will happen" does not explain her evasiveness and hesitancy during the hearing. The RAD also notes that nothing indicates that the Applicant requested accommodation or was declared a vulnerable person.

[18] The RAD finds that Applicant was not forthcoming when testifying about her relationship with her first same-sex partner, Olaynika. The RPD asked the Applicant questions that allowed her to expand on the activities she and Olaynika were involved in, but other than explaining the layout of the dormitories at their boarding school, the Applicant only provided information that was already contained in her BOC narrative. The RAD also notes that when the RPD explained the necessity of providing corroboration of her same-sex relationships, the Applicant stated that she would be able to acquire documentation from Olaynika. The RAD says it never received any documentary corroboration regarding the relationship and draws a negative credibility inference about the Applicant's allegation.

[19] The RAD also finds that the Applicant gave confusing testimony about whether and how she first knew anyone who was lesbian. Her testimony that some girls at her school were lesbians and discussed being with girls contradicted her earlier story. The RAD finds that this undermines the Applicant's credibility.

[20] The RAD says that it is unable to deal with the Applicant's submission that the RPD made errors in its analysis of whether she provided unique and specific details about each of her relationships because the Applicant did not point to specific errors. The RAD also rejects the Applicant's submission that the RPD was incorrect to require corroborative documentation of her same-sex relationships. The RPD outlined issues in the Applicant's testimony and documentation that created credibility concerns and justified the RPD's requirement of corroborating documents. The RAD notes that it is the Applicant's onus to establish her claim and that the RPD can demand documentation that should be reasonably available.

[21] The RAD rejects the Applicant's submission that her testimony regarding her relationship with Victoria was not hesitant or unsure, as found by the RPD. The RAD finds that the transcript supports the RPD's finding on this issue. Regarding Victoria's non-appearance at the hearing, the RAD distinguishes *Kamburona v Canada (Citizenship and Immigration)*, 2013 FC 701, because in that decision the Court held that a majority of the Board's findings were unreasonable, a circumstance the RAD finds different from the Applicant's claim. And the RAD reiterates that it had already decided on credibility and timing grounds not to admit the Applicant's and Victoria's affidavits attesting to Victoria's explanation for not attending. The RAD therefore finds that the Applicant is not bisexual because none of the documentation submitted, or testimony given, allows her claim to be found credible.

[22] The RAD further finds that the Applicant's omission of two male partners from her BOC narrative determinately undermines the credibility of her bisexuality claim. The Applicant initially testified that she did not think that inclusion of her male partners in the narrative was important, and then testified that she thought it was normal to date men and abnormal to date women. The RAD finds that the Applicant's explanations for the omissions were inconsistent and confusing. Since the Applicant is university educated and there was no indication of intellectual dysfunction at the hearing, the RAD does not find her explanations to be credible. The RAD also finds that the portion of the transcript submitted by the Applicant to establish that she knew she was bisexual is not representative, and that the Applicant was inconsistent on this point.

[23] The RAD does find that the RPD made an error regarding the date of the alleged discovery of the Applicant's sexual orientation by her family, but also finds that this error is not determinative of the claim. The RAD also finds that, contrary to the RPD's assertions, the RPD never questioned the Applicant about why she left home with her passport, and that the Applicant did identify her father as an agent of persecution.

[24] The Applicant also submitted an affidavit from her mother. Based on a review of the transcript and the Applicant's mother's affidavit, the RAD finds that the Applicant is not credible in her allegation that she was given the news of her uncle's discovery of sexuality by her sister. The RAD notes that the Applicant only mentioned her sister living at her parents' home when questioned about it by the RPD, and that there is no mention of her sister in her mother's affidavit "with respect to what happened on August 6, 2016."

[25] The RAD finds that the Applicant's delay in claiming refugee protection upon arriving in Canada is not determinative. However, it is reasonable to expect that she would have claimed upon arrival based on her education level, admitted research into the acceptance of gays and lesbians in Canada, and the events that preceded her departure from Nigeria.

[26] The RAD states that it reviewed letters the Applicant provided from the 519 Community Centre and the Black Coalition for AIDS, but finds that they do not provide proof of the Applicant's sexual orientation because there is no indication that the community groups explored the Applicant's credibility. The RAD accepts that these groups do not have a personal interest in the outcome of the Applicant's claim, but finds no explanation of how they had established her

sexuality beyond self-declaration. The RAD gives no weight to a letter from the Metropolitan Community Church of Toronto because the letter's statement that the Applicant attends the church regularly contradicts the Applicant's testimony that she had not gone to any churches in Toronto. The RAD again gives no weight to the letter from the Riverdale Immigrant Women's Centre because information in the letter about the Applicant being threatened with ritual cleansing and forced marriage by her uncle was omitted from the BOC narrative. The RAD does not accept the Applicant's explanation that her mind was unsettled during the creation of the narrative and finds that it is reasonable to expect that the Applicant's testimony about when she received this information would be consistent.

[27] Because the RAD finds that the Applicant has not provided any credible documentation or testimony to support her allegation of bisexuality, it confirms the RPD's decision and dismisses the Applicant's appeal.

IV. ISSUES

[28] The Applicant submits that the following are at issue in this application:

1. Is the RAD's finding that the Applicant was evasive and hesitant during her hearing before the RPD unreasonable?
2. Is the RAD's consideration of the Applicant's evidence of her sexual orientation unreasonable?

[29] The Respondent frames the issues as follows:

1. Is the RAD's decision not to admit the Applicant's new evidence unreasonable?

2. Is the RAD's decision to uphold the RPD's credibility findings unreasonable?

V. STANDARD OF REVIEW

[30] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[31] The RAD's decision on whether new evidence meets the requirements of s 110(4) of the Act is reviewable under a reasonableness standard. See *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29 [*Singh*].

[32] The standard of review applicable to the RAD's credibility findings is also reasonableness. See *Majoros v Canada (Citizenship and Immigration)*, 2017 FC 667 at para 24.

[33] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible,

acceptable outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above, at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

VI. STATUTORY PROVISIONS

[34] The following provisions of the Act are relevant in this application:

Convention refugee

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,

(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

(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.

Person in need of protection

97 (1) A person in need of

Définition de réfugié

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) 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) 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.

Personne à protéger

97 (1) A qualité de personne à

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

(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.

...

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) 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

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

...

Procedure

110 (3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.

...

Evidence that may be presented

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

...

Hearing

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is

Fonctionnement

110 (3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.

...

Éléments de preuve admissibles

(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

...

Audience

(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve

documentary evidence referred to in subsection (3)	documentaire visés au paragraphe (3) qui, à la fois :
(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;	a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
(b) that is central to the decision with respect to the refugee protection claim; and	b) sont essentiels pour la prise de la décision relative à la demande d'asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

VII. ARGUMENT

A. *Applicant*

(1) Evasive and Hesitant Testimony

[35] The Applicant submits that the RAD's agreement with the RPD's finding that she was evasive and hesitant during her testimony is unreasonable. The RAD reached this conclusion by finding that the transcript is not a true picture of the hearing. The Applicant says that, rather than being evasive, she was scared and that responding to questioning was difficult. She says, however, that her responses were forthcoming and that the letter from the Riverdale Immigrant Women's Centre provides a legitimate explanation for her difficulties in testifying. She submits that the RAD should have placed more weight on the letter and explained why the transcript did not give a true picture of the hearing. The RAD's statement that it reviewed the recording provides no insight into how a true picture of the hearing led to the finding that the Applicant was evasive or hesitant.

(2) Evidence of Sexual Orientation

[36] The Applicant submits that new evidence she submitted to the RAD is relevant because the RPD impugned her credibility on the basis that her partner, Victoria, did not attend the hearing. The Applicant also submitted an affidavit from a former same-sex partner that corroborated her allegation that she is bisexual and the existence of their relationship. She says that she did not go into as much detail about her first same-sex partner in her BOC narrative because it was a relationship from secondary school that had taken place a long time ago.

[37] The Applicant points out that the Nigerian Penal Code criminalizes homosexuality and that this Court has recognized that there is a *prima facie* case that homosexuals and bisexuals will be at risk of persecution if returned to Nigeria. See *Ladipo v Canada (Citizenship and Immigration)*, 2014 FC 408 at para 9. She submits that she has provided evidence that she is a bisexual woman through affidavits that respond to issues at the RPD hearing. She says that a temporary loss of communication with Mariam and the unavailability of Victoria provide reasonable explanations as to why there was a delay in the Board receiving the evidence. The Applicant submits that, considering the serious risk she faces if returned to Nigeria, these affidavits should have been admitted by the RAD.

B. *Respondent*

(1) New Evidence

[38] The Respondent submits that the RAD's conclusion that it could not consider any of the new documents the Applicant submitted because they did not meet the criteria for admissibility of new evidence is reasonable. The RAD's function is to assess potential errors in the RPD's decision. See *Spasoja v Canada (Citizenship and Immigration)*, 2014 FC 913 at paras 42-44. In these circumstances, the RAD can only consider new evidence if it arose after the RPD's decision, or if it could not have reasonably been presented at the time of the RPD's decision: Act, s 110(4). The Federal Court of Appeal has held that the statutory criteria for admission of new evidence must be "narrowly interpreted": *Singh*, above, at para 35. The Court goes on to say that "[t]he role of the RAD is not to provide the opportunity to complete a deficient record submitted before the RPD": *Singh*, above, at para 54.

[39] Rather than a flexible approach to new evidence before the RAD, *Singh* establishes that "a restrictive approach to new evidence is reflected in the criteria and the RAD does not have discretion to ignore the criteria": *Demberel v Canada (Citizenship and Immigration)*, 2016 FC 731 at para 31. The RAD may reject documents as not meeting the statutory criteria "[i]n the absence of any evidence that the documents could not, with reasonable diligence, have been identified and disclosed": *Figueroa v Canada (Citizenship and Immigration)*, 2016 FC 521 at para 23 [*Figueroa*]. The Respondent points out that probative value and credibility are not enough to counteract the requirements of s 110(4) of the Act. See *Figueroa*, above, at para 45; *Singh*, above, at paras 36 and 63. The Respondent says that, even though the Federal Court of

Appeal acknowledged in *Singh* that the RAD has some flexibility to apply the conditions of s 110(4), such flexibility is permitted but not required. See *Singh*, above, at para 64. The Respondent says that it was the Applicant's responsibility to put her best foot forward before the RPD.

(2) Credibility

[40] The Respondent notes that the RAD correctly determined that it should only show some deference to the RPD's credibility findings where the RPD has a particular advantage. See *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93. Despite this, the RAD took issue with the RPD's credibility findings regarding the Applicant's father as agent of persecution and why she had her passport with her when her sexual orientation was discovered.

[41] The Respondent submits, however, that the Board is entitled to make adverse credibility findings on the basis of contradictions and inconsistencies in the evidence. See *Sheikh v Canada (Minister of Employment & Immigration)*, [1990] 3 FCR 238 (CA); *Alizadeh v Canada (Minister of Employment & Immigration)*, [1993] FCJ No 11 (QL) (CA). Reasonable findings can be based on implausibility, common sense and rationality. See *Aguebor v Canada (Minister of Employment & Immigration)* (1993), 160 NR 315 (FCA); *Shahamati v Canada (Minister of Employment & Immigration)*, [1994] FCJ No 415 (QL) (CA). The Board may reject evidence that is inconsistent with "the probabilities affecting the case as a whole": *Araya v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 626 at para 6. And adverse credibility findings can be made when allegations that go to the heart of an applicant's claim are omitted

from the BOC narrative and emerge at the hearing. See *Aragon v Canada (Citizenship and Immigration)*, 2008 FC 144 at paras 21-22.

[42] The Respondent says that documentary evidence submitted by the Applicant cannot cure deficiencies in the Applicant's testimony. And the Respondent notes that evidence from the Metropolitan Community Church of Toronto and the Riverdale Immigrant Women's Centre contradicted the Applicant's testimony. Nor do the Gender Guidelines disallow negative credibility findings or create an opportunity to add factual context to a failed claim. See *Karanja v Canada (Minister of Citizenship and Immigration)*, 2006 FC 574 at para 5.

VIII. ANALYSIS

[43] Some of the RAD's findings and conclusions are significantly problematic and require this matter to be returned for reconsideration.

[44] To begin with, the RAD makes numerous findings based upon inconsistency without really explaining what the perceived inconsistency is and without specific reference to the evidence so that the Applicant and the Court can determine whether or not these findings are reasonable.

[45] For example, in dealing with Victoria's failure to attend the RPD hearing and her subsequent affidavit before the RAD, the RAD finds as follows:

[23] In the original Memorandum of Appeal, the Appellant submitted a personal affidavit. The affidavit submitted was a retelling of her refugee hearing, attempting to correct information

given at the hearing, plus justify other issues that arose during the RPD hearing. The RAD finds that most of the information contained has no relevance and if accepted, would not justify allowing the refugee protection claim.

[24] The RAD notes one issue outlined in the affidavit, page 16, paragraph 9, is inconsistent with testimony given at the hearing. The affidavit states that her friend and potential witness was ill with food poisoning. In reviewing the transcript of the hearing, page 100, the Appellant stated that her friend Victoria would not be at the hearing because she had an appointment. The RAD finds this document not probative given this obvious inconsistency.

[25] The RAD will not admit the document as new evidence. The issues outlined in this affidavit are more properly addressed in the Memorandum of Appeal.

[26] The Appellant submitted an affidavit from Oluwaseun Victoria Oladutele (Victoria). This letter confirms that she is a close friend of the Appellant. She further states that she had intended to appear at the hearing as a witness, but fell incredibly ill. As the RAD stated above, the inconsistency between this information and testimony given at the RPD hearing is determinative. The RAD finds this affidavit not credible, and gives it no weight, and will not admit it as new evidence.

[Footnote omitted.]

[46] There is no obvious or necessary inconsistency between the Applicant's testimony before the RPD that Victoria "had an appointment" and her affidavit evidence that says she was "ill with food poisoning." If Victoria was ill with food poisoning then she may well have had a medical appointment. In addition, because the RAD refused the Applicant's request for an oral hearing, this perceived inconsistency was never put to the Applicant with a request for an explanation. Yet, on the basis of this perceived inconsistency, the RAD finds that Victoria's affidavit is not credible. No explanation is provided as to why a perceived inconsistency in the Applicant's evidence leads to the conclusion that Victoria's evidence cannot be believed. Victoria's evidence that she could not attend the RPD hearing because she fell ill is consistent

with the Applicant's own evidence that Victoria had food poisoning, and is not, without further explanation, obviously contradicted by the Applicant's testimony that Victoria had an appointment. Victoria also provided written evidence of her relationship with the Applicant in a letter that was before the RPD. That letter reads as follows:

TO WHOM IT MAY CONCERN

My name is Oludutele Victoria Oluwaseun, I am bisexual woman from Nigeria and I am making a refugee claim in Canada, I am yet to go for my hearing of my refugee claim.

I know Oladoyin Deborah Farominyi and we recently started having an intimate relationship, I meet her at 519 Church Street Community Center during an orientation program in September 2016 and later we meet again at Black-Cap. We started talking and we became friends. Since I met her I like her boldness and confidence and I find her attractive and I asked her if she would go on a date with me. After much persuasion she finally agreed and we went on our first date on 25th of September 2016. She confided in me about her past experience as a bisexual in Nigeria and I also shared my story with her, we realized that we have many things in common. We decided to start a relationship and together we look forward to having a successful hearing after which we plan to settle down as a family.

We love to go out together to malls and restaurants, I like her a lot and find she is an open minded with shapely figure, we understand each other and she really complements me. She is caring and she is always concerned about my well-being I feel that I can relate more with her, as she is from my country and she is from my mother side in Nigeria. We both understand the struggle of being bisexual in Nigeria.

Yours faithfully

Oladutele Victoria oluwaseun

[47] The RPD does refer to this letter in its Decision (para 12) but it isn't clear why it was not accepted as evidence of a bisexual relationship between the Applicant and Victoria. The RPD finds that the Applicant was "hesitant and unsure about her relationship with Victoria" and that

the Applicant “testified that she has slept with Victoria, but could not testify how long ago it was, whether it was a week ago, a month ago, and simply [stated she] cannot remember.” There is no finding that Victoria’s letter cannot be believed and/or whether the Applicant’s testimony and memory problems could be related to the Applicant’s emotional state.

[48] The RAD shows here that it is far too eager to find inconsistencies where they may not exist, and is not interested in sufficiently exploring the evidence to determine whether there are any real inconsistencies.

[49] There are similar problems with the RAD’s reasoning when the Member deals with the new evidence from the Applicant’s sister:

[30] The first affidavit is a copy, not an original, from Folekemi Abolarinwa, the Appellant’s sister. The affidavit is dated February 25, 2017, and was sworn in the High Court of Benue State. The Appellant’s affidavit states that her sister was unhappy with her because of her bisexuality, but with the passage of time, she has come to terms that the Appellant is bisexual.

[31] The Appellant’s sister’s affidavit retold the story of their mother and uncle’s discovery of the pictures of the Appellant and Arewa in a compromising sexual position. She stated that she phoned the Appellant, and warned her not to come home. She further stated that her uncle phoned the police and that they are looking for her.

[32] The RAD finds that this story is consistent with information given in the Appellant’s Basis of Claim (BOC) narrative. The RAD notes, there is one very important detail missing, the arrest of her friend Arewa. The RAD finds that it would have been reasonable to expect that such information would have been included in the affidavit, because the sister was allegedly involved in the scenario with her uncle, and the police.

[33] According to the BOC narrative, the sister and/or the mother informed her of Arewa’s arrest after she arrived in Canada. In addition, her sister allegedly warned her not to come home after

the alleged discovery of the photographs in her suitcase. It would appear from this information that the sister was supportive and looking after the Appellant's best interests. The Appellant submits that she testified during the RPD hearing that her sister was still devastated and shocked with the knowledge that she was bisexual, and unwilling to provide an affidavit in support of her bisexuality. She further submits that her sister only provided the affidavit after the hearing because she had come to terms with the knowledge that her sister is bisexual.

[34] The RAD does not accept the explanation given by the Appellant for the affidavit's lateness. The RAD finds that it would've been reasonable and credible, given the allegations of the Appellant's situation and the fact that she and her mother had allegedly contacted the Appellant after her arrival in Canada in August 2016 that this affidavit would reasonably have been in front of the RPD at the hearing. According to section 110(4) of the IRPA and Rule 29(4)(c), the RAD rejects this document as new evidence.

[Footnote omitted.]

[50] One of the reasons why the RAD appears to doubt this affidavit is because "it would have been reasonable to expect that such information [regarding Arewa's arrest] would have been included in the affidavit...." So the RAD is suspicious of the affidavit for what it does not say. Yet it isn't clear how this plays into the RAD's decision to exclude the affidavit which appears to be based, *inter alia*, upon the RAD's refusal to accept the Applicant's explanation that she could not have provided the sister's affidavit to the RPD because "her sister only provided the affidavit after the hearing because she had come to terms with the knowledge that her sister is bisexual." This is consistent with the sister's own explanation which the RAD does not mention. Given the cultural circumstances in Nigeria, I fail to see what is unreasonable about a sister being extremely unhappy upon discovering the Applicant's bisexuality and the family uproar that this discovery caused, yet nevertheless eventually coming to terms with it and providing a supporting affidavit.

[51] And, once again, the Applicant was never given an opportunity to address this concern because the sister's affidavit was excluded and no oral hearing was granted. I am also troubled by the RAD's failure to be more specific about the basis for some of its important findings. For example, the RPD had found the Applicant's testimony to be hesitant and evasive. In order to refute this charge, the Applicant referred the RAD to the transcript of the RPD hearing together with a report from the Riverdale Immigrant Women's Centre that said she was "anxious and grieved by the problems that her identity has caused. She appears quiet and reticent, and unsure of what will happen."

[52] The RAD rejects this evidence in the following way:

[46] The RAD gives deference to the RPD with respect to the manner of the Appellant's responding to questions. The RAD finds that a review of the transcript does not give a true picture of the hearing. In reviewing the recording of the RPD hearing, the RAD concurs with the RPD's findings. The RAD gives no weight to the letter, referenced above, from the Riverdale Immigrant Woman's Center [*sic*], in that it does not explain the evasiveness and hesitancy in answering the RPD's questions. In addition, the RAD can find no documentation to support that the Appellant or her counsel, at the RPD hearing, requested any special dispensation for the Appellant, nor is there any indication that she was declared as a vulnerable person.

[53] This rejection does not tell us what it was that persuaded the RAD to endorse the RPD. First of all, it does not say that the transcript supports the RPD and does not support the Applicant. Instead, it says that "the transcript does not give a true picture of the hearing," without explaining what the transcript lacks that can only be found in the recording. I fail to understand why hesitancy and evasiveness would be apparent in a recording but would not be caught by the transcript. If the Applicant was evasive, then this will show up on the page. Without specific

examples, I don't think it is possible to understand what the RAD means by saying that "the transcript does not give a true picture of the hearing." The RAD is simply endorsing the RPD on this important point without providing the detail that the Applicant and the Court need to understand what the recording tells us that the transcript does not. This is important because the RAD does not say that the Applicant is incorrect that the transcript does not show hesitancy or evasiveness.

[54] Similar problems occur when the RAD deals with the RPD's findings that the Applicant had failed to provide sufficient details about her relationship with Olaynika:

[49] The RAD, reviewing the testimony of the hearing, finds that the Appellant was not forthcoming in her testimony about her alleged first same-sex partner, Olaynika. She gave testimony that was the same information recorded in her BOC narrative, and other than explaining the physical layout of the dormitories, gave no insight into this alleged first same-sex relationship. The RAD disagrees with the Appellant's submissions that she was not given an opportunity to give more details about the relationship. Reviewing the transcript, the RPD finds that questions were asked that would have allowed her an opportunity to talk about the various activities that they were involved in.

[Footnote omitted.]

[55] So, in this case, and relying upon the transcript, the RAD appears to accept the RPD's findings that "questions were asked that would have allowed her the opportunity to talk about the various activities they were involved in."

[56] We are never told what these questions are, where they appear in the transcript, and in what context they were asked. In reading the transcript myself, I am at a loss to understand how and when the Applicant was asked to give more details than she did or why, if the RPD felt there

were insufficient details, it did not ask the Applicant directly. In fact, at the hearing of this matter before me, the Respondent conceded this was an error because the Applicant attempted to provide the RPD with details about what she did with Olayinka but the Presiding Member said “I don’t need to know that.”

[57] Both the RPD and the RAD make much of the Applicant’s failure to say more about her relationships with men and point to perceived inconsistencies about being in love:

[61] The RPD stated that the Appellant identified as bisexual, stating that she is attracted to men and women. However, the RPD noted that her relationships with two males, Remi in 2010, and Sami from November 2013 until August 2014, were not in her BOC narrative.

[62] When asked why she did not include Sami, a man with whom she testified she was in love, in her BOC narrative, she testified that at first she did not think it was important, and then testified she thought it was normal to date men and abnormal to date women. The RPD found this explanation unreasonable, and found, on a balance of probabilities, that the Appellant only dated men in Nigeria.

[63] The RPD stated that the Appellant’s testimony with regards to her feelings for both men and women was confusing. At one point she testified that she had no opinion. Then she testified that she liked ladies a bit more. She testified that she is bisexual because she likes men too, but at one point said she did not like men, and then changed her testimony that she did not like Remi in Nigeria because he was not a good person. The RPD stated that she did not expect the Appellant to be firm in her sexual preference because human sexuality is fluid, especially in young people, and it may move on the spectrum. However, the RPD stated that the Appellant’s testimony was inconsistent from one sentence to the next, and she could not provide a reasonable explanation with regards to being in love at the same time with Sami and Miriam [*sic*]. The RPD stated that emotional attachment that comes with [the] intimacy of being in love is not equal to the sexual attraction of wanting to have sex with two different people at the same time. The RPD found that the Appellant was not a credible witness.

[64] The Appellant, referencing Federal jurisprudence, submitted that the omissions from the BOC form should not be used as a basis to reach negative credibility findings. She further stated that not all details in the claim are included in her BOC form, and such an omission should not be used as a yardstick to impugn the Appellant's credibility.

[65] The Appellant submitted that her explanation, referenced above by the RPD, is perfectly sound and reasonable, given her cultural and social background. The Appellant submitted a small portion of the hearing to substantiate that she knew she was bisexual.

[66] The RAD finds that the omission of the Appellant's two male partners in her BOC narrative is determinative, and undermines her credibility as an alleged bisexual female. The basis of the claim was that the Appellant is bisexual. Not to include, in her BOC narrative, her relationships with men is not credible.

[67] With regards to the Appellant's explanations, given in testimony, the RAD finds that they were not consistent and were confusing because her testimony changed when answering questions about the issue. The Appellant is university educated, and there was no indication of intellectual dysfunction at the hearing. No issues in this regard were brought to the attention of the RPD by her counsel. The RAD does not find her explanations for excluding, in her BOC narrative, her relationships with men reasonable or credible.

[68] With regards to the portion of the hearing submitted by the Appellant, the RAD finds that this is not representative of the transcript of the hearing with regards to the Appellant's statements about both men and women. The RAD, in reviewing the transcript, finds that the Appellant was inconsistent with respect to this issue. Her testimony changed regularly when responding to issues about her bisexuality.

[Footnotes omitted.]

[58] Both the RPD and the RAD appear to believe that the Applicant could not be "in love at the same time with Sami and Miriam [*sic*]." The RPD, endorsed by the RAD, makes the following categorical statement:

The emotional attachment that comes with intimacy of being in love is not equal to the sexual attraction of wanting to have sex with two different people at the same time. The claimant was not a credible witness.

(at para 17)

[59] I don't think that the RPD and the RAD are given any special training in the ways of love and, in particular, the emotional capabilities of a young bisexual woman who has grown up in Nigeria. But what we have here is a negative credibility finding that relies, at least in part, upon some kind of normative emotional state and attachment capability that the Applicant does not exhibit. There is no basis for such a finding.

[60] I also find it unreasonable that the RPD and the RAD fault the Applicant for not saying more about her relationships with men. The Applicant has not fled Nigeria because of her relationships with men and she is in no danger if she returns to Nigeria and has relationships with men. The sole ground of her claim is that she is bisexual and has had relationships with women and is now known to the authorities as a woman who has had relationships with women. In order to assess this risk, the RPD and the RAD do not require evidence that she has also had relationships with men.

[61] The RAD points out that the RPD did, in fact, make some mistakes in its decision but concludes that they are not sufficiently material to overturn the RPD decision. Those errors must now be added to the ones I have identified. I also point out that, in dealing with the affidavit of the Applicant's mother the RAD finds as follows:

[77] In reviewing the transcript of the hearing, the RAD finds that the Appellant only referenced her sister living at her mother's

place when the RPD mentioned the issue. In referencing the Appellant's mother's affidavit, the RAD finds no mention of the Appellant's sister, with respect to what happened on August 6, 2016. The letter makes reference to the Appellant shopping and not coming home. Although not a strong finding by the RPD, the RAD finds, on a balance of probabilities, that the Appellant's allegations that her sister was involved in giving her the news about the alleged outing by her uncle, not credible.

[Footnote omitted.]

[62] At paragraph 16 of the mother's affidavit (Certified Tribunal Record at 448) she says "on August 16, 2016 I was able to speak with Oladoyin [the Applicant].... She admitted that her sister had warned her not to come home that day." Clearly, the RAD has overlooked important evidence.

[63] I am not saying that the Applicant's evidence was not without its problems. However, the negative credibility finding upon which the Decision is based is cumulative, and the concerns I have referred to above are sufficient, in my view, to render the Decision unreasonable and to require that it be sent back for redetermination.

[64] There are other problems with this Decision related to the RAD's failure to allow an oral hearing which should be carefully considered upon redetermination. However, I don't need to address those issues here, as I have already decided that this application must be allowed for reasons set out above.

[65] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-3196-17

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted RAD.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3196-17

STYLE OF CAUSE: OLADOYIN DEBORAH FAROMINIYI v THE
MINISTER OF IMMIGRATION, REFUGEES AND
CITIZENSHIP CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 29, 2018

JUDGMENT AND REASONS: RUSSELL J.

DATED: MARCH 15, 2018

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