

Federal Court



Cour fédérale

Date: 20191129

Docket: IMM-2074-19

Citation: 2019 FC 1535

Ottawa, Ontario, November 29, 2019

PRESENT: Madam Justice Strickland

BETWEEN:

**RASHIDAH LWANYAGA NANYANZI
NUREEIN THAMAN BAKR
NAVID BAKR IMTIYAZ
NAZREEN IJRA BAKR**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision of the Refugee Protection Division (“RPD”) of the Immigration and Refugee Board of Canada, dated March 22, 2019, which found that the Applicants are neither Convention refugees nor persons in need of protection pursuant to ss 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”). Further, pursuant to s 107(2) of the IRPA, there was no credible basis for their claim.

[2] For the reasons that follow, this application for judicial review is granted.

Background

[3] Rashidah Lwanyaga Nyanzi, also known as Rashidah Nyanzi Lwanyaga, (“Applicant”) is a citizen of Uganda. She is the designated representative for her three minor children (“Minor Applicants”) whose claims were joined with hers (collectively, the Applicant and the Minor Applicants are referred to in these reasons as the “Applicants”). The Applicant claims that she fears persecution in Uganda by reason of her sexual orientation as a lesbian as well as harm at the hands of her abusive spouse.

[4] In her Basis of Claim (“BOC”) form, the Applicant claims that she had her first same-sex relationship while in secondary school, and there she later met Rehema Nasimbwa (“Rehema”) and began a longstanding relationship with her. Both relationships had to be kept secret, as homosexuality is illegal in Uganda. In 2002, while the Applicant was in university, her brother became suspicious of her relationship with Rehema and reported those suspicions to their father, a devout Muslim, who threatened to stop paying the Applicant’s tuition if she continued to be around Rehema. The Applicant graduated with her bachelor’s degree in social sciences in 2005. In 2006, she began a course of studies in health and social work in the United Kingdom (“UK”).

[5] In December 2007, the Applicant was in Uganda when her brother organized a party. There, he introduced the Applicant to his friend, Abdul Swabur (“Swabur”). The Applicant believes that she was drugged and claims that she was raped by Swabur. Further, that she later learned her brother and family had encouraged Swabur, in order for the Applicant to live a “normal life”. She told Rehema and her sister of the rape but did not report it to the police.

[6] After returning to the UK to resume her studies, she learned that she was pregnant. Her father threatened to stop paying for her education if she had an abortion. She returned to Uganda and her baby was born in July 2008. Her family and Swabur's family agreed that the two should be married and a Nikah ceremony was held in August 2008. In September 2008, she returned to the UK where she completed her studies in 2010. She then returned to Uganda and continued to live with Swabur, who she claims was abusive.

[7] In March 2012, Rehema introduced the Applicant to Mr. Kelly Mukwano, a director of iFreedom, an LGBTQ support organization. The Applicant was hired by iFreedom as a Community Liaison Officer. She had her second child in January 2013. Swabur did not approve of her work and he took a second wife in August 2015. The Applicant gave birth to their third child in January 2016. She claims that after the birth she did not want to return home and she went to stay with her cousin. However, Swabur came with police officers who asked her to return home and told her that if she refused she would be charged with child neglect, as her two daughters had stopped attending school.

[8] She claims that in August 2016 she and Swabur quarreled about her return to work and that he threw a pot of boiling water at her, burning her leg. Further, that she was subjected to much physical and emotional abuse at Swabur's hands but she kept silent to protect her true sexual identity. However, after Swabur returned their young son to her with a burned shoulder, which Swabur refused to explain, she took her children and moved to a shelter. She obtained a visitor visa, left her children with her cousin and flew to Canada, claiming refugee protection upon arrival on November 28, 2017. Subsequently, the Applicant's sister brought the Applicant's three children to join her in Canada.

[9] The RPD denied the Applicants' claim.

[10] The Applicants were required to report for removal to Uganda on July 25, 2019. On July 23, 2019, they brought a motion seeking to stay their removal until their application for leave and judicial review of the RPD's negative decision had been finally determined by this Court. The stay motion was denied by Order dated July 24, 2019, however, the Applicants failed to appear for removal. A warrant for the arrest of the Applicant was issued on July 25, 2019.

Decision under review

[11] The RPD found that the determinative issue was credibility. It found that there was no reasonable explanation for the many inconsistencies between the Applicant's oral testimony and the evidence and documents that she presented. Nor was there persuasive evidence to explain omissions from her BOC but which were contained in her supporting documents. Further, the documents she submitted did not corroborate her evidence or her testimony.

[12] The RPD formulated its decision by way of multiple headings. As to the topic of the arranged rape, the RPD acknowledged the Applicant's explanation as to why she did not report it to the police, but noted that the Applicant's cousin had not mentioned the rape in her affidavit. The RPD next addressed the Applicant's sexual orientation and found that the Applicant's evidence was not consistent about when and how her father learned of her sexual orientation and that the Applicant changed her testimony about an attack on Rehema by the Applicant's brother. The RPD considered Rehema's affidavit, noting that it refers to the Applicant as her common-law partner but that the Applicant in her BOC named Swabur as her common-law partner. The RPD did not accept the Applicant's explanation that this must have been a typing error, drew an

adverse credibility inference, and found that the Applicant's documents were created for the claim.

[13] The port of entry ("POE") interview was the next listed topic heading and the RPD found that during that interview the Applicant described an incident where she was disowned by her family, but that this was not mentioned in her BOC and was inconsistent with her oral testimony about who knew of her sexual orientation. Further, that the documents she presented also negated her claim.

[14] The RPD then addressed the affidavit of the Applicant's cousin, Damalie, and domestic abuse. It noted that Damalie's affidavit was prepared on Lwanyaga and Company letterhead, being the last name of the Applicant and her father, and that the Applicant's evidence that her father is a lawyer, as is her husband who works for her father. Her cousin is also a lawyer. The RPD noted that the affidavit did not mention the rape. The RPD stated that the Applicant's testimony was that the abuse by Swabur started right after their marriage but drew an adverse inference from her failure to claim asylum when she returned to the UK to resume her studies.

[15] Under the topic of who in Uganda knew of the Applicant's sexual identity, the RPD found that the Applicant's testimony, that only Rehema and her cousin knew of her sexual orientation while she was in Uganda, was inconsistent with her POE statement. Further, that it was implausible that her brother suspected the Applicant's sexual orientation but that her sister was not aware of this. The RPD also addressed the Applicant's volunteer participation at 519 Community Centre in Canada and concluded that it did not establish that she is a lesbian.

[16] Concerning medical documents from St. Nicholas Clinic, the RPD found that they were manufactured because the medical notes do not correspond to specific incidents in the BOC, the Applicant did not accurately identify when and whether she went to Kibuli Hospital, and there is a prevalence of fraudulent documents in Kampala. The RPD also stated that the notes appear to have been written by the same person even though they are dated over several years. As to a June 7, 2018 letter from Dr. Colledge of the Canadian Centre for Victims of Torture (“CCVT”), the RPD commented that during her testimony the Applicant did not seem to remember Dr. Colledge and that the letter discussed scars from injuries – the burn to her leg said to have been caused by her husband pouring hot water on her and a scar to her left breast said to have been caused when her husband poured hot porridge on her chest – stemming from incidents not mentioned in her BOC. Nor did the clinic she attended in Uganda refer to the burns. The RPD also referenced the July 30, 2018 psychiatric assessment of Dr. Oguntoyinbo, of the CCVT, noting that it states that when the Applicant tried to leave her husband he had her arrested and that she was detained for two days. The RPD drew an adverse inference from the omission of any mention of the detention in the Applicant’s BOC.

[17] The RPD noted that the GCMS information indicated that the legal guardian of the Minor Applicants was travelling with them to Canada for tourism. Their father was not accompanying them but that his permission to travel without him was received. When asked about this by the RPD, the Applicant testified that she did not know how custody was transferred to the Applicant’s sister from her cousin or how the permissions were obtained and stated that her sister made all of the arrangements. The RPD stated that the Applicant claimed that she was abused, but that the agent of her persecution gave consent for the children to travel. The RPD found that

either the visas for the Minor Applicants were obtained with forged documents or the abuse never took place and the whole claim was manufactured.

[18] The RPD then addressed s 107(2) of the IRPA and found that that the claim had no credible basis. It found that the Applicant's testimony was not supported by the documents she submitted and that it was "marred with omissions, inconsistencies, and implausibilities, which goes to show that there is no persuasive evidence to support her allegations." The evidence showed that the claim was fabricated because none of it was corroborated by the Applicant. The RPD found that the evidence presented was attempt to deceive the RPD, that the documents were fabricated to establish and bolster the Applicants' claim, but that those very documents were the reasons for finding the claim to have no credible basis. Further, that there were so many credibility concerns, omissions, and inconsistencies which were not satisfactorily explained, that there was no residual or any persuasive evidence left which established the Applicant's claim.

Issues and standard of review

[19] The Applicants submit that the issues are whether the RPD erred in assessing the credibility of the Applicant's fear of persecution on the basis of her sexual orientation and on the basis of domestic abuse by Swabur, whether the RPD erred in applying the CCVT psychological report, and whether the RPD reasonably concluded that the Applicants' claim had no credible basis.

[20] In my view, all of these issues fall under the umbrella issue of whether the RPD's decision was reasonable.

[21] The RPD's assessment of an applicant's credibility is a factual determination within the "heartland" of the RPD's jurisdiction, it is subject to review by this Court against the standard of reasonableness (*Omar v Canada (Citizenship and Immigration)*, 2017 FC 20 at para 11 ("Omar"); *Zhou v Canada (Citizenship and Immigration)*, 2013 FC 619 at para 26; *Eze v Canada (Citizenship and Immigration)*, 2016 FC 601 at para 12), and it is to be afforded a high degree of deference (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 46; *Aguebor v Canada (Employment and Immigration)* (1993), 160 NR 315 at para 4 (FCA) ("Aguebor"); *Singh v Canada (Employment and Immigration)* (1994), 169 NR 107 at para 3 (FCA) ("Singh")). An IRPA s 107(2) finding of "no credible basis" is also to be reviewed on a reasonableness standard (*Joseph v Canada (Citizenship and Immigration)*, 2018 FC 638 at para 11; *Mohamed v Canada (Citizenship and Immigration)*, 2017 FC 598 at paras 21-22).

[22] Reasonableness is concerned with the existence of justification, transparency, and intelligibility within the decision-making process and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

Analysis

[23] The Applicants submit that the RPD erred in assessing the credibility of the Applicant's claim of persecution due to her sexual orientation because it misapprehended, ignored, and distorted evidence in order to disbelieve the Applicant's allegation that she is a lesbian. Further, the RPD unreasonably discounted credible affidavits that corroborated her claim. The Applicants submit that that RPD also erred in assessing the credibility of the Applicant's allegations of abuse and the rape that she suffered at the hands of Swabur, unreasonably discounting the

probative medical evidence that corroborates her allegations of domestic violence. The RPD also failed to address the Applicant's explanation for her failure to seek asylum in the UK in 2008. Further, that the RPD erred by failing to assess the CCVT psychological report for its probative value in overcoming some credibility concerns. Finally, the Applicants submit that because the RPD's credibility findings were unreasonable, its "no credible basis" finding also cannot stand, and in the alternative, that the finding is not tenable because the RPD ignored credible documents that could establish the Applicant's sexual orientation. The Applicants' written submissions address these submissions in detail.

[24] In its written submissions, the Respondent asserted, as a preliminary matter, that the application for judicial review should be dismissed without a determination of the merits. The Applicants' misconduct, or "unclean hands", arising from their failure to report for removal after their motion for stay of removal had been dismissed by this Court is a sufficient basis upon which to dismiss the application (*Canada (Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 at para 9). Alternatively, the Respondent made two brief submissions. First, that the Applicants' arguments are bald and amount to a mere disagreement with the way the RPD weighed the evidence. Second, that the RPD reasonably rejected the Applicant's explanation for failing to claim asylum in the UK, finding that it was inconsistent with someone having a subjective fear of persecution and that her behaviour undermined her alleged subjective fear of persecution. When appearing before me, the Respondent made oral submissions on the merits of the Applicants' written submissions.

Preliminary Issue

[25] As indicated above, the Applicants sought a stay of their removal, which was denied. However, they did not appear for removal. In this application for judicial review, the Respondent filed an affidavit of Ms. Saudia Samad, a legal assistant with the Department of Justice, affirmed on September 12, 2019, indicating that she was advised by Canada Border Services Agency (“CBSA”) that the Applicants did not appear for removal and that the arrest warrant for the Applicant remains outstanding. In response, the Applicants filed a motion seeking the admission of an affidavit of Teklemichael Ab Sahlemariam, solicitor and sole owner of the Law Office of Teklemichael Ab Sahlemariam. Amongst other things, that affidavit attached as an exhibit a copy of a Health Sciences North, Mental Health and Addictions Program record, dated July 25, 2019, the date that the Applicants were required to appear for removal, indicating that the Applicant had been assessed because she claimed to be suicidal. Also attached was an August 2, 2019 letter from the Applicants’ counsel to CBSA advising of the reason why she had not attended for removal and a fax confirmation sheet. This information was not included in the affidavit of Ms. Samad. The Respondent then filed an affidavit of Hailey Dang, a legal assistant with the Immigration Law Division of the Department of Justice, who deposed that CBSA had advised her that the August 2, 2019 letter from Applicants’ counsel was not found in the CBSA removal file and that counsel for the Respondent was not aware of the letter until she was served with the Applicants’ motion record.

[26] At the hearing I granted the Applicants’ motion. And, ultimately, as the Applicants had provided the fax transmission sheet and CBSA had offered no explanation as to why the August 2, 2019 letter was not within its files, the Respondent abandoned this preliminary issue and did

not pursue its position that the matter should not be heard on the merits due to the Applicants' unclean hands.

Credibility

[27] As noted above, credibility is a factual determination within the heartland of the RPD's jurisdiction and must be reviewed with deference (*Omar* at para 11; *Singh* at para 3). The RPD is also owed deference in the determination of the plausibility of testimony. As stated by the Federal Court of Appeal in *Aguebor*, as long as the inferences drawn by the tribunal are not so unreasonable as to warrant intervention of the Court, its findings are not open to judicial review. Further, the burden of establishing that the RPD's inferences are unreasonable lies with the applicant (*Aguebor* at para 4).

[28] The Applicants refer to *Valtchev v Canada (Citizenship and Immigration)*, 2001 FCT 776 (FCTD) ("*Valtchev*"), which states that:

[7] A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, *Immigration Law and Practice* (Markham, ON: Butterworths, 1992) at 8.22]

[8] In *Leung v. M.E.I.* (1994), 81 F.T.R. 303 (T.D.), Associate Chief Justice Jerome stated at page 307:

[14] ...Nevertheless, the Board is under a very clear duty to justify its credibility findings with specific and clear reference to the evidence.

[15] This duty becomes particularly important in cases such as this one where the Board has based its non-credibility finding on perceived "implausibilities" in the claimants' stories rather than on internal inconsistencies and contradictions in their narratives or their demeanour while testifying. **Findings of implausibility are inherently subjective assessments which are largely dependant on the individual Board member's perceptions of what constitutes rational behaviour. The appropriateness of a particular finding can therefore only be assessed if the Board's decision clearly identifies all of the facts which form the basis for their conclusions. The Board will therefore err when it fails to refer to relevant evidence which could potentially refute their conclusions of implausibility...**

(emphasis added)

[9] In *Bains v. M.E.I.* (1993), 63 F.T.R. 312 (T.D.) at 314, Mr. Justice Cullen quashed a decision of the tribunal after concluding that it erred because its plausibility findings were made without referring to the documentary evidence, and because they were made based on Canadian paradigms...

[29] Similarly, in *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319, this Court stated that implausibility findings must be clearly expressed and the basis for the finding must be apparent from the reasons (at para 44).

[30] The Federal Court of Appeal has also held that the RPD is under a duty to give its reasons for casting doubt on an applicant's credibility in "clear and unmistakable terms" (*Hilo v Canada (Employment and Immigration)* (1991), 130 NR 236 (FCA) ("*Hilo*").

[31] I agree with the Applicant that the RPD's credibility findings arising from its assessment of some of the evidence are unclear. For example, as to the alleged arranged rape, the RPD noted the Applicant's explanation as to why she did not report it to the police, being that no one would have believed her and that her sexual orientation would be detected. The RPD does not state whether or not it accepted this explanation. Instead, it states that her cousin, Damalie, who seemed to be knowledgeable of the Applicant's circumstances, did not mention the rape in her affidavit, concluding with the sentence: "[h]owever, that her family arranged her marriage to the person who allegedly raped her."

[32] In my view, the RPD's concluding statement is unintelligible in the context of its assessment of the credibility of the Applicant's claim of an alleged arranged rape.

[33] As to Damalie's affidavit, this states that the Applicant and Damalie have been friends since childhood. Further, that in 2002 the Applicant's parents found out that the Applicant is a lesbian and arranged to marry her off. Damalie's affidavit states that the Applicant was introduced to her future husband in 2007, and they were engaged. As noted by the RPD, Damalie's affidavit makes no mention of the alleged arranged rape. Conversely, in her BOC, the Applicant states that the alleged arranged rape occurred in December 2007 and that she told Rehema and her cousin about it. She states that they advised her to go to the police but she feared that the complaint would not go far, as her family were supporting Swabur as a man they had found for her, and that she feared that her sexual orientation would come to light.

[34] It may have been open to the RPD to have drawn an adverse inference from the fact that Damalie did not mention the alleged arranged rape, particularly as the Applicant's evidence was that she told her cousin of the attack and her cousin advised her to report it to the police. Further,

the alleged rape and its context as an arranged event to “normalize” the Applicant’s sexuality would have been significant aspects of the Applicant’s claim, yet this was not mentioned in Damalie’s supporting affidavit. However, while the RPD noted the omission, it did not state that it drew an adverse credibility inference based on the omission, the lack of consistency of the content of the affidavit with the Applicant’s BOC, or based on other concerns with the affidavit, and it made no specific factual finding as to whether or not the alleged arranged rape occurred.

[35] In its subsequent assessment of Damalie’s affidavit, the RPD also pointed out the fact that the affidavit was drawn up by Lwanyaga and Company, the last name of the Applicant and her father, and that the Applicant had testified that both her father and husband are lawyers and that her husband works for her father. The RPD again noted that Damalie’s affidavit mentioned that the Applicant was married off, but not that she was raped. And, that the affidavit states that the Applicant’s children were left in Damalie’s custody and Swabur was looking for the Applicant. Again, however, the RPD makes no factual findings, no credibility inferences, and draws no conclusions based on these observations.

[36] I note that Damalie’s affidavit also states that after the Applicant fled her marital home, her husband kept looking for her and threatened to harm her and the children if he found them. Further, that the Applicant’s children were left in Damalie’s custody when the Applicant left Uganda, and that her husband continued to look for her after she fled to Canada. Further, that the Applicant was afraid that he might find the children, who were then still living with Damalie, and harm them.

[37] The Applicant’s submissions on judicial review do not contest, and appear to acknowledge, that this was, in fact, her father’s law firm. Based on the evidence, it was open to

the RPD to have reasonably inferred that if Damalie, who the Applicant testified was also a lawyer, was an ally of the Applicant's and was hiding her children from Swabur who was threatening to harm them, it was highly unlikely that Damalie would, while still harbouring those children, attend at the very law firm where Swabur works to have a supporting affidavit prepared. Particularly as that affidavit states that, at the time that the affidavit was sworn, the children were still living with Damalie and Swabur was searching for them, and the Applicant's testimony that her cousin was being stalked by Swabur and feared for her life. Again, however, the problem is that the RPD offered no such reasoning and does not indicate what, if any, finding or inference it reached. It merely observes that the law firm has the same name as the Applicant.

[38] As to the Applicant's sexual orientation, the RPD found that the Applicant's oral testimony was that in 2002 her brother told her father about her relationship with Rehema. The RPD stated that when it asked the Applicant when her father came to know about her same-sex relationship, she stated that he only had suspicions. However, the RPD noted that in her BOC the Applicant states that her brother told her father in 2002, that her father was very angry, and that he threatened to stop paying her tuition. The RPD stated that the Applicant then went to the UK to study, supported by her father even though he suspected her sexual orientation. It found that her testimony was not consistent about when and how her father came to know about her alleged same-sex relationship. Later in its reasons, the RPD stated that, when asked about who knew of her alleged sexual orientation, the Applicant stated that only her cousin and Rehema knew, and that her sister knew only about the domestic abuse. The RPD stated that this was not consistent with the POE statement – to be addressed later – and that it was implausible that the Applicant's brother would suspect, but that her sister was never aware of the Applicant's sexual orientation.

[39] The Applicants submit that the Applicant's evidence was consistent, being that although her sexual orientation was suspected by her father and her brother, until her text messages with Rehema were found by Swabur and forwarded to her brother and father in June/July of 2017, this was not confirmed.

[40] I note that in her BOC, the Applicant stated that her brother had become suspicious of her relationship with Rehema in 2002, and that:

He often found Rehema [*sic*] [in the Principal Applicant's university room] and this made him become suspicious. He expressed discontent and verbally attacked us by questioning our sexuality but I laughed it off and never took offence of his love hate in order to avoid retaliation. I was surprised that he still reported me to our father about my friendship with Rehema [*sic*] and his suspicion of a same sex relationship. My father reacted so furiously and agitated about the suspicion by calling me on his cellphone that same day and threatening to stop paying my tuition if I continued to be around Rehema [*sic*].

[41] The transcript of the Applicant's testimony before the RPD indicates that the Applicant again stated that her brother called her father and told him that he had suspicions that she and Rehema were having an intimate relationship. When asked whether her father took any actions between 2002 and 2007 she stated that he kept threatening to stop paying her tuition if she continued in any relationships with a girl. When asked, "so, he accepted you as you are, or... he didn't shun you or anything?" the Applicant replied that her father believed that she had cut off contact with Rehema. When asked when her father actually knew that the Applicant was in a same-sex relationship, she testified that she had forgotten to delete messages on her phone from her girlfriend and had left her phone on her bed. Swabur read the messages and immediately called her brother who told her father. The messages were also forwarded to her father and that this occurred in mid-2017.

[42] Upon review of this evidence, I am unable to find any basis for the RPD's finding that the Applicant's testimony and her BOC were not consistent as to when and how her father came to know of her alleged same-sex relationship. That said, but not mentioned by the RPD, is that in her POE interview the Applicant was asked how long her family and husband had known that she is a lesbian. She responded that they had their suspicions for a long time but confirmed it around 2006 or 2007. Further, the affidavit of her cousin, Damalie, states that the Applicant's parents found out that the Applicant is a lesbian in 2002. These are apparent relevant inconsistencies with the Applicant's testimony that her father's suspicions were not confirmed until 2017. However, the RPD did not identify them as such and did not reference them as the basis for its finding.

[43] In considering the Applicant's claimed sexual orientation, the RPD also stated:

When asked if Rehema suffered any repercussions, she [the Applicant] stated that Rehema was attacked by her brother. However, when asked if Rehema needed any medical treatment, the claimant changed her testimony and stated it was only a verbal attack. I find that she changed her testimony and I draw an adherence [*sic*] from the inconsistency.

[44] However, as pointed out by the Applicants, the RPD clearly erred in its statement as to this evidence. The transcript reveals that the Applicant's evidence was clear and consistent that the attack was merely a verbal one:

MEMBER: So, was there any repercussion on her part... was there anything done from your family to her?

CLAIMANT: No

MEMBER: No?

CLAIMANT: No. it's just the verbal threats.

MEMBER: Why do you think that was so?

CLAIMANT: My brother verbally attacked her when she was in the room with me.

MEMBER: I beg your pardon? Your brother...

CLAIMANT: My brother, yes. My brother verbally attacked her. One time he came to my room, he verbally attacked her.

MEMBER: And when was that?

CLAIMANT: It was the same time I was at the university. When I was at university.

MEMBER: When you were university and what year was that?

CLAIMANT: That was 2002. 2002...

MEMBER: 2002.

CLAIMANT: Yes

MEMBER: And you said your brother attacked her?

CLAIMANT: Yes

MEMBER: And what happened to her?

CLAIMANT: We just...we didn't think much of it, we just ignored it, and we ... we didn't want to retaliate, so we just...we just...we just...we were looked at him and we didn't say anything to him because that is what he used to do. He used to come, he used to find her there and he used to express his anger and resentment. He didn't want her to be in the room with me.

MEMBER: Did she have to go see a doctor, a hospital when she was attacked?

CLAIMANT: No, it was just the verbal threats...I don't want you here, what are you doing here, why do you ever come here. Like the verbal threats.

MEMBER: So, it's not a physical attack?

CLAIMANT: No, not physical, it was just a verbal...

MEMBER: So, why would you say attacked her?

CLAIMANT: I said verbally attacked her.

[45] Given this evidence, it is undisputable the RPD disregarded the evidence and clearly erred in finding that that the Applicant changed her evidence as to the attack. Accordingly, the negative inference that the RPD based on that flawed evidentiary finding is an error and is therefore unreasonable. It is also impossible to discern from the reasons how much weight the RPD put on this negative credibility finding.

[46] In considering who in Uganda actually knew of the Applicant's alleged sexual orientation, the RPD stated that the Applicant's testimony was that only her cousin and Rehema knew and that her sister only knew of the domestic abuse. The RPD found that this was inconsistent with her POE statement. Further, that it was implausible that her brother suspected but her sister was never aware of the Applicant's alleged sexual orientation.

[47] The Applicants submit that this latter finding was speculative and that plausibility findings should only be made in the clearest of cases (*Valtchev* at para 7).

[48] I note that the evidence in the record suggested that the Applicant's brother became suspicious of her sexual orientation when he visited the Applicant at university and frequently found Rehema visiting, and that he relayed these suspicions to his father. There was no evidence about these suspicions also being conveyed to the Applicant's sister or her family in whole. I agree with the Applicant that the RPD failed to identify the factual basis supporting its inferred finding that it was not plausible that the Applicant's brother suspected her sexual orientation, but that her sister did not.

[49] However, as noted above, the RPD also found that the Applicant's testimony that her sister was not aware of the Applicant's sexual orientation was not consistent with her POE interview. The record shows that at the POE interview, the Applicant was asked who threatened her. She responded that her husband and her family threatened her and that they are "astute" Muslims and do not approve of someone being gay. This would suggest that her family were aware of her sexual orientation, and although it does not specifically speak to her sister's knowledge, it does support an inconsistency with the Applicant's testimony as found by the RPD.

[50] The RPD also noted that when she was asked at the POE if there was anything else that she would like to add before that interview was terminated, the Applicant spoke to a public incident that was known to her family. Her relevant POE evidence was:

Maybe a few bits and pieces about what happened in Uganda. When I was working as a community Liaison Officer my job was to interview people who were gay, lesbian, bisexual and transgender. I had a duty to go out in the field and meet with law enforcement to make sure the people in these communities got the justice they deserved, and this exposed me to a lot of people insulting me and hurting me, throwing stones at me and humiliating me in public. The local tabloid issued a picture and said I was with these two random female individuals and said that we were topless lesbians in the country and that we were coercing other young females into being lesbians. This wasn't true at all. Somehow the news got to my family and my dad was very angry with me and he told me that I was no longer his daughter, my whole family disowned me. My life became in danger, I lost my job because of this and had to move from place to place because of this. That is when my boss recommended that I apply for a visa because in Canada you are free to be yourself.

[51] This would seem to suggest that her whole family disowned her because of her sexual identity implied by the tabloid report. If so, an inference could be drawn from that evidence that

her sister was aware of the Applicant's sexual identity, which the RPD found was inconsistent with the Applicant's testimony that he sister was not aware of the Applicant's sexual identity.

[52] The RPD also noted that none of this was mentioned in the Applicant's BOC. It stated that, when asked to explain this omission, the Applicant's testimony was that she did not know that all of the information had to be included in her BOC. The RPD rejected this explanation.

[53] Given that the Applicant's BOC narrative is a detailed 10-page document, it would not have been unreasonable for the RPD to have drawn an adverse inference from her failure to mention the stone throwing, the tabloid article, and the alleged impact the article had on her life, which she did set out in her POE statement. However, upon review of the transcript I am unable to determine where this omission was put to the Applicant or identify responding testimony, as described by the RPD, that she did not know that she had to do so. The transcript indicates only that, when asked by her counsel why the stone throwing incident was not included in her BOC, the Applicant responded that she could not really explain the omission, other than she was emotional and just wrote what came to her at that time.

[54] Further, the RPD did not reject the Applicant's explanation on the basis that this was not a reasonable explanation given the detail found in her BOC or that the POE information was so significant that it was not reasonable that it had not been mentioned. Instead, the RPD stated that it rejected her explanation because in her oral testimony she stated that her sister did not know and her father only had suspicions as to her sexual identity. However, I find this to be unintelligible as I am unable to determine how this is connected to any explanation offered as to the omission from her BOC of the POE incidents. As to the RPD's concluding statement pertaining to the POE evidence, "[f]urthermore, the documents she has presented also negate her

claim”, I am unable to ascertain what documents the RPD may have been referencing in making this statement in the context of its consideration of who in Uganda knew of her sexual identity.

[55] Finally, the Applicant submits that the RPD erred by ignoring significant documentary evidence that corroborated her sexual orientation, a central aspect of her claim (*Cepeda-Gutierrez v Canada (Citizenship and Immigration)*, 1998 CanLII 8667 (FCTD)).

[56] In my view, as to the certificate showing the Applicant’s participation in the Pride Toronto Parade, while this was not explicitly mentioned by the RPD in its reasons, many thousands of people participate in that parade and their doing so does not establish their sexual orientation. The failure to mention it does not arise to a reviewable error. Similarly, the RPD did note documentation establishing that the Applicant volunteered at the 519 Community Center, but found that this does not establish that she is a lesbian, and that in her testimony she confirmed that a person does not have to be from the LGBTQ community to attend or volunteer there.

[57] The RPD did not, however, specifically refer to other supporting documentation. This included an April 18, 2018 support letter from the Metropolitan Community Church of Toronto (“MCC”). This letter indicates that the Applicant has attended monthly support meetings at the MCC since December 3, 2017, seeking support for her refugee claim based on her sexual orientation and has volunteered with the Wednesday Program and Café Connection. The letter states that by engaging with the MCC the Applicant has shown her willingness and level of comfort in being a part of the MCC community as a lesbian. Further, that the Applicant had told the MCC of her experience of homophobia in Uganda. Specifically, that when Swabur discovered she is a lesbian and worked for a secret LGBTQ organization, he physically abused

both her and her son, burning both of them. It is true that the RPD did not mention this support letter or assess it in the context of the Applicant's claimed sexual identity. Had it done so, however, it might also have noted that the support letter is inconsistent with the Applicant's BOC version of events.

[58] Nor did the RPD consider the iFreedom support letter in which the Executive Director identifies the Applicant as a lesbian, or 12 explicit emails from December 7, 2017, to January 30, 2019, identified as being between the Applicant and Rehema. This was evidence that potentially corroborated her evidence and testimony as to her sexual orientation. The failure to mention it is problematic, particularly as the RPD makes the general statement that the documents the Applicant provided did not corroborate her evidence or her oral testimony. While it may have been open to the RPD, for various reasons, to discount this evidence or to afford it little weight, the RPD simply did not address it, which was an error.

[59] Viewed in whole, the RPD's reasons pertaining to the Applicant's sexual identity, the central aspect of her claim, and which is tied to her allegations of domestic abuse, are fragmented, incomplete, disjointed, and lacking in clear findings, inferences supported by the cited evidence, or cohesive conclusions. While it may well have been possible for the RPD to reach the conclusion that it did, that the Applicant's claim as to her sexual orientation was not credible, its reasoning overall is sufficiently flawed that it cannot be saved.

[60] I agree with the RPD that the record illustrates many inconsistencies and omissions, which are not restricted to the Applicant's sexual orientation. It was also potentially open to the RPD, had it clearly indicated that it was doing so and why, to afford the Applicant's documentary evidence limited probative value based on its credibility findings. This is because

once the RPD comes to the conclusion that an applicant is not credible, in most cases, it will necessarily follow that the RPD will not give that applicant's documents much probative value, unless the applicant has been able to prove satisfactorily that the documents in question are truly genuine (*Hamid v Canada (Employment and Immigration)*, [1995] FCJ No 1293 at para 21 (QL) (FCTD); *Diaz v Canada (Citizenship and Immigration)*, 2016 FC 1343 at para 10; *Sun v Canada (Citizenship and Immigration)*, 2017 FC 425 at paras 17-18)). And, it is, of course, open to the Court to look to the record to determine if it explains why the RPD reached the conclusion that it did (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15). However, in this case, because of the fragmented approach taken by the RPD, combined with the lack of complete, supported cohesive findings or inferences, as well as factual inaccuracies or errors upon which some credibility findings were based, the Court would, in essence, be required to remake the decision, which is not its role (*Canada (Citizenship and Immigration) v Matar*, 2015 FC 669 at para 29). And, for the same reasons, in the context of the reasonableness of the decision, I am simply unable to find that the decision-making process was justified, transparent, and intelligible, or to determine if it fell within the range of possible, acceptable outcomes which are defensive in respect of the facts and the law.

[61] Thus, while I acknowledge that upon reconsideration by a different RPD member the same outcome may likely result, the matter must be remitted back.

JUDGMENT in IMM-2074-19

THIS COURT’S JUDGMENT is that:

1. The style of cause is amended to correct the name of one of the Minor Applicants to “Navid Bakr Imtiyaz”.
2. The application for judicial review is granted.
3. The matter is sent back for redetermination by a different panel of the RPD.
4. No question of general importance for certification was proposed by the parties and none arises.

“Cecily Y. Strickland”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2074-19

STYLE OF CAUSE: RASHIDAH LWANYAGA NANYANZI ET AL v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 6, 2019

JUDGMENT AND REASONS: STRICKLAND J.

DATED: NOVEMBER 29, 2019

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