

Federal Court



Cour fédérale

Date: 20191210

Docket: IMM-2906-19

Citation: 2019 FC 1577

Ottawa, Ontario, December 10, 2019

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

OZICHI ALLPORT NWABUEZE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Nwabueze, a Nigerian citizen, claimed Convention refugee status in Canada based on being bisexual. His claim was rejected by both the Refugee Protection Division [RPD] and the Refugee Appeal Division [RAD].

[2] The RPD's decision was made on the basis of credibility:

[T]he claimant is not credible in his allegations, he is not a reliable witness, and consequently the Panel finds that the claimant is not a bisexual person as he alleges, on a balance of probabilities. Therefore, the claimant does not face a serious possibility of persecution if he returns to Nigeria.

[3] The RAD concluded that Mr. Nwabueze had not demonstrated any error in the RPD's decision that would warrant setting it aside. It did not accept Mr. Nwabueze's submission that the RPD erred in its credibility findings. It is the decision of the RAD that is the subject of this application.

[4] The negative decision was because of adverse credibility findings made because of omissions in the Basis of Claim [BOC], and unreliable evidence filed at the hearing. The parties agreed that the critical issue in this application is the credibility finding made by the RAD. If that decision is unreasonable, then the decision must be set aside.

[5] The narrative in the BOC reflects that Mr. Nwabueze had his first same-sex relationship during high school. He met his most recent same-sex partner in university, where they were both studying to become doctors. Upon graduation, they worked at different hospitals but kept in contact. In order to appease his family, Mr. Nwabueze married a woman in 2016, but continued to meet secretly with his same-sex partner.

[6] On May 10, 2017, Mr. Nwabueze was attending a party with his cousin, and his same-sex partner. The other guests saw the two men in a compromising position in their hotel room because they had been drinking and accidentally left the door open. Mr. Nwabueze left his partner and went to his car, but on his way back to the hotel room, he saw that a crowd had

gathered and were beating his partner. The police arrived and took his partner away, but Mr. Nwabueze escaped with the help of his cousin and went into hiding at a friend's home.

[7] Two days later, Mr. Nwabueze returned to work at the hospital where he saw his handcuffed partner with two men. They had come looking for Mr. Nwabueze. He escaped to his home and confessed the incident to his wife. He then went into hiding in a church. He learned that the police had come to his home and the church looking for him so he fled to Abuja to hide and to plan his escape abroad.

[8] Mr. Nwabueze travelled to the United States on May 18, 2017, using an existing visa and remained there for four months before crossing illegally into Canada on September 30, 2017, where he filed a claim for refugee protection.

[9] The RAD noted that the RPD rested its credibility finding on the following three omissions in the BOC narrative, when compared with the oral testimony. It is notable that there was no finding by the RAD that there were any contradictions in Mr. Nwabueze's evidence.

[10] The first omission was that Mr. Nwabueze made no mention in the BOC of any prison sentence received by his partner arising from being found with him at the party. During the RPD hearing, he was asked if he knew the present whereabouts of his partner. Mr. Nwabueze testified that when he was in the U.S. and before coming to Canada, his cousin told him that he had learned from others that the partner had received the maximum 14-year sentence in prison for his same-sex activity. When the RPD asked why he had omitted this from the BOC, he responded:

“this was simply something his cousin heard, so he did not know if it was a fact.” When asked by the RPD whether he believed that his partner was in prison, Mr. Nwabueze testified that he did believe it.

[11] Before the RAD, it was argued that this omission should not be used to impugn his credibility unless it was material and significant to the claim. Indeed, that is this Court’s jurisprudence. In *Fedadov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 101 at para 18, Justice Barnes noted: “While the failure to mention material or key allegations of persecution in one’s PIF is a reasonable basis for concern, the omission of peripheral detail is not.”

[12] The RAD dismissed the explanation advanced by Mr. Nwabueze that the information was omitted as it was hearsay, and was not material to his claim.

[13] The first question the RAD had to address is whether Mr. Nwabueze is bisexual. Like the RPD, because of the credibility issues, it found that he was not.

[14] How is his partner’s possible prison sentence relevant to whether Mr. Nwabueze is bisexual? The response of the RAD: “If his partner had been convicted and sentenced, this would be of obvious relevance to the Appellant’s risk in the event of his return to Nigeria” [emphasis added].

[15] There are at least two problematic aspects to the RAD's reasoning. First, there is arguably no reliable evidence on which the RAD could make a finding, on the balance of probabilities, that Mr. Nwabueze's partner was convicted and sentenced to prison. The only evidence that Mr. Nwabueze could offer is that someone told his cousin who told him his partner had been sentenced, and that Mr. Nwabueze believed he was in prison, but did not know this. This is clearly hearsay and even if it were set out in the BOC, offers scant evidence on which the RPD or RAD could base a decision.

[16] Second, the RAD's assessment is that the omission is material because it's relevant to his risk if he returns to Nigeria, suggests that risk can be established by this evidence. However, there is overwhelming evidence in the record of the risk bisexuals face in Nigeria. This omitted "belief" is not a material or key allegation going to persecution; it is peripheral to the claim. Moreover, the RAD entirely ignores that the BOC makes several references to the fact that Mr. Nwabueze's partner was taken in handcuffs by the authorities to several locations looking for Mr. Nwabueze. If the RAD was looking for evidence of risk, that is it.

[17] The second omission from the BOC that troubled the RAD were omissions "regarding the suspicions around his relationship with his partner and the occasions when they were discovered by others in Nigeria." The explanation Mr. Nwabueze offered the RAD was that "he did not believe these events were central to his claim and he did not believe that the individuals who had caught him with his partner would disclose this information to others." In fact, Mr. Nwabueze appears to have been correct in his assessment as the record shows that these

occasions occurred more than a year prior to Mr. Nwabueze leaving Nigeria and his sexual orientation was never disclosed.

[18] In my view, the RAD's analysis is problematic and unreasonable. The omission is not material. It does not go to the issue of the sexual orientation of Mr. Nwabueze.

[19] First, the RAD states that the "longstanding relationship between the Appellant and his partner in Nigeria is material to his claim." It is quite plainly not material if a claimant has a long-standing partner, or several. Duration of a relationship is also immaterial. Having engaged in sexual intimacy is arguably relevant, but that fact is set out in the BOC, and testified to by Mr. Nwabueze.

[20] Second, the RAD states that this omission is "relevant to the level of risk to the Appellant in Nigeria" [emphasis added]. It is an error for the RAD to suggest, as it does, that a bisexual person is only at risk in Nigeria if his orientation has been discovered. This Court has repeatedly held that one is not required to hide one's sexual orientation to be safe in one's home country, and those who have done so do not jeopardise their refugee claim: *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282, para 29; *Francis v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1141, para 62; *Okoli v Canada (Minister of Citizenship and Immigration)*, 2009 FC 332, para 36.

[21] Additionally, his degree of risk is entirely irrelevant to a finding that he is entitled to protection. The issue is whether he is at risk.

[22] The third omission relates to the suspicions of Mr. Nwabueze's wife about his relationship with his male partner. At the hearing, Mr. Nwabueze testified that his wife was suspicious about his sexual orientation a few months prior to their wedding, and that she caught him kissing his male partner on the night of the wedding. On each occasion, he made excuses assuring her that the partner was simply a friend.

[23] Before the RAD, Mr. Nwabueze stated that his explanation was reasonable and that it was understandable that he did not view his wife's suspicions as being central to his claim, as he felt that he had successfully allayed her concerns. In the view of the RAD, "suspicions around the Appellant's relationship ... are material to the Appellant's allegations for the same reasons as explained further above", i.e. to his risk if returned to Nigeria. Again, I disagree that degree of risk is in any way material given the overwhelming evidence of the risk faced by those who engage in same-sex relationships in Nigeria.

[24] The material issue to be determined by the RAD is whether the claimant is bisexual and therefore at risk in Nigeria. The first task for the RAD was to determine whether, on the balance of probabilities, he is bisexual. The second task is then to assess whether as a consequence of his sexual orientation he has a reasonable fear of persecution in Nigeria

[25] In my view, the RAD unreasonably found the omissions to be material to the claim that Mr. Nwabueze is bisexual and therefore at risk in Nigeria. Its finding on credibility based on these omissions is unreasonable. The decision must be set aside.

[26] Neither party proposed a question to be certified for an appeal, nor is there one.

JUDGMENT IN IMM-2906-19

THIS COURT'S JUDGMENT is that the application is allowed, the decision of the Refugee Appeal Division is set aside, the appeal from the Refugee Protection Division is to be re-determined by a differently constituted Panel, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2906-19

STYLE OF CAUSE: OZICHI ALLPORT NWABUEZE v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 28, 2019

JUDGMENT AND REASONS: ZINN J.

DATED: DECEMBER 10, 2019

APPEARANCES:

Xianchen An FOR THE APPLICANT

Prathima Prashad FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dov Maierovitz FOR THE APPLICANT
Barrister & Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Department of Justice
Toronto, Ontario