Federal Court  Cour fédérale

Date: 20181126

Docket: IMM-1463-18

Citation: 2018 FC 1182

Ottawa, Ontario, November 26, 2018

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

REGINA DENIS
LINCOLN AGHO (MINOR)
VENICE AGHO (MINOR)
SNOW AYEVBOSA AGHO (MINOR)
TROY OSARUYI AGHO (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. *Introduction*

[1] The principal applicant, Ms. Regina Denis [PA], is the designated representative of her children Lincoln Agho, Venice Agho, Snow Ayevbosa Agho, and Troy Osaruyi Agho [the minor applicants]. All five applicants unsuccessfully sought Canada's protection as Convention

refugees or persons in need of protection under Sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act].

[2] According to the PA's narrative, submitted with her Basis of Claim form [BOC], she was born in Nigeria in 1976 and since 2007 ran her own small catering company in Nigeria. The PA claims that she met her husband Mr. Donald Agho [Mr. Agho] in 2003 and married him in 2008. The minor applicants, who are their children, were respectively born in 2004, 2006, 2011, and 2013, and all claim to be Nigerian citizens. The basis of the PA's claim is that her community now knows that she is bisexual. She fears persecution by the Nigerian police, Mr. Agho's family, and members of her neighbourhood.

[3] The applicants claimed protection on February 7, 2017. In her narrative, the PA states that she was caught with a female sexual partner on January 13, 2017. The minor applicants fear persecution as the children of a bisexual mother and the two daughters fear that they will be circumcised against their will.

[4] After holding a hearing on May 24, 2017, the next day on May 25, 2017, the Refugee Protection Division of the Immigration and Refugee Protection Board [RPD] found that the applicants failed to establish their identities on the balance of probabilities and accordingly dismissed their claims. On March 6, 2018, the Refugee Appeal Division [RAD] dismissed the applicants' appeal, leading to the present judicial review application.

[5] The impugned decision is reviewable on the standard of reasonableness as the question of identity is essentially a fact-driven analysis (*Tambadou v Canada (Citizenship and Immigration)*, 2016 FC 1042 at para 22; *Su v Canada (Citizenship and Immigration)*, 2012 FC 743 at para 5). The RAD's refusal to admit new evidence is also subject to the reasonableness standard (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 22-30 [*Singh*]); as is a RAD decision not to hold an oral hearing (*Sisay Teka v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 314 at para 17).

[6] In this case, there are two narratives at play which rely on conflicting evidence. The applicants' narrative is that they fled risks to their lives in Nigeria and arrived in Canada on January 29, 2017. The respondent submitted its own evidence which contradicts the applicants' story. This evidence, which will be described in more detail below, essentially suggests that the applicants may have arrived in Canada on December 15, 2016 with Spanish passports listing identical dates of birth, similar names, Spanish citizenship, Spanish addresses, and Spanish places of birth.

[7] This decision turns on the respondent's conflicting evidence and how the RPD relied on it to draw erroneous and unreasonable conclusions about the applicants' identities which the RAD wholly confirmed with minimal analysis of its own. In a nutshell, it is necessary to intervene because the RAD failed to assess or give proper weight to the identity documents that the applicants submitted to the RPD, further refused to admit the PA's original Nigerian passport and the two eldest minor applicants' Nigerian school records as new identity evidence, and refused to hold an oral hearing.

II. *The applicants' narrative and the Minister's evidence*

[8] According to the PA's narrative, the applicants hid at her cousin's house after the PA's sexual orientation became notorious. The applicants left as soon as the PA was able to retain the services of an immigration agent, using money that her cousin gave her. With the agent's help, the applicants travelled to Toronto through Amsterdam. Mr. Agho did not accompany them. A support letter from the PA's cousin corroborates this version. The letter states that the applicants arrived at his house on January 13, 2017 and hid there from the police until January 28, 2017 when they left for Canada with an agent's help. The PA testified that the applicants went wherever the agent brought them and that the agent handled their travel documents. The PA was unaware of the nature of these travel documents, what information they contained (such as which names), did not have them in her possession, and did not know where the documents were or what happened to them.

[9] After the applicants claimed refugee protection, Canadian immigration authorities searched the applicants' names in the Global Case Management System [GCMS] database. On February 9, 2017, an immigration officer [the interviewer] interviewed the PA, with an interpreter present, and stated that they believed she and her eldest two children applied for Canadian visas on December 14, 2009 from Paris. The youngest two children were not yet born in 2009. According to the examination summary, the PA denied that she ever applied for a Canadian visa in 2009 and did not respond when asked what country she travelled to Canada from. No final decision was rendered on those visa applications (see Certified Tribunal Record [CTR] at pp 144, 302). The visa application notes list the PA's name as Regina Denis and provide that Nigeria is her country of birth.

[10] On March 25, 2017, the PA was convened for a second interview and the same interviewer informed her, through an interpreter, about additional information discovered in the GCMS notes. According to the notes, persons having names very similar to all five applicants, and identical dates of birth, were issued Canadian electronic travel authorisations [eTAs] on September 27, 2016 under a Spanish address and using Spanish passports. These individuals used those passports and the eTAs on December 15, 2016 to enter into Canada at the Toronto airport.

[11] The eTA application notes, and GCMS notes, appear to reproduce the biographical information contained in the Spanish passports, including the applicants' names and dates of birth, and state that they are all Spanish citizens. The GCMS notes also list the Nigerian and Canadian addresses disclosed in the BOC and the generic application form (CTR at pp 61-62, 145, 319). According to the notes, the individuals travelling with Spanish passports used very similar names to those provided in the applicants' BOC forms (the name Regina Kingsley Kingsley was used and the other four individuals had the exact same first names as the minor applicants, but used the last names Agho and Kingsley). According to the notes, the purpose of the visit was to see their uncle over the Christmas holidays.

[12] The interviewer informed the PA that, in light of this information, they suspected that the applicants entered Canada using those Spanish passports on December 15, 2016 and asked the PA to provide an explanation (CTR at p 302). The interviewer also questioned her again about the visa applications from Paris. The PA responded that she was not aware of the visa or eTA applications. The interviewer ended the second meeting by asking the PA to return to that office

and provide further proof of her Nigerian identity and residence for the past ten years by March 30, 2017.

[13] Apart from attending the two meetings with the interviewer, the PA was never detained by Canadian immigration authorities on the basis of concerns about her identity.

III. *The hearing and procedural history*

[14] On February 7, 2017, the applicants filed their refugee claims. Later on, the RPD sent them undated notices to appear for a hearing on May 24, 2017. It is critical to provide some context about how and when the Minister's evidence was produced and to shed some light about how the RPD's hearing of this matter proceeded.

[15] In her BOC, the PA acknowledged that the four minor applicants are her children and that their father is not in Canada. This section of their BOC states: "If you are the child's parent but the other parent is not in Canada, do you have any legal documents or written consent allowing you to take care of the child or travel with the child? If yes, what document(s) do you have? If not, why not?" In response, the PA wrote: "I will request a consent letter."

[16] On April 27, 2017, the PA received a letter from a RPD Case Management Officer requesting that she provide "consent to travel with minor Claimants." The PA was afforded until May 15, 2017 to provide the letter, as paragraph 34(3)(a) of the *Refugee Protection Division Rules*, SOR/2012-256 [RPD rules], requires that documents be filed no later than ten days before the hearing date. The request in question did not suggest that any other documents (identity-

related or otherwise) would be required from the applicants before the scheduled hearing, and as a matter of fact, the RPD never requested further identity documents from the applicants before the hearing.

[17] Without providing Mr. Agho's consent letter, the PA's refugee claim could have been subject to an exclusion under section 98 of the Act and paragraph 1F(b) of the *United Nations Convention relating to the Status of Refugees* [the Convention] for committing the offence of abduction (under sections 283 and 284 of the *Criminal Code*, RSC 1985, c C-46: *Paris Montoya v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1674). If the PA failed to provide the letter within the delay, the Minister likely would have intervened on the basis of such an exclusion. Indeed, on May 15, 2017, the applicants' counsel provided the RPD with a letter from Mr. Agho in which he consents to the PA travelling with the minor applicants and permanently living with them in Canada.

[18] As the RPD's letter of April 27, 2017 pointed out, paragraph 34(3)(a) of the RPD rules requires that documents be provided no less than ten days before the hearing date. As proof of their identities, the applicants also submitted the following documents to the RPD within the delay set forth in the RPD rules:

(a) A photocopy of the biographical information page of the PA's expired Nigerian passport, which lists 2009 as the issue date and 2014 as the expiration date, states that she is a Nigerian citizen, provides her birth date, and states that she was born in Nigeria;

(b) Photocopies of the minor applicants' handwritten Nigerian birth certificates (the original birth certificates were provided at the hearing);

(c) A photocopy of the PA's Nigerian driver's license issued on February 9, 2016, providing her name, date of birth, Nigerian address, and photograph (the original driver's license was provided at the hearing).

[19] Moreover, the applicants' counsel provided additional documents on May 23, 2017, the day before the hearing. Notably, the following two documents were produced at that late time:

(a) A support letter from the PA's cousin, who claims to have known her since she was born, dated May 17, 2017. He corroborates her version of the events. A copy of his Nigerian driver's license was provided with the letter; and

(b) An undated support letter from the PA's former Nigerian neighbour of two years. He claims that in January 2017, the police came by his home in search of the PA and that "news [was] making round about her sexuality." A copy of his Nigerian driver's license was provided with the letter.

[20] On May 23, 2017, the Minister submitted a late notice of intent to intervene on three grounds under section 29 of the RPD rules and paragraph 170(e) of the Act: "identity, credibility, and program integrity." According to subsection 27(3) of the RPD rules, program integrity concerns the possibility that a refugee claim was made under a false identity, using fraudulent documents, subject to misrepresentation, or that substantial changes were made to a BOC form.

[21] Among other recitals, the Minister's letter requested that the RPD provide relief from certain provisions of the RPD rules:

> **THE MINISTER REGRETS** the late date of this intervention, and requests the granting of relief from the applicable requirements of RPD Rules 29, 33 and 36, given the exceptionally relevant and probative nature of evidence to be disclosed.

[22] Attached to the letter, the Minister produced a solemn declaration of a Canada Border Services Agency [CBSA] Hearings Officer of the Greater Toronto Area, dated May 23, 2017, which appended reports of the CBSA Integrated Customs Enforcement System [ICES], as well as GCMS Extracts, Biodata and Visa Applications. The solemn declaration attests to the fact that the Officer reviewed the CBSA ICES which recorded that the five individuals with names similar to the applicants' names entered Canada on December 15, 2016 using Spanish passports and that they were processed in the same primary inspection lane by the same Border Services Officer at the Toronto Airport. The Minister did not produce copies of the Spanish passports, the eTA applications, or the 2009 visa applications as evidence.

[23] Essentially, the rules referenced by the Minister in its letter set forth the formalities that must be observed when the Minister intervenes and for the production of documents before the RPD, including the requirement that ten days' notice be given for such documents.

[24] The hearing proceeded on the scheduled date of May 24, 2017. On that day, the minor applicants' original Nigerian birth certificates were provided to the RPD as was the PA's original Nigerian driver's license. The applicants' counsel was uncertain as to whether the hearing would proceed or if it had been adjourned given the Minister's late intervention. The RPD panel

member acknowledged having received the notice of intervention for the first time that morning. However, the RPD ultimately allowed the Minister's intervention, admitted the Minister's late evidence, and decided to proceed with the hearing as originally scheduled.

[25] At the hearing, the PA testified in the Nigerian language Edo with the assistance of an interpreter. She was questioned by the panel and the Minister about the Minister's evidence, her travel history, and her identity. Much of the hearing focused on the PA's efforts to obtain additional documents from her husband in Nigeria, such as her original expired Nigerian passport, for the purpose of proving her identity to the RPD's satisfaction. This was the first time the PA had been specifically asked to provide her original Nigerian passport. The questions did not focus on the substantive merits of the applicants' refugee claims beyond the preliminary issue of identity.

[26] The PA testified that her children were all born in Nigeria, denied that any of them was born in Spain, and denied that she had ever been to Paris. She stated that none of her children had ever been to Spain, other than her eldest child who joined her and her husband on a three week trip to Spain in 2005. The PA testified that she did not have any documents supporting her travel route from Nigeria, through Amsterdam to Toronto, as this was handled by her agent. The PA stated that she did not provide further identity documents after the interviewer's request because she did not understand that he was seeking these documents to determine her identity and did not know what documents to provide. The PA stated that she did not attempt to get her original expired passport or any other documents relating to her residence or identity from Mr. Agho between the second meeting with the interviewer and the RPD hearing. She believed Mr.

Agho was angry with her after discovering her sexual relationship with another woman and that he would not comply.

IV. *Identity: the determinative issue before the RPD*

[27] On May 25, 2017, the day after the hearing, and two days after the Minister's late intervention, the RPD dismissed the applicants' claims for refugee protection, holding that they failed to establish their identities on the balance of probabilities. The RPD based its conclusion on the following findings:

(a) **Nigerian Birth Certificates:** Contrary to the Minister's evidence, the four original birth certificates submitted to establish the minor applicants' identities "bear no verifiable security features";

(b) **Photocopy of the PA's expired Nigerian Passport:** The security features of the PA's expired passport could not be tested because the original was not in evidence;

(c) **Nigerian Driver's License:** The PA's original driver's license bears some security features. However, the driver's license alone is insufficient to establish the PA's "Nigerian residency" because it is possible for a person to apply online to renew it from any location in the world. Even if the PA obtained the license by appearing at the Nigerian office in person, it does not establish that she is a Nigerian resident or that she was a Nigerian resident at the time the license was issued in February 2016, "especially in the absence of a current Nigerian passport to show her travel history and identity";

(d) **The two support letters:** The RPD noted that the applicants provided two "late-disclosed" support letters to "respond in part to the [Minister's] request for proof of residency in Nigeria." The neighbour's letter only provides that they were neighbours for the past two years and "fails to corroborate the [applicants'] Nigerian residency for ten years as directed." The letter does not establish Nigerian residence at all because the Minister's evidence contradicts it. The letter is given no weight as proof of the applicants' identities. The RPD affords the cousin's letter "no weight" to establish the applicants' identities because its contents were "inconsistent with the Minister's unanswered evidence" that five persons with the applicants' names arrived in Canada with Spanish passports in December 2016;

(e) **Passports and Travel Documents:** The RPD noted that the applicants did not provide any original passports "to support their alleged Nigerian national identities" or any "documentation to corroborate their alleged travel history." The applicants did not "reasonably or sufficiently explai[n] the complete absence of passports or any other documents to corroborate her account of having traveled from Nigeria to Canada on January, 29, 2017";

(f) **Request for additional identity evidence:** The RPD took issue with the fact that the PA did not provide additional proof of "identity and residency in Nigeria for the past ten years" by the deadline provided by the interviewer. The RPD rejected the PA's explanation that she did not know what further identity documents to provide and that she provided all of the documents she had as lacking credibility

because of the number of times she was asked for additional identity and residency documents. The RPD rejected the PA's explanation that she did not think she could get further documents from Mr. Agho because she believed he was angry and noted that when she asked for the consent letter, he complied. The RPD held that it is more likely that the PA was unable to provide additional identity documents because the applicants "had no current, genuine Nigerian [*sic*] identities documents such as passports to obtain and disclose";

(g) **The Minister's Evidence:** The RPD held that the "Minister's evidence strongly indicates the [applicants'] are Spanish citizens, irrespective of whether the [applicants] are or could be Nigerian citizens." At several points throughout the decision, the RPD remarked that it prefers the Minister's evidence to the applicants' evidence, noting that the Minister's evidence is supported by a secure system with electronically tracked information. However, the RPD concedes that the "Minister's evidence is not definitive proof of the [applicants'] Spanish citizenship because the Minister did not present the original Spanish passports naming the [applicants] and their dates of birth".

V. *Appeal to the RAD*

[28] On June 22, 2017, the applicants appealed the RPD's decision. They asked the RAD to accept and consider the PA's original Nigerian passport, as well as the two eldest minor applicants' Nigerian school certificates and the report cards for the 2015-2016 school session. To explain that these documents were not reasonably available at the time the RPD dismissed the

claims, the applicants submitted an affidavit drafted by the PA and a series of text messages from June 20 to June 28, 2017 in which the PA convinces Mr. Agho to provide her original, expired Nigerian passport. The applicants also requested that the RAD grant them an oral hearing.

[29] The RAD upheld the RPD's decision. In particular, the RAD made the following findings:

(a) **The New Evidence:** As a preliminary matter, the RAD dismissed the applicants' new evidence as it did not meet the admissibility requirements provided by subsection 110(4) of the Act and *Singh*. This evidence was reasonably available to the applicants as the PA admitted that she made no efforts to obtain further identity documents from Mr. Agho, even though she was able to obtain the consent letter from him. The RAD held that it does not have discretion to go beyond the mandatory requirements of subsection 110(4) of the Act (*Singh* at paras 34-35). These documents may have probative value but the RAD's role is not to provide the applicants with an opportunity to complete a deficient record. The RAD dismissed the request for an oral hearing because it did not admit any new evidence; and,

(b) **Appeal of the RPD's Identity Conclusions:** In brief reasons on the merits, the RAD held that the applicants failed to fulfill their onus under section 106 of the Act and section 11 of the RPD rules. In making this finding the RAD held:

> I do not agree that the RPD erred in its assessment of the [applicants'] identity documents, or that it dismissed them on the basis of suspicion. It assessed each of her identity documents on their own merit, as outlined above, and found that the hand-written children's birth certificates, photocopy of the biographical page of

> her expired passport, and Nigerian driver's license were insufficient to establish their identities. In assessing the question of whether the [PA] had established her identity, it further considered the Minister's evidence regarding the visa application and travel to Canada of individuals with matching birthdates and almost identical names as the [PA] and her children, which conflicted the [PA's] account of events, and found that his evidence was reliable. I therefore find that the RPD did not reject the [applicants'] identity evidence on the basis of the Minister's evidence and submissions or based on suspicion, and find that it considered and based its findings regarding the [applicants'] identit[ies] on the totality of the evidence.

[30] The RAD further held that the RPD did not find the applicants' identity documents to be invalid and acknowledged that foreign-issued identity documents are presumed valid. In the RAD's view, the RPD found that these documents were insufficient to establish the applicants' identities because they lacked security features, were partial photocopies, and had limited probative value because they could be renewed outside of Nigeria or by proxy. The RAD held that, alternatively, the Minister's evidence was reliable and would rebut the presumption of validity. The RAD dismissed the applicants' argument that the RPD erred by making a negative credibility finding regarding the applicants' identities due to the lack of travel documents. In the RAD's view, the RPD considered "the lack of travel documents in its overall determination regarding the [applicants'] identities, and it was not an error to do so."

VI. *Reasonableness of the RAD's decision on the merits of the appeal*

[31] While the applicants have challenged the RAD's preliminary decision not to admit new evidence or hold an oral hearing, I will first address the arguments on the merits of the appeal and the reasonableness of the RAD's identity determination in the overall context of the case.

[32] The applicants argue that the RAD blindly endorsed the RPD's conclusions about their identity documents without conducting an independent analysis of the record before it. The RAD therefore erred by applying a reasonableness standard of review to the RPD's decision when the RPD was not entitled to deference. The applicants also submit that the RAD's decision was unreasonable for many reasons, many of which relate to the RAD's failure to conduct an independent analysis of the record.

[33] The applicants submit that since birth certificates and driver's licenses are fundamental identity documents, it was unreasonable for the RAD to expect the applicants to provide anything further. The applicants remark that neither the RPD nor the RAD held that the Nigerian identity documents are invalid which means, implicitly, that they recognized these documents to be authentic: these documents must therefore establish the applicants' identities. The applicants further submit that it was unreasonable for the RAD to rely on the Minister's evidence because primary documents were not provided to support the Minister's notes, such as copies of the visa applications made from Paris, or copies of the Spanish passports allegedly used by the applicants. In the applicants' view, the Minister's allegations were mere suspicions and did not amount to concrete evidence which could be relied on to disprove their identities.

[34] The applicants further submit that the RAD's decision was unreasonable in that it affirmed the RPD's decision to reject the birth certificates and the driver's license as proof of the applicants' identities without providing reasons of its own. It was unreasonable to dismiss the birth certificates for lacking security features without further reasons especially given that the National Documentation Package [NDP] does not provide that any specific security features are

to be expected when assessing Nigerian birth certificates. Moreover, the RAD affirmed the RPD's factual error that a Nigerian driver's license may be renewed from outside Nigeria: according to the NDP, a new driver's license shall only be issued in person. The applicants also submit that the RAD unreasonably upheld negative credibility findings made by the RPD resulting from the lack of documents establishing their travel history as these were peripheral to the issue of identity (*Cooper v Canada (Minister of Citizenship and Immigration),* 2012 FC 118).

[35] The respondent agrees that the RAD must conduct an independent analysis of the evidence but submits that this was done in this case. The respondent argues that the RAD's reasons were brief but sufficient: the RAD applied the appropriate standard of review. The respondent submits that the RAD reasonably held that the applicants did not establish their identities in light of the Minister's evidence which they could not explain. In the respondent's view, neither the RAD nor the RPD held that the applicants' identity documents are inauthentic; the applicants simply failed to fulfill their onus of establishing their identities on the balance of probabilities with sufficient probative evidence (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067). In any case, the Minister's contradictory evidence reasonably supported a finding that the presumption that these foreign-issued identity documents are valid was refuted.

[36] I agree with the applicants that the RAD made a number of reviewable findings, and I would further note that the RAD's unreasonable conclusions arise from its apparent blind endorsement of the RPD's own untenable findings, which will be set out in further detail below. While I do not believe that the standard of review applied by the RAD is dispositive in this

matter, as its decision is unreasonable regardless of the standard it applied, I believe that some general remarks are in order, after which I will point out a number of the RAD's determinative errors.

[37] Generally speaking, a RAD decision may be unreasonable if it inappropriately defers to the RPD's findings instead of applying a correctness standard and fails to come to its own conclusions about the correctness of the RPD's findings of law, fact, or fact and law (*Canada (Citizenship and Immigration) v Abdul Salam*, 2018 FC 676 at para 11, *Ali v Canada (Citizenship and Immigration)*, 2016 FC 396 at para 4). However, the RAD may defer to the RPD's factual findings where the RPD truly benefitted from an advantageous position, such as in the assessment of credibility following an oral hearing; otherwise, the RAD must review the RPD's findings on a correctness standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paras 70, 103 [*Huruglica*]). I would note, however, that in some circumstances, the RPD will not enjoy a meaningful advantage over the RAD in assessing credibility, such as when the RAD can listen to a recording of the hearing or if the oral testimony is otherwise captured in the RAD record (*Rozas Del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at paras 90-91, 105). That being said, with respect to assessing documentary evidence, including identity documents, the RPD does not generally enjoy a meaningful advantage over the RAD, unless the RPD assessed the original documents which are not contained in the RAD record at the time the RAD renders its decision; in such cases it may be reasonable for the RAD to defer to the RPD's findings with respect to the authenticity of those documents (*Jadallah v Canada (Citizenship and Immigration)*, 2016 FC 1240 at para 54).

[38] In this respect, I would make the following particular observations. It appears that the original birth certificates and the original driver's license were not before the RAD as they were seized by the Minister after the RPD hearing. One could argue that it was appropriate for the RAD to defer to the RPD's findings regarding the inherent characteristics of those identity documents. However, information about Nigerian identity documents in the NDP was available to the RAD on appeal, the RPD's conclusions about information contained in the NDP were not entitled to any deference, and the RAD was required to independently assess the relevant passages of the NDP. On another note, it does not appear that the RPD enjoyed any meaningful advantage in assessing the PA's translated testimony. The RAD had access to an audible recording of the entire hearing. In any event, this is not a case that turns on credibility findings arising from the PA's testimony.

[39] Ultimately, I am not satisfied that the RAD properly undertook the hybrid appeal approach required by *Huruglica* as the RAD's "overly obsequious support for and reinforcement of all RPD findings" raises serious doubts about the independence and rigour of the RAD's analysis (*Jeyaseelan v Canada (Citizenship and Immigration)*, 2017 FC 278 at paras 17-19). Moreover, the vast majority of the RAD's decision entails summary of the RPD's own findings or endorsement of the RPD's findings. With the exception of a single passage, each conclusion of the RAD appears to rely on the RPD as a point of reference ("the RPD found", "the RPD considered", "the RPD determined"). Such language is an indication that the RAD inappropriately deferred to the RPD's findings and did not perform its appellate role as required (*Khachatourian v Canada (Citizenship and Immigration)*, 2015 FC 182 at para 33).

[40] This discussion is largely academic as concerns the RAD's conclusions about the authenticity of the applicants' identity documents. While the RPD's findings relating to documents not before the RAD could have been entitled to deference, regardless of the standard used, the RAD's findings with respect to the applicants' birth certificates and the driver's license are unreasonable. Documents issued by a foreign authority are presumed to be valid and in order to rebut this presumption, evidence to the contrary must be before the decision-maker (*Ramalingam v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 10 (QL), 1998 CanLII 7241 (FC) at paras 4-6; *Chen v Canada (Citizenship and Immigration)*, 2015 FC 1133 at paras 10-11 [*Chen*]). I find that such evidence was not before the RAD.

[41] The RAD did not accept the Nigerian birth certificates as proof of the minor applicants' identities due to a lack of "verifiable security features," and its preference for the Minister's evidence. However, there was no evidence, or passage in the NDP, suggesting that security features of any specific kind are expected for Nigerian birth certificates. Moreover, neither decision provides any explanation as to *why* security features should be required nor *what* specific security features were expected. Without evidence that specific security features are required, "a lack of verifiable security features" is not a reasonable basis to rebut the presumption that a foreign-issued document is valid (*Duroshola v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 518 at para 24; *Chen* at paras 10-11). While the RAD did not possess the original birth certificates, which were before the RPD, the record contained photocopies. It appears from these copies that each of the birth certificates was affixed with an official stamp. However, neither the RPD nor the RAD mentioned the stamp, which could very well be a security feature capable of identifying the issuing authority in Nigeria (*Elhassan v*

Canada (Citizenship and Immigration), 2013 FC 1247 at paras 20-22; *Adesida v Canada (Citizenship and Immigration)*, 2016 FC 256 at paras 15-25).

[42] Moreover, the RAD did not accept the driver's license as proof of the PA's identity because in its view, the license could be renewed from any location in the world or by proxy and again because it preferred the Minister's evidence. I would first note that according to the NDP, driver's licenses are used for identity purposes in Nigeria because the country does not have an established national identity card system. A Nigerian driver's license is therefore a primary identity document, which, if authentic, may independently establish a claimant's identity (*Diallo v Canada (Citizenship and Immigration)*, 2014 FC 878 at para 4 [*Diallo*]). In passing, according to other documents in the NDP, Nigeria has attempted to implement a national identity card as some have been issued, though it does not appear to be fully recognized: "The Sun reports that despite the 1 September 2015 deadline for the [National Identity Management Commission's] implementation of the [National Identification Card], customers continue to be turned down in Lagos when they attempt to use the card as identification for transactions (The Sun News Online, 9 July 2015)".

[43] In the case at bar, the RAD's finding is unreasonable as the possibility to apply for a driver's license remotely or by proxy is irrelevant to the issue of identity, which is not concerned with the PA's residence or presence in Nigeria at a specific moment in time. Regardless of whether a person resides in Nigeria or is physically present in Nigeria when the license is issued or renewed, it remains that, unless it is inauthentic or obtained by fraudulent means, the license is recognized by Nigerian authorities as identifying the person in question.

[44] In any case, as the applicants rightly point out, the Nigerian NDP in the RAD record, states that an application to renew a driver's license, or to be issued a new license, may be initiated online from any location, but personal appearance at the licensing centre is required to provide signatures, photographs, and biometric data (CTR 632-636). Under the new system, a Nigerian driver's license shall therefore only be issued or renewed in person. The RPD misinterpreted the NDP which states that under the old system, remote applications were possible without need to physically attend to obtain the license. This old system was replaced in 2012 and the PA was issued her driver's license in 2016. Again, this error was upheld by the RAD without any independent analysis, and this Court seriously questions if the RAD even read the relevant sections of the NDP.

[45] Moreover, the RAD's reasons for dismissing the applicants' identity documents are especially problematic in that they rely on characteristics that affect all Nigerian birth certificates and driver's licenses and are not specific to the documents that the applicants produced or the PA's testimony about how those documents were acquired, neither of which seemed to raise any concerns. The RAD's conclusions about the PA's driver's license and the minor applicants' birth certificates are therefore unreasonable as they suggest that even genuine documents from Nigeria would not be acceptable (*Chen* at para 13; *Lin v Canada (Citizenship and Immigration)*, 2012 FC 157 at paras 54-57). Presumably, the security features missing from the minor applicants' birth certificates would be missing from any Nigerian birth certificate. Likewise, if it were true and relevant that one could obtain a Nigerian driver's license without physical attendance, this would apply to all Nigerian driver's licenses. The RPD and the RAD cannot

confer a general discretion upon themselves to accept or reject valid identity documents, at will, by relying on general statements in the NPD of the country in question.

[46] I would also note that the RAD did not discuss the two support letters that the applicants provided. It was not reasonable to ignore them. The jurisprudence requires the RAD to consider and assess each identity document submitted by the applicants notwithstanding its decision to reject other identity documents (*Katsiashvili v Canada (Citizenship and Immigration)*, 2016 FC 622 at para 25).

[47] The cousin's letter claims that the PA and her children are Nigerian and that he has known the PA "since she was born", while the neighbour's letter claims that the applicants lived in Nigeria for at least two years prior to their arrival in Canada. I would note that a photocopied driver's license identifying the author was appended to each letter. This Court is entitled to infer that the RAD overlooked this evidence which squarely contradicts its identity conclusions *(Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204 at paras 30-31). Moreover, the RAD cannot reasonably ignore documents tendered by claimants to establish their identities; the RAD must conduct an independent assessment of each identity document in the record, even if other identity documents are held to be inauthentic (*Aytac v Canada (Citizenship and Immigration)*, 2016 FC 195 at paras 40-42; *Teweldebrhan v Canada (Citizenship and Immigration)*, 2015 FC 418 at paras 19-21).

[48] Moreover, if the RAD's silence is to be taken as an endorsement of the RPD's reasons for dismissing these letters, this was unreasonable. The RPD could not reasonably dismiss the

neighbour's letter simply because it does not cover the 10 year period requested by the Minister. That period is entirely arbitrary. While a two year period of Nigerian residence cannot in itself establish the applicants' identities, it certainly corroborates the other evidence they provided to that effect. Moreover, while the Minister's evidence may contradict the narrative in the cousin's letter (that the applicants hid at his house in January 2017), it remains that he claimed to know the PA since she was born and this could not reasonably be dismissed without further explanation.

[49] In light of these determinative errors, it was unreasonable for the RAD to conclude that the RPD assessed the birth certificates and the driver's license "on their own merit," without conducting its own analysis of the NDP or the copies of the identity documents in the record. In my view, these unreasonable findings are certainly determinative; however, the RAD's reliance on the Minister's evidence was also an unreasonable basis to reject the applicants' identity documents.

VII. *Unreasonable reliance on the Minister's evidence to reject the applicants' identity documents*

[50] In coming to the above conclusion, I have specifically considered the fact that the RAD apparently held that the applicants' identity documents were not rejected on the basis of the Minister's evidence alone. Rather they were apparently rejected after the RPD supposedly considered "the totality of the evidence" – which this Court supposes refers to the identity documents, which were not properly assessed, and the lack of travel documents as well. The RAD also held that the RPD did not deem the identity documents to be invalid; it simply found

them to be insufficient, but that in any case, the presumption of authenticity could have been refuted by the Minister's evidence. These findings are also unreasonable for a number of reasons.

[51] Firstly, the RAD could not reasonably contradict the authenticity of primary documents issued by the Nigerian government by relying on secondary sources (the Minister's notes, an affidavit, and examination notes from the interview with the CBSA Hearings Officer) when the Minister never produced the primary documents on which those notes were based. These primary documents must exist, be in the Minister's possession, and it must have been in the Minister's power to produce them. If this Court were to conclude otherwise, practically any document drafted by this government, primary or otherwise, and regardless of the document's authenticity or form, could be relied on to impugn otherwise presumptively valid documents emanating from a foreign state. Moreover, the RPD rules require a claimant to provide acceptable documents establishing identity (section 11) and, where either party provides a copy of a document to the RPD, they must provide the original document "no later than at the beginning of the proceeding at which the document will be used" (section 42). It appears that the Minister and the applicants were held to different standards here. If the applicants must produce acceptable identity documents, it follows that if the Minister intends to contradict the applicants' identities, it must do so with acceptable documentation of its own. It is difficult to see how the GCMS notes, which essentially consist of a record of primary documents in the Minister's possession, fulfill this standard when the Minister provided no reasonable explanation for the decision not to produce those primary documents.

[52] Secondly, at best, the Minister's evidence suggests that the applicants could be Spanish citizens. However, the RPD explicitly found that it could not make such a determination because the Spanish passports were not before it and the RAD did not find otherwise. I cannot agree with the respondent that either the Minister's evidence or the lack of travel documents has any bearing on the applicants' identities or that the Minister's evidence rebuts the presumption that the applicants' identity documents are authentic. Of course, the Minister's evidence could be highly relevant to the merits of the applicants' refugee claims and in assessing the credibility of their narratives, since they claim that in January 2017 the PA was in Nigeria when the younger brother of her partner's husband caught her with her female lover. Even if we accept that the Spanish passports are fraudulent, or were not properly obtained, still, the applicants would have to explain why we should not accept the Minister's evidence that the applicants arrived in Canada in December 2016, which appears to contradict their narrative on the merits. Moreover, if the Minister had chosen to intervene on the basis of an exclusion under section 1(E) of the Convention, this evidence would have been directly material. Evidently, the merits of the refugee claims have yet to be at issue given that the claims were dismissed solely on the basis of the applicants' identities. It also goes without saying that the Minister never sought to rely on its evidence for the purpose of making an exclusion argument because all five applicants would be Spanish citizens. Its intervention was solely made on the basis of identity, credibility, and program integrity.

[53] Thirdly, contrary to the implication that runs throughout the decisions of both the RAD and RPD, section 106 of the Act and section 11 of the RPD rules do not require a refugee claimant to prove their national identity to the exclusion of all other nationalities. Rather, these

provisions require that claimants provide “acceptable documentation establishing identity.” Moreover, these provisions do not require claimants to provide travel documents, such as passports, nor do they require them to provide documents establishing residence in the country in question for a specific period of time. Of course, passports or documents establishing residence could be of assistance in establishing identity. However, the respondent’s counsel was unable to provide me with any authority or convincing argument that such documents must be provided in addition to identity documents, such as a birth certificate or driver’s license, in the absence of a tenable finding that those identity documents presented to the RPD are either inauthentic or were fraudulently obtained.

[54] Fourthly, even if a very broad interpretation is given to the power of the Court to look at the tribunal’s record (*Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII)), it is not the role of this Court to rewrite an apparently deficient decision and to replace the tribunal’s factual findings with its own (*Sharif v Canada (Attorney General)*, 2018 FCA 205 (CanLII) at paras 26-27, referring to *Delta Air Lines Inc v Lukács*, 2018 SCC 2 (CanLII); *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61 (CanLII)). Yet, this Court is particularly concerned about the RAD’s decision, and the respondents’ arguments, because, boiled down to their essence, they suggest that when a refugee claimant’s travel history is unclear, or the claimant is suspected of travelling on false documents, they have failed to establish their identity, notwithstanding the fact that they have produced presumptively valid identity documents that have not been seriously challenged.

[55] It is common for people fleeing persecution to follow the instructions of an agent who organized their escape, to use false travel documents, lie about travel documents, or to simply not have any travel documents. However, this Court consistently holds that these factors are peripheral to general credibility findings, a determination of whether or not a person is a refugee, and cannot be relied on to impugn the reliability of other documents that a claimant produces (*Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 at paras 42-47; *Cooper* at paras 3-8; *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 11; *Kaur v Canada (Minister of Citizenship and Immigration)*, 2005 FC 103 at paras 13-18; *Teneqexhiu v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 397 at paras 5-6). In this case, the PA's testimony was consistent to the effect that she travelled following an agent's instructions, that the agent managed their travel documents, she could not describe the information contained in those documents, and did not know where they were or what happened to them. This Court has thus repeatedly cautioned against drawing negative conclusions when such facts arise, although this is exactly what both the RPD and RAD have done here. In other words, it was unreasonable for the RAD to uphold the RPD's "preference" for the Minister's evidence which could not have established more than a possibility of Spanish citizenship or travel using false Spanish documents. These are not reasonable grounds for rejecting otherwise unchallenged Nigerian identity documents, finding them "insufficient", or for refuting their presumed authenticity.

[56] Before this Court, the respondent acknowledged that the RAD and RPD did not make a finding that the five individuals who arrived in Toronto in December 2016 actually are the applicants. However, if this Court were to accept that the Minister's evidence is actual proof that

the applicants are those five individuals, it would certainly be reasonable to conclude that the applicants travelled to Canada using false Spanish passports. However, given that the applicants have provided Nigerian identity documents, it is nevertheless unreasonable to conclude that the applicants did not establish their identities without a proper assessment of those identity documents or to rely on their travel history to impugn their identities or general credibility.

[57] For the foregoing reasons, the RAD's decision that the applicants did not establish their identities is unreasonable. This would be sufficient in itself to set aside the impugned decision and remit the matter back to another panel of the RAD for redetermination. I will however address the other issues raised by the parties.

VIII. *The RAD's refusal to admit new evidence is also unreasonable*

[58] Subsection 110(4) of the Act set forth the principles that apply to the RAD's discretion to admit new evidence:

110(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.	**110(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.
[Emphasis added]	[Je souligne]

[59] The applicants argue that new evidence, the original passport, and school records of the two eldest minor applicants for the 2015-2016 session, was not reasonably available at the time of the RPD hearing and the RAD unreasonably refused to admit these documents. Essentially, they submit that Mr. Agho had these documents in his possession and would not provide them to the applicants because he was angry that the PA was involved in a sexual relationship with another woman.

[60] While these highly relevant documents were possibly available prior to the May 24, 2017 hearing, because the PA was able to obtain the consent letter from Mr. Agho by May 15, 2017, I find that it was nevertheless unreasonable for the RAD to refuse to admit these new documents. In the present case, I find that the applicants could not reasonably have been expected in the circumstances to have presented these documents at the time their refugee claims were rejected by the RPD.

[61] On this point, I would repeat that the RAD essentially concluded that it "does not have the discretion to go beyond the provisions of subsection 110(4) [of the Act] which sets out explicit, mandatory conditions that must be met in order for new evidence to be admitted." Since the applicants' evidence existed at the time the RPD rejected their claims and was reasonably available, because Mr. Agho provided the consent letter, "this evidence does not meet the requirements under [sub]section 110(4) of the [Act], and [the RAD] cannot accept it."

[62] The RAD did not strictly misinterpret *Singh*, in which the Federal Court of Appeal held as follows (at para 63):

> However, subsection 110(4) is not written in an ambiguous manner and does not grant any discretion to the RAD. As mentioned above (see paras. 34, 35 and 38 above), the admissibility of fresh evidence before the RAD is subject to strict criteria and neither the wording of the subsection nor the broader framework of the section it falls under could give the impression that Parliament intended to grant the RAD the discretion to disregard the conditions carefully set out therein.
>
> [Emphasis added]

[63] It is true that the RAD cannot go *beyond* the three explicit conditions for admitting new evidence provided under subsection 110(4) of the Act. *Singh* clearly held that these three conditions are exhaustive. However, in reading the subsection itself, one cannot say that the RAD is entirely without discretion in assessing the admissibility of new evidence *within* the confines of those three conditions themselves, without importing additional considerations that parliament did not intend to grant the RAD the jurisdiction to consider. Granted, the first two conditions, newness and reasonable availability, appear to be relatively objective and confer little, if any, discretion upon the RAD. However, the third condition, whether the applicant could have reasonably been expected in the circumstances to have presented the evidence at the time the RPD rejected the refugee claim, is clearly quite broad and entails a certain degree of inherent discretion in its application.

[64] It cannot be forgotten that *Singh* also held that "It goes without saying that the RAD always has the freedom to apply the conditions of subsection 110(4) with more or less flexibility depending on the circumstances of the case" (at para 64). Moreover, this Court has held that it is not sufficient for the RAD to conclude that the evidence does not meet the statutory requirements without assessing all of the conditions set forth in subsection 110(4) of the Act (*Ajaj v Canada*

(Citizenship and Immigration), 2015 FC 928 at para 58; *Galamb v Canada (Citizenship and Immigration)*, 2016 FC 1230 at para 17).

[65] Proper assessment of the third condition essentially entails consideration of an applicant's reasonable expectations in the circumstances which, for example, allows the RAD to consider an applicant's justifiable surprise that identity evidence presented before the RPD was not sufficient, or the overall fairness of the manner in which the RPD proceeded (*Abdullahi v Canada (Citizenship and Immigration)*, 2015 FC 1164 at paras 10-14), or new circumstances that arise shortly before a RPD hearing (*Jeyakumar v Canada (Citizenship and Immigration)*, 2017 FC 241 at paras 17-22), especially when a RPD decision is rendered shortly after that hearing is held (*Ogundipe v Canada (Citizenship and Immigration)*, 2016 FC 771 at paras 22-27).

[66] I acknowledge that the applicants only raised reasonable unavailability as the ground for producing new evidence while they admitted that those documents existed at the time the RPD rendered its decision. However, in this case, there were compelling reasons for the RAD to admit the applicants' new evidence under the third condition of subsection 110(4) of the Act. In the circumstances, I do not believe it was reasonable for the RAD to dismiss the new evidence by relying on its failure to meet either of the first two statutory conditions and then stop there to plainly conclude that it could go no further. In this matter, it was clear on the face of the record that the third statutory condition was highly relevant. While the RAD did not have the discretion to consider extraneous factors, it certainly could consider if, in the circumstances, the applicants could have reasonably been expected to present that evidence to the RPD before it rendered its decision. The RAD's failure to further assess the admissibility of the new evidence, and thus

engage in an analysis of that third condition, by essentially holding that its discretion was limited by the very statute that requires it to consider that condition, was unreasonable in the particular circumstances of this case.

[67] In the case at bar, there are three compelling reasons why the applicants could not reasonably have been expected to provide further identity documents before the RPD dismissed their claims, which the RAD failed to consider:

(a) The applicants could not have anticipated the Minister's last minute intervention or that they would be responding to evidence tendered to contradict their identities;

(b) The RPD itself never put the applicants on notice that it required further identity documents despite putting them on notice to provide the consent letter from Mr. Agho, which they did provide; and

(c) The RPD rendered its decision the day after the hearing, effectively precluding the applicants from providing further identity documents, even though the RPD knew that the original passport probably existed because it had a photocopy before it.

[68] I find that this manner of proceeding was unfair and reeks of an attempt to dispose of the applicants' refugee claims without giving them a fair opportunity to establish their identities.

[69] The Minister only intervened the day before the hearing on the basis of identity (among other grounds). This intervention was highly irregular as it did not occur within the ten days required in the RPD rules and the Minister's evidence was also produced the day before the hearing.

[70] Ordinarily, the RPD may exercise its discretion to dispense with the requirements for filing a document within the ten day delay; however, to do so the RPD must consider the relevant factors provided in section 36 of the RPD rules:

36. A party who does not provide a document in accordance with rule 34 must not use the document at the hearing unless allowed to do so by the Division. In deciding whether to allow its use, the Division must consider any relevant factors, including	36. La partie qui ne transmet pas un document conformément à la règle 34 ne peut utiliser celui-ci à l'audience à moins d'une autorisation de la Section. Pour décider si elle autorise ou non l'utilisation du document à l'audience, la Section prend en considération tout élément pertinent, notamment :
(a) the document's relevance and probative value;	a) la pertinence et la valeur probante du document;
(b) any new evidence the document brings to the hearing; and	b) toute nouvelle preuve que le document apporte à l'audience;
(c) whether the party, with reasonable effort, could have provided the document as required by rule 34.	c) la possibilité qu'aurait eue la partie, en faisant des efforts raisonnables, de transmettre le document aux termes de la règle 34.
[Emphasis added]	[Je souligne]

[71] According to the Minister's intervention letter, filed the day before the hearing, the sole basis for requesting an exemption from the RPD rules was the "relevance and probative value" of its evidence. Upon listening to the recorded RPD hearing, this Court finds that the RPD did not consider the factors provided above. Notably, the Minister was not asked if with reasonable effort it could have produced its evidence within the delay. If the applicants had been given proper notice that the Minister would be intervening on the basis of identity and that the Minister would produce evidence, the applicants could have had the opportunity to request an adjournment and submit further identity documents to respond to the Minister's submissions. However, until the applicants were informed that the Minister would intervene on the basis of identity, and without any notice from the RPD that further identity documents were required, this Court finds that they could not reasonably have been expected to provide further identity documents before the hearing, in addition to the birth certificates, the driver's license, the two letters, and the passport photocopy already provided.

[72] It cannot be said that the applicants knew that further identity documents were required before the RPD hearing took place. It is true that the interviewer requested further documents two months before the RPD hearing. However, I must repeat that the applicants were never put on notice by the RPD that further identity documents were required for their hearing. Indeed, the RPD Case Management Officer had already communicated with the applicants about the need to obtain a consent letter from Mr. Agho to demonstrate that the PA did not abduct the minor applicants. It follows that if further identity documents were needed from the applicants, the RPD could have put them on notice and asked them for identity documents itself.

[73] While the interviewer who met with the PA before the hearing may not have been satisfied that she or the minor applicants established their identities, such a conclusion was not binding on the RPD which remained bound to perform an independent assessment of the applicants' identity documents (*Diallo* at para 5; *Matingou-Testie v Canada (Citizenship and Immigration)*, 2012 FC 389 at para 27; *Jackson v Canada (Citizenship and Immigration)*, 2012 FC 1098 at para 34). I agree with the applicants that, after providing the birth certificates and the driver's license, in addition to letters from the cousin and the neighbour, it was not reasonable for the RPD to expect them to provide further evidence of their identities or residence, such as the original passport, without first making a request. The applicants were entitled to expect that the traditional identity documents they provided: the birth certificates and the driver's license, would be sufficient to establish their identities (*Bahta v Canada (Citizenship and Immigration)*, 2014 FC 1245 at para 18).

[74] This Court also notes that the applicants did present a photocopy of the biographical page of the PA's expired passport. Normally, the RPD may reasonably refuse to afford probative value to a photocopied identity document if it is not supported by the original document, provided either on written request or at the hearing, and no explanation is given for that failure (section 42 RPD rules, *Flores v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1138 at paras 7-8; *Diallo* at para 10). However, the Minister intervened at the 11th hour to present its own evidence which was unsupported by the primary documents on which it was based: the applicants' alleged visa applications, eTA applications, and Spanish passports. Neither the RPD nor the RAD gave the photocopied passport any weight or considered whether the

Minister's late intervention had any bearing on the applicants' inability to provide that original passport.

[75] Moreover, section 36 of the RPD rules permits additional evidence to be presented after a RPD hearing (*Bakos v Canada (Citizenship and Immigration)*, 2016 FC 191 at para 48). However, the RPD rendered its decision the day after holding the hearing. This precluded the applicants from applying to file further identity evidence, even though the RPD knew that the PA likely had a passport in Nigeria because the RPD had the photocopy before it. Instead, the RPD drew negative inferences from the applicants' failure to produce this passport in the first place, concluding essentially that the applicants did not provide the original because it did not exist: "The panel finds, on a balance of probabilities, it is more likely that [the PA] was unable to provide any additional documents to prove the [applicants'] Nigerian identities because the [applicants] had no current, genuine Nigerian [*sic*] identities documents such as passports to obtain and disclose."

[76] In these particular circumstances, it was not reasonable for the RAD to dismiss the applicants' new evidence. I acknowledge that an applicant's surprise, without justification in light of the circumstances, that evidence presented to the RPD was insufficient after the decision is rendered is not generally in itself a basis for presenting new evidence to the RAD (*Canada (Citizenship and Immigration) v Desalegn*, 2016 FC 12 at paras 22-24). However, given the Minister's conduct, and the manner in which the RPD proceedings were undertaken, the applicants could not reasonably have been expected to present that evidence to the RPD and the

RAD's refusal to properly consider this statutory condition was unreasonable in the circumstances.

IX. *The RAD's decision not to hold an oral hearing*

[77] The applicants submit that the RAD's decision not to hold an oral hearing was also unreasonable; it should have held an oral hearing to assess the new documentary evidence because this evidence meets the three conjunctive conditions of subsection 110(6) of the Act.

[78] Subsections 110(3) and 110(6) of the Act, which set forth the RAD's discretion to hold an oral hearing after new evidence is admitted, and section 111 of the Act which sets forth the RAD's jurisdiction provide as follows:

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.	**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.
[…]	[…]

110(6). The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3):

(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(b) that is central to the decision with respect to the refugee protection claim; and

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

[…]

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

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

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

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

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

110 (6). La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

b) sont essentiels pour la prise de la décision relative à la demande d'asile;

c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

[…]

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

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

(a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and	**a)** que la décision attaquée de la Section de la protection des réfugiés est erronée en droit, en fait ou en droit et en fait;
(b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.	**b)** qu'elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen des éléments de preuve qui ont été présentés à la Section de la protection des réfugiés.

[79] Since the RAD refused to admit new evidence, it did not examine the issue of holding an oral hearing. However, given that the decision not to admit the new evidence was unreasonable, some comments about whether the RAD could reasonably refuse to hold an oral hearing if it had admitted the new evidence are also in order in this case.

[80] The three conditions of subsection 110(6) of the Act must be fulfilled for the RAD to enjoy the discretion to hold an oral hearing. Moreover, even if these three conditions are met, the RAD retains the discretion not to hold an oral hearing, as it may be satisfied that it can determine the matter without an oral hearing (*Singh* at para 71; *Sow v Canada (Citizenship and Immigration)*, 2016 FC 584 at paras 33-34). However, the RAD must exercise its discretion to hold an oral hearing reasonably (*Horvath v Canada (Citizenship and Immigration)*, 2018 FC 147 at para 18).

[81] In my view, it would be unreasonable for the RAD to exercise its discretion not to hold an oral hearing. Although it appears that neither the RAD nor the RPD made explicit credibility findings with respect to the PA's testimony, I agree with the applicants that negative credibility findings were made regarding the lack of travel documents and the applicants' travel history. Both the RPD and RAD relied on the applicants' suspected travel history and their lack of travel documents to impugn their identity documents. Moreover, I believe that the materiality conditions under section 110(6) of the Act are fulfilled because the new evidence could be central to the applicants' claims, and could affect the outcome since identity is a dispositive issue. If the applicants' identities are not established, the claims fail and the new evidence could rectify that outcome; an oral hearing therefore ought to be held to properly consider that new evidence (*Osman v Canada (Citizenship and Immigration)*, 2018 FC 1048 at paras 33-34).

[82] Further remarks are in order with respect to the RAD's jurisdiction in this case and the need to conduct a new oral hearing since the RPD did not specifically address the credibility of the claims themselves. Neither the RPD nor the RAD rendered a decision on the merits of the applicants' refugee claims as both tribunals dismissed the claims on the basis of identity. Moreover, upon review of the recorded RPD hearing, I must remark that the PA was not questioned about the substance of her refugee claim and oral submissions were essentially limited to the issue of identity.

[83] As such, after making a determination on the applicants' identities, the RAD may not treat the merits of the refugee claims and make further substantive findings unless it gives the parties notice and an opportunity to make submissions on those issues *(Husian v Canada*

(Citizenship and Immigration), 2015 FC 684 at para 10; *Fu v Canada (Citizenship and Immigration)*, 2017 FC 1074 at para 14; *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 65-76). Failing notice by the RAD, or submissions by the applicants on further substantive issues, the RAD would have to remit the remaining substantive questions back to the RPD for its determination under paragraph 111(1)(c) of the Act and subsection 111(2) of the Act, after the RAD disposes of the identity question (*Jianzhu v Canada (Citizenship and Immigration)*, 2015 FC 551 at para 12; *Deng v Canada (Citizenship and Immigration)*, 2016 FC 887 at paras 14-18).

X. *Conclusion*

[84] For these reasons, the application for judicial review is granted. The decision made by the RAD is set aside and the matter is returned to another panel of the RAD for redetermination in conformity with the present reasons for judgment. No question of general importance has been raised by counsel.

JUDGMENT in IMM-1463-18

THIS COURT'S JUDGMENT is that the application for judicial review be granted. The decision made by the Refugee Appeal Division [RAD] is set aside and the matter is returned to another panel of the RAD for redetermination in conformity with the above reasons for judgment. No question is certified.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1463-18
STYLE OF CAUSE:	REGINA DENIS, LINCOLN AGHO (MINOR), VENICE AGHO (MINOR), SNOW AYEVBOSA AGHO (MINOR), TROY OSARUYI AGHO (MINORS) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 7, 2018
JUDGMENT AND REASONS:	MARTINEAU J.
DATED:	NOVEMBER 26, 2018

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