Federal Court  Cour fédérale

Date: 20180327

Docket: IMM-4634-16

Citation: 2018 FC 342

Ottawa, Ontario, March 27, 2018

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

AUGUSTINE OJIE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the case

[1] The Applicant, Augustine Ojie, seeks judicial review of the decision of a Senior Immigration Officer [the Officer], refusing his application for permanent residence on humanitarian and compassionate [H&C] grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicant alleges that the Officer made unreasonable factual findings. He asks that the decision be set aside and his H&C application be remitted to a different officer for redetermination.

[3] For the reasons that follow this application is allowed and the matter is remitted for redetermination by another officer, other than the officer who determined the Applicant's Pre-Removal Risk Assessment [PRRA] and the officer who determined this H&C application.

II. **Background facts**

A. *Nigerian night club*

[4] The Applicant was born in Nigeria in August, 1975. After attending university he set up a nightclub in 2003 in a bungalow located in a gated community in Benin. In 2008 the club began to be frequented by gay and lesbian patrons. In November 2010, a nearby branch of the Church of God complained to the police that the nightclub was promoting homosexual acts. The police arrested the Applicant and detained him for one week during which they physically abused him.

[5] In April, 2011, as a result of further pressure from the Church of God, the Applicant was arrested again and held for three days by the police. In May, 2011 while the Applicant was in town his assistant contacted him to advise that the police closed down the nightclub and were searching for him. The basis for the search was that someone had sworn an affidavit stating that he and the Applicant had sex at least once a week at the nightclub and the Applicant had paid him with cash and gifts.

[6] The Applicant then procured the services of an agent, who suggested that he flee to Canada. He left Nigeria using a false passport on June 22, 2011 and arrived in Canada on June 23, 2011.

B. *The refugee hearing*

[7] On July 11, 2011, the Applicant submitted an inland refugee claim on the basis of perceived homosexuality.

[8] The Applicant's refugee claim was heard on June 1, 2012 and rejected on July 30, 2012. Before the Refugee Protection Division [RPD] the Applicant testified that he was not gay and had a long term relationship with a girlfriend for several years. He said that because of the nightclub he would be perceived as gay if he was sent back to Nigeria. The RPD found that the Applicant had not credibly established his identity, his story about the nightclub lacked credibility and even if his story was believed, there were internal flight alternatives available in Nigeria.

[9] The RPD determined that on a balance of probabilities the Applicant was not perceived in Nigeria as a homosexual man. The panel noted that the objective documentary evidence disclosed discrimination against gays, lesbians, bisexuals and transgendered people in Nigeria.

[10] The Applicant sought judicial review of the RPD decision but leave was denied on January 15, 2013.

C. *The Pre-Removal Risk Assessment*

[11] In August 2014, the Applicant applied for a pre-removal risk assessment [PRRA]. The PRRA application was based on the previous risks, but added a *sur place* claim: in early 2014 the Applicant met and subsequently fell in love with another man in Canada, Oluwafemi Amodu. The Applicant said that word of his bisexuality got back to Nigeria. He also discovered from his niece that police had been to his mother's house on more than one occasion to make threats against his life for being in a same-sex relationship.

[12] The PRRA Officer found that the Applicant had restated the same risks as the RPD heard and had not rebutted any of the issues the RPD had raised. The PRRA Officer also reviewed the US Department of State 2012 Country Condition Reports on Human Rights Practices – Nigeria - April 19, 2013. The PRRA Officer found there had not been significant changes in country conditions in Nigeria since the RPD heard the case.

[13] The Applicant's PRRA application was rejected on October 17, 2014. An application for leave for judicial review was dismissed in February 2015.

III. **The H&C decision**

[14] On March 30, 2015 the Respondent received the Applicant's H&C application that is the subject of this review. The H&C application was considered by a different officer than had determined the PRRA application.

[15] In his H&C application the Applicant reiterated the hardship he would face in Nigeria on the basis of perceived homosexuality and, now, also on the basis of his actual bisexuality. It was

submitted that he had established himself with a business in Canada, was law-abiding with good conduct and had integrated himself well into Canada. The Applicant also submitted a psychological report, which had previously been prepared for his PRRA application and stated that removal to Nigeria would seriously undermine his psychological well-being.

[16] Flagged in the submissions as "a crucial aspect" of the H&C application was that on January 7, 2014 the Nigerian government passed a new anti-gay law: the *Same Sex Marriage Prohibition Act*. The new law criminalized same-sex marriage and membership in gay rights organizations. It provided for a penalty of up to 14 years in prison for violations of the law. Various links to newspaper articles and other reports on the response from Canada, the United States and Britain to the law were included by the Applicant as well as copies of several articles. A quote from then Foreign Affairs Minister John Baird was referred to in the submissions in which Minister Baird called upon Nigeria to repeal the law.

[17] The Applicant's H&C application was denied on October 17, 2016. The Officer noted that the Applicant did not want to return to Nigeria because he is bisexual and would "be unable to escape arrest, punishment, debasement and eventual 14 years imprisonment". The Officer then found that the Applicant "essentially reiterated the same factors in his H&C application that he put forth during his refugee claim hearing and in his PRRA application". The Officer acknowledged that whether the Applicant had a well-founded fear of persecution could not be considered but the underlying facts could be taken into account in considering whether the Applicant's circumstances warranted H&C relief.

[18] Given the previous negative RPD finding, the Officer found insufficient evidence to support that the Applicant would face hardship in Nigeria based on his homosexuality. The Officer found that the evidence did not support that adverse country conditions would have a direct negative impact on the Applicant or that he was a member of a group that will be affected by discrimination in his country of origin.

IV. **Issue and Standard of Review**

[19] The standard of review of the Officer's decision is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44, [2015] 3 SCR 909. The only issue in this review is whether the Officer's decision was reasonable.

[20] Given the exceptional and highly discretionary nature of H&C relief the Court owes considerable deference to the decision of the H&C Officer and, it has been said, that means there is a wider scope of possible reasonable outcomes: *Holder v Canada (Citizenship and Immigration)*, 2012 FC 337 at para 18, 7 Imm LR (4th) 338.

[21] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*].

[22] If the reasons, when read as a whole, "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met": *Newfoundland and Labrador Nurses'*

Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at para 16, [2011] 3 SCR 708 [*Nfld Nurses*].

V. **Analysis of the H&C decision**

[23] The Officer's treatment of several pieces of evidence is at issue between the parties in this application.

[24] The Applicant says the Officer misapprehended the evidence and made errors that led to an unreasonable credibility finding which caused an improper evaluation of his H&C application.

[25] The Respondent says the Applicant failed to provide sufficient evidence to justify a positive determination and what he is really asking is for the Court to reweigh the evidence.

A. *The change in profile of the Applicant*

[26] The RPD decision was released on July 30, 2012. It was based entirely upon the Applicant's claim that he was not gay but was perceived to be gay by the police and the Church in Nigeria. In the decision, the RPD expressly mentioned the fact that the Applicant was not gay and noted that he testified he had never had sex with someone of the same sex.

[27] The Applicant first identified as bisexual in May, 2014. In August, 2014 the Applicant filed his application for a PRRA. His allegation of risk was both that he would be perceived as homosexual in Nigeria and that he was in a same-sex relationship. He also indicated that he learned from his niece that it had become known in Nigeria amongst his friends, family, and

community, that he was dating a man. She also told him that the police in Nigeria were actively pursuing him. The Applicant said that the police had visited his mother and his former personal assistant looking for him and making threats against him.

[28] On March 30, 2015 the Applicant filed his H&C application. In it he stressed that the new anti-gay law in Nigeria, which was signed into force January 7, 2014, put his life at risk. Evidence was put forward, with links to online articles, that the government was enforcing this law with a number of arrests being made.

[29] The Applicant points to two statements in the H&C decision that he says show the Officer misapprehended the basis of his claim for H&C relief. These statements show the Officer was concerned that the Applicant had not sufficiently explained why he only started participating in LGBT groups, and only stated he was bisexual, after having had his refugee claim denied and approximately three years after coming to Canada.

[30] The Respondent says the inconsistencies between the Applicant's RPD claim as a heterosexual and the information in his PRRA, and H&C, that he was bisexual were inadequately explained in the Applicant's evidence.

[31] In my view, despite clear statements by the RPD, the Officer either failed to taken into account or, fully appreciate, that the Applicant only realized he was bisexual three years after the RPD decision. If the Officer did take it into account, he failed to explain that in his analysis. The result is that the reasons for the decision are neither transparent nor intelligible with respect to the Applicant's forward looking risk of harm on return to Nigeria.

[32] The following statements from the H&C decision supports my view that the Officer did not reasonably grapple with the changed profile of the Applicant:

> The Applicant has essentially reiterated the same factors in his H&C application that he put forth during his refugee claim hearing and in his PRRA application.
>
> ...
>
> [T]he applicant has not linked this evidence [articles reporting on homosexuality in Nigeria] to his personal situation in Nigeria and it therefore does not support that he faces hardship in Nigeria based on his homosexuality. He has not provided objective evidence to overcome the findings of fact made by the RPD and upheld in litigation.
>
> ...Further, the Applicant does not inform why he waited more than three years and following the rejection of his refugee claim to join a LGBT group, having been in Canada with access to such groups since June 2011.
>
> ...
>
> He has not indicated why, when before the panel he stated he was heterosexual while [*sic*] following his negative determination he states that he is bisexual.

[33] These statements by the Officer are not consistent with the Applicant's narrative or with the evidence presented to the Officer of the Applicant's bisexuality. The Applicant's changed profile needed to be directly addressed by the Officer; it was not. While the Officer could have possibly raised, and then addressed, concerns that the Applicant's recently discovered bisexuality may have been convenient for his immigration claims, it is something altogether different, on the facts of this case, for the Officer to find that the Applicant provided inconsistent evidence before the RPD and the PRRA and H&C applications.

B. *The affidavit evidence*

[34] The Respondent says that the Officer did not misapprehend the evidence, and that it was properly found to be insufficient. In order to reconcile the change in the Applicant's story between the RPD hearing and the H&C application the Respondent states corroborative evidence was required and the Applicant failed to provide it.

[35] The Applicant says corroborating evidence was supplied – three sworn affidavits and a letter from The 519 Church Street Community Centre [519 Church] – but the Officer improperly assigned little weight to them.

[36] The Officer reviewed three sworn affidavits. The Officer summarized the contents of each affidavit and critiqued them all on the basis that: (1) the deponents did not indicate the objective basis on which they made their assertions; (2) they did not provide corroborating evidence demonstrating that the Applicant, on return to Nigeria, would face the hardship claimed as a result of his sexual orientation and, (3) the affidavits were written by those with an interest in the outcome of the Applicant's matter and therefore were not unbiased.

[37] One affidavit was from the Applicant's same sex partner, who is also from Nigeria. He attested to their relationship being intimate and that, if returned to Nigeria, the Applicant would not be safe as police throughout the country would arrest him and put him in jail.

[38] A second affidavit was sworn by another Nigerian who at the time was seeking refugee protection based on his homosexuality. He met the Applicant at 519 Church where they became friends. He attests to the Applicant telling him at that time that he had never been with a man but

was falsely labelled as gay. In June 2014 the Applicant told the affiant that he was dating a man. After that he met the Applicant and Mr. Amodu several times and attested that "[he] know[s] they are very much in love with each other".

[39] The third affidavit, sworn on September 22, 2014, was from the Applicant's former personal assistant in Nigeria – the person who contacted the Applicant to warn him that the police had closed down the nightclub. He attested to the week that the Applicant spent in jail when he was arrested and that the Applicant told him he had been beaten and tortured. He also attested to the Applicant's subsequent detention. He stated that on the day the nightclub was stormed by police he was questioned by them about the Applicant's location. He confirmed that he called the Applicant once the police left and told him not to return. He also swore that police have continued to ask him about the Applicant and, as recently as April 2014, the police went to the affiant's house seeking the Applicant. He concludes that there is nowhere in Nigeria where the Applicant can go and live freely.

[40] Contrary to the Officer's statement, there was an objective basis from which each deponent spoke: their own personal observation and knowledge of the Applicant as well as their own direct knowledge of the conditions in Nigeria for homosexuals.

[41] As to the personal interest or bias of each deponent, it has now been said by this Court many times that such analysis is an unprincipled one which defeats the Officer's primary task:

> [5] This Court stated one of the underlying reasons why this approach is unreasonable in *Varon v Canada (Citizenship and Immigration)*, 2015 FC 356 at para 56[,252 ACWS (3d) 122]:

> ...If evidence can be given "little evidentiary weight" [or no weight at all in the case at bar] because a witness has a vested interest in the outcome of a hearing then no refugee claim could ever succeed because all claimants who give evidence on their own behalf have a vested interest in the outcome of the hearing. ...
>
> [6] In addition, rejection of evidence from family and friends because it is self-serving or because the witnesses are interested in the outcome, is an unprincipled approach to potentially probative and relevant evidence. To allow a tribunal to reject otherwise relevant and probative evidence in this manner creates a tool that may be used at any time in any case against any claimant. It therefore defeats a primary task of such decision-makers which is to assess and weigh the evidence before them.
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> *Tabatadze v Canada (Citizenship and Immigration)*, 2016 FC 24 at paras 5-6, 262 ACWS (3d) 460.

[42] It is curious and inconsistent, as well as disingenuous, for the Officer to reject the affidavits provided by non-family members as biased while also faulting the Applicant for not producing an affidavit from his mother, niece or other family member to support his submissions:

> The applicant's submissions inform that his mother has rejected him because of his sexual orientation, his niece told him that in August 2014 news spread to family, friends, and the community in Nigeria that the applicant was dating a male in Canada, and that the police were actively pursuing him. The applicant has not provided corroborating evidence to support these assertions such as sworn declarations from his mother, niece or other family members in Nigeria. I therefore find them to be vague, lacking in details, not supported by evidence and provided by persons interested in the outcome of this assessment.

[43] The comments of the Officer about the fact that affidavits that were <u>not</u> sought from family members cannot be reconciled with the Officer's critique of the affidavits from non-family that were put before the Officer. Given the Officer's treatment of non-family based affidavits as lacking objectivity and being biased it is unclear how affidavits from the family

would be useful to the Officer since they would be again based on only the knowledge and observation of those with an interest in the Applicant's matter which the Officer seems to take as an indication that they lack objectivity and contain bias. In that respect the Officer's analysis of the affidavits that were provided, and those that the Officer felt were missing is not transparent or intelligible.

C. *The letter from The 519 Church Street Community Centre*

[44] The Applicant submitted with the H&C application a letter from 519 Church dated January 13, 2015. The letter, which had not been before the PRRA officer, confirmed that the Applicant had been a dedicated member of the 519 Church since October 2014 and he participated actively in the LGBT Refugee Support Group. The letter indicated that the group was a peer driven support group for LGBT refugee claimant members only. The letter also said that the Applicant attended and participated in weekly group meetings and LGBT related workshops.

[45] The Officer accepted that the Applicant was a member of the Centre but found that the letter did not inform whether the Applicant was gay or bisexual. The Officer stated that membership in the organization did not necessarily indicate homosexuality or bisexuality.

[46] It appears that the Officer misconstrued the 519 Church letter. The letter did more than state the Applicant was involved with the 519 Church. The author states that the Applicant belongs to a group that is only open to LGBT refugee claimants which is the same as saying that the Applicant identifies as, in his case, bisexual. Before the Officer dismissed the letter, s/he should have taken the time to carefully read and understand its contents.

[47] The letter was not submitted to show that authorities in Nigeria might know the Applicant was a member of 519 Church. The affidavit evidence, had it not been dismissed for being biased, along with the submissions of the Applicant were provided to support that the police, friends, family, and the Applicant's community, had already learned he was dating a man. The letter was submitted to provide support to the Applicant's claim of bisexuality and is useful for that purpose given the inherent difficulties that can arise in trying to prove sexual orientation: *Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760 at para. 42, 8 Imm LR (4th) 131.

D. *The decision as a whole*

[48] Reasonableness review is to be conducted "as an organic whole, without a line-by-line treasure-hunt for error": *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54, [2013] 2 SCR 458, citing *Nfld Nurses* at para 14. Considering the H&C decision as a whole it is clear that the Officer came to a number of conclusions that are either not supported by the evidence or were made only after improperly disregarding the evidence that was before the Officer.

[49] The Officer never explicitly said that he did not believe the Applicant was bisexual. The Officer refused to grant H&C relief as a result of his mistreatment of the affidavit evidence, coupled with the faulty analysis of the letter from 519 Church. This resulted in an improperly justified, unintelligible and opaque, process that resulted in the elimination of corroborative evidence that would otherwise have supported the Applicant's submissions.

[50] Taking the decision as a whole, had the Officer paid more attention to the change of the Applicant's profile and, had the corroborative evidence not been unreasonably dismissed as biased, it is not clear that the Officer would have arrived at the same conclusion on the hardship the Applicant might face arising from risks to the Applicant as a result of the country conditions upon return to Nigeria.

VI. **Concluding remarks**

[51] The Court expresses no opinion with respect to whether the overall outcome could fall within a range of possible outcomes acceptable on the facts and law when properly applied.

[52] This matter is being returned for re-determination as, by failing to address the changed Applicant's profile and by summarily dismissing the corroborative evidence of the three affidavits and 519 Church letter, the Officer's reasons are not transparent, justified, or intelligible. Based upon these unreasonable errors the Court cannot be sure that the outcome would have been the same if a fulsome analysis of the evidence had been conducted.

[53] In arriving at their decisions, both the PRRA officer and the H&C officer relied heavily on the findings of the RPD without adequately addressing the change of profile of the Applicant. For that reason, it would be unfair to the Applicant to return the matter for redetermination by an officer other than the H&C Officer without also requiring that the PRRA officer not conduct the redetermination.

[54] Neither party submitted a question for certification and none exists on these facts.

JUDGMENT IN IMM-4634-16

THIS COURT'S JUDGMENT is that:

1. The application is allowed and this matter is returned for redetermination by an officer other than the officers who determined the Applicant's PRRA and H&C applications;
2. There is no question for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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