

Federal Court



Cour fédérale

**Date: 20181107**

**Docket: IMM-310-18**

**Citation: 2018 FC 1115**

**Ottawa, Ontario, November 7, 2018**

**PRESENT: The Honourable Madam Justice McDonald**

**BETWEEN:**

**COURAGE ERHABOR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] Mr. Erhabor was sponsored for permanent residence (“PR”) status by his same-sex partner under the “spouse or common-law partner in Canada” class pursuant to section 72(2)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. Following an interview, the application was denied as the Immigration Officer (the “Officer”) concluded that the relationship was not genuine.

[2] For the reasons that follow, this judicial review is dismissed as the decision of the Officer is reasonable and there was no breach of procedural fairness.

### **Background**

[3] The Applicant is a citizen of Nigeria. In August 2014, his claim for asylum in the United States (US) on the basis of his sexual orientation as a gay man was denied. He arrived in Canada in July 2015 and made a refugee claim on the basis of his sexual orientation.

[4] The Applicant met his sponsor at a community centre that offers programs for LGBT refugee claimants. His sponsor is also from Nigeria and has been a Canadian permanent resident since 2012 when his own claim for refugee protection on the basis of sexual orientation as a bisexual man was accepted.

[5] The Applicant and his sponsor have resided together since January 2016. They married on February 13, 2016 in Toronto.

[6] The sponsorship application was submitted in June 2016 and a hearing was held on December 20, 2017.

### **Decision Under Review**

[7] In the December 22, 2017 decision, the Officer denied the application for permanent residence as she was not satisfied that the relationship was genuine.

[8] On the day of the hearing, the Applicant and his sponsor were interviewed separately.

Where the Officer noted discrepancies in their answers, these were put forward to the couple.

However they were unable to resolve the discrepancies to the Officer's satisfaction. Some of the inconsistencies included:

- How they got to the restaurant for their first date
- How they got to and from the bus station after their second date trip to Niagara Falls
- Whether they stayed the night in Niagara Falls or not
- The last time the sponsor stayed in his previous apartment
- How often the Applicant attends school
- Who else was in the car on the way to their wedding
- What meals they ate on their honeymoon
- Who purchased the wedding bands
- What they had done that previous weekend

[9] In August 2015, prior to the spousal sponsorship application, the Applicant filed a refugee claim based on his sexual orientation. The Minister intervened in this application because of credibility issues arising from inconsistencies with the US asylum claim. At the spousal sponsorship hearing, the Officer had a copy of the intervention application and was aware of the inconsistencies and the credibility issues. When the Officer asked the Applicant why this information was not disclosed as part of his application, the Applicant advised that he was trying to keep his PR application simple and therefore only included the details from Nigeria. However, due to the Applicant's inability to provide a clear and consistent narrative, the Officer called the Applicant's credibility into question.

[10] With respect to the sponsorship hearing, the Officer noted that both the Applicant and his sponsor were able to provide consistent answers to general questions. However, the Officer noted that their answers to questions of a more personal and intimate nature were lacking in detail or were inconsistent. For example, the Officer noted that the sponsor lacked knowledge of the Applicant's schooling, his class schedule, and when he would begin his engineering program. The sponsor did not know who was sending the Applicant money from Nigeria. As well, the sponsor was not aware that the Applicant's parents were deceased until after the sponsorship application was completed.

[11] At the end of the interview, the Applicant and sponsor asked what else they could do to establish the genuineness of their relationship. When the Officer stated that they could show their cell phones with their text messaging histories and photos, both the Applicant and the sponsor declined to provide this information.

[12] Despite the documentation and information provided to support the relationship, the Officer did not find that this documentary evidence outweighed what was presented in the in-person interview. After reviewing all the evidence, the Officer was not satisfied that there was a genuine spousal relationship between the parties and denied the application for permanent residence.

### **Issues**

[13] Based upon the submissions of the parties, the following issues arise:

- I. Was it a breach of procedural fairness for the Officer to consider the refugee claim information?
- II. Was the Officer's approach to the text messages a breach of procedural fairness?
- III. Did the Officer unreasonably engage in a microscopic analysis of the relationship?

## **Analysis**

### **Standard of review**

[14] Matters of procedural fairness and natural justice are subject to review on the standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 55, 57, and 79).

[15] The applicable standard of review with respect to an officer's decision on the genuineness of a spousal relationship is that of reasonableness (*Mills v Canada (Citizenship and Immigration)*, 2008 FC 1339 at para 19).

### **I. Was it a breach of procedural fairness for the Officer to consider the refugee claim information?**

[16] The Applicant argues that the Officer breached his procedural fairness rights by drawing a negative credibility inference against him regarding his pending refugee claim and the Minister's intervention. In particular, the Applicant takes issue with the following comments made by the Officer: "What would have helped you was the truth. But two stories that don't

match can equal a lie; and you lack credibility; and there is also the fraudulent documents coming in the mail.”

[17] The Applicant argues that the matters relating to his refugee claim should be properly adjudicated by a competent member of the Refugee Protection Division, and that the Officer here was outside her expertise. Furthermore, the Applicant was unable to verify or address the authenticity of the allegedly fraudulent documents relating to his refugee claim. The Applicant’s position is that the Officer’s negative credibility finding due to the pending refugee claim was unfair and was a breach of procedural fairness.

[18] In the context of the interview, the Officer informed the Applicant that she had a copy of the Minister’s intervention and the Applicant was provided with an opportunity to respond to the credibility issues and the allegedly fraudulent documents. In considering this information, however, the Officer did not make findings or determinations in relation to the Applicant’s refugee claim. Rather, the Officer considered this evidence as part of the overall credibility assessment in the context of whether the marriage was genuine and whether it was entered into primarily to acquire status or a privilege.

[19] This approach is fair and in keeping with the jurisprudence that states while previous immigration history should not be determinative, it can be a relevant consideration (*Bercasio v Canada (Citizenship and Immigration)*, 2016 FC 244 at paragraphs 35, 36).

[20] Therefore, it was reasonable for the Officer to consider the Applicant's immigration history in the context of all of the evidence. This information was not determinative of the application therefore it does not amount to a breach of procedural fairness.

**II. Was the Officer's approach to the text messages a breach of procedural fairness?**

[21] In his Affidavit filed in support of the judicial review application, the Applicant attached numerous pages of text messages. This evidence was not before the Officer. It was requested by the Officer, but the Applicant declined to provide it at the hearing. He now seeks to rely on this information.

[22] The general rule on judicial review is that the court can only consider evidence that was before the decision-maker. In *Tabañag v Canada (Citizenship and Immigration)*, 2011 FC 1293 [Tabañag] at paragraph 14 the court states, "It is trite law that the scope of the evidence on an application for judicial review is restricted to the material that was before the decision-maker... Additional evidence may be submitted on issues of procedural fairness and jurisdiction."

[23] The Applicant now purports to rely on this evidence, arguing that it was a breach of procedural fairness for the Officer to first ask for this information, and then make a negative credibility finding against the Applicant when he refused to provide the information.

[24] I disagree that this was an unreasonable request for the Officer, especially when considered within the context in which it arose. The Applicant asked the Officer what other evidence he could offer that would convince the Officer the relationship was genuine. In

response, the Officer suggested that he show his electronic communications with his sponsor. The Applicant declined this offer. As the Applicant was accorded the opportunity to present this evidence at the hearing but declined to do so, it would be inappropriate for the Court to consider the evidence now [*Tabañag* at para 14].

[25] The Applicant relies upon the *Chairperson's Guideline 9: Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression* at section 7.2 that states, "It is not expected that an individual establish their [sexual orientations and gender identities and expressions] through the use of sexually explicit photographs, videos or other visual material." However, here the Officer was not asking for evidence to prove the Applicant's sexual orientation, but rather was asking for evidence that supported the genuineness of the relationship. Furthermore, in the Officer's notes it is made clear that she was not looking for explicit texts and photos, but rather communications that showed the genuineness of the relationship. Therefore, no breach of procedural fairness arises in relation to the Officer's treatment of this evidence and it would be inappropriate for the Court to now consider this evidence.

[26] The final procedural fairness issue raised by the Applicant is the Officer's refusal to allow him and his sponsor to kiss. He says this precluded him from putting forward evidence to demonstrate the genuineness of the relationship. The Officer was reasonable when she stated that a single kiss would not provide evidence of a genuine relationship.

[27] The applicant has not established any breaches of procedural fairness.



### III. Did the Officer unreasonably engage in a microscopic analysis of the relationship?

[28] The Applicant argues that the Officer unreasonably weighed the minutiae and minor discrepancies in the overall assessment of evidence on the genuineness of the marriage. He argues that the Officer failed to give appropriate weight to the answers that were consistent. In support of this, the Applicant relies upon *Tamber v Canada (Citizenship and Immigration)*, 2008 FC 951 [*Tamber*] at paragraph 18 where the court found that an undue focus on the minutiae without enough focus on the *bona fides* of a marital relationship is unreasonable.

[29] In *Tamber*, however, the detailed questions that were challenged were unrelated to the relationship between the applicant and the sponsor. Here the Officer explicitly acknowledged that the couple gave consistent answers to questions of general knowledge, but did not give consistent answers to the questions of a more intimate or personal nature. The questions relating specifically to the relationship between the Applicant and his sponsor were where the Officer noted inconsistencies. Given that the nature of this relationship is precisely what an officer is charged with assessing, it was not unreasonable for the Officer to give greater weight to these inconsistencies in the overall balance.

[30] Taken as a whole, the inconsistencies noted by the Officer undermined the couple's credibility and, as such, the Officer's decision cannot be characterized as unreasonable. Furthermore, this Court owes deference to the Officer's assessment of credibility as the Officer is best placed to make these assessments in the circumstances.

[31] The application is therefore dismissed.

**JUDGMENT in IMM-310-18**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review of the Officer's decision is dismissed.
2. There is no question for certification.

"Ann Marie McDonald"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-310-18

**STYLE OF CAUSE:** COURAGE ERHABOR v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** SEPTEMBER 18, 2018

**JUDGMENT AND REASONS:** MCDONALD J.

**DATED:** NOVEMBER 7, 2018

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