Federal Court  Cour fédérale

Date: 20200619

Docket: IMM-3817-19

Citation: 2020 FC 711

Ottawa, Ontario, June 19, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

FELICIA ZEAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Felicia Zeah, the applicant, is a citizen of Nigeria. She has sought refugee protection in Canada on the basis of her fear of persecution in Nigeria due to her bisexuality.

[2] The applicant's claim was rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] on September 28, 2018, on credibility grounds.

[3] The applicant appealed this decision to the Refugee Appeal Division [RAD] of the IRB. In a decision dated May 23, 2019, the RAD dismissed the appeal and confirmed the RPD's determination that the applicant is neither a Convention refugee nor a person in need of protection under, respectively, sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[4] The applicant now applies for judicial review of this decision under section 72(1) of the *IRPA*. Her principal contention is that the RAD's adverse credibility determinations are unreasonable.

[5] For the reasons that follow, I agree with the applicant in one key respect. The matter must, therefore, be redetermined by the RAD.

II. BACKGROUND

[6] The applicant was born in Lagos in January 1958. Before coming to Canada, she had been living in the United States for over thirty years.

[7] While she was living in the United States, the applicant earned an Associate in Science diploma in nursing from Minneapolis Community and Technical College in 2006 and a Bachelor of Science degree from Bethel University in 2010. The applicant worked in the United States as a nurse for about 20 years.

[8] The applicant states that she first realized that she was bisexual when she had a secret sexual relationship with a female classmate, B.M., in their final years of high school (from 1975 to 1977). The applicant's family knew Ms. M. but believed she was just a friend.

[9] In 1983, the applicant married a Nigerian man. Ms. M. also got married to a man in Nigeria the same year.

[10] The applicant and her husband went to the United States in 1985 on visitors' visas but did not leave. The applicant states that they divorced in 1986. The applicant has two adult children from this marriage who live in the United States.

[11] At her hearing before the RPD, the applicant testified that she had maintained contact with Ms. M. after high school, including while she was in the United States. The two had a brief sexual encounter in 2001 when the applicant returned to Nigeria for a two-week visit. This incident is not mentioned in the applicant's Basis of Claim [BOC] narrative. The applicant testified at the RPD that the two of them still had feelings for one another until as recently as 2014.

[12] The applicant also testified that she had affairs with two women in the United States – a six-month affair in 2003 with B.K. and another secret relationship with a woman that lasted from 2005 to 2015. Neither of these relationships is mentioned in the BOC narrative.

[13] In 1989, the applicant married James Wells, a U.S. citizen. Mr. Wells attempted to sponsor the applicant for U.S. citizenship but this did not go through. In her BOC narrative, the applicant states that Mr. Wells withdrew his sponsorship because he discovered that the applicant had had a relationship with a woman (when this happened and who this other woman was are not clear from the narrative). On the other hand, the applicant testified before the RPD that Mr. Wells did go ahead with the sponsorship but the application was rejected because of concerns about the genuineness of the evidence of her divorce from her first husband.

[14] The applicant and Mr. Wells divorced in 1999.

[15] That same year, the applicant married her third husband, Wilson Zeah, who was also a U.S. citizen. The applicant states that she and Mr. Zeah had one child together, a son who was born in 2000. He also lives in the United States.

[16] Mr. Zeah attempted to sponsor the applicant for U.S. citizenship as well but this, too, was unsuccessful. According to the applicant, this was also because of concerns about the genuineness of documents purporting to prove her divorce from her first husband.

[17] The applicant and Mr. Zeah divorced in June 2017 after having been separated for two years. The applicant states in her BOC narrative that this was because Mr. Zeah found out about her relationship with Ms. M.

[18] In a letter dated August 15, 2017, that was filed with the RPD, Mr. Zeah states that he learned about this relationship in June 2014, when he overheard the applicant speaking with her "female lover" on the phone.

[19] According to the applicant, after Mr. Zeah first found out about her affair with Ms. M., he threatened to divorce her. Feeling depressed, the applicant (who did not drink) got drunk, called her cousin Bukky Thomas in Nigeria, and "poured out [her] heart," including disclosing that she was bisexual and her relationship with Ms. M. The applicant does not say exactly when this happened but, having regard to Mr. Zeah's letter, it would appear to have been in or around June 2014.

[20] Having learned this information, Ms. Thomas then began blackmailing the applicant. When the applicant could no longer give her the money she was demanding, Ms. Thomas attempted to blackmail Ms. M. Eventually Ms. Thomas disclosed the relationship to Ms. M.'s husband and "spread it in the community" in Nigeria. As a result, Ms. M. was arrested by the Nigerian police and, under torture, provided them with the applicant's name as her lover. What happened to Ms. M., in turn, led her and her family to seek revenge against some members of the applicant's family in Nigeria.

[21] Meanwhile, the applicant was assisted by legal counsel in the United States in her efforts to regularize her status there.

[22] In support of her refugee claim, the applicant filed an affidavit sworn August 7, 2017, from her last U.S. lawyer, Rachel Petersen.

[23] Ms. Petersen states that she was first retained by the applicant in 2012. At that time, a final order for removal from the United States had been made against the applicant. Previously, the applicant had sought the cancelation of this order. The record on the present application does not disclose on what grounds this relief had been sought. The request was denied and the applicant appealed this decision to the Board of Immigration Appeals [BIA]. The appeal was dismissed by the BIA on October 12, 2012. This decision is not part of the record on this application (although it is referred to in a subsequent decision of the BIA that is part of the record). Despite the result, no steps were taken at that time to enforce the removal order.

[24] With Ms. Petersen's assistance, in or about 2014, the applicant moved to re-open her appeal to the BIA (the exact date the motion to re-open was brought is not in the record on this application). In this motion, the applicant raised for the first time her need for asylum in the United States. She claimed that, as a woman and a Christian, she was at risk from Boko Haram if she were to return to Nigeria. The applicant did not advance any other grounds for seeking protection.

[25] In a decision dated June 9, 2015, the BIA dismissed the motion to re-open the appeal. (Ms. Petersen states in her affidavit that this happened in 2016 but this appears to be an error since the decision of the BIA – dated June 9, 2015 – was filed with the RPD and is part of the record on this application.)

[26] Ms. Petersen states in her affidavit that, with her assistance, the applicant appealed this decision to the United States Court of Appeals for the Eighth Circuit. Ms. Petersen also states that the appeal was dismissed. She does not say when this decision was made and the decision of the Court of Appeals is not part of the record on this application. However, Ms. Petersen goes on to state that at some point after the appeal was dismissed (and presumably while the applicant was still in the United States), the applicant "confided in [her] that she previously had a same-sex partner in Nigeria and that she was scared of this person but she had never mentioned it before [they] filed the motion to reopen her case." Ms. Petersen states that this was apparently because the applicant "had been too embarrassed to say so before."

[27] When asked at her RPD hearing why she had not brought her sexual orientation up earlier, the applicant testified that her lawyer was from Nigeria and she was concerned that the local Nigerian community would learn about her sexual orientation. The applicant also testified that she did not bring it up with her lawyer because she did not want her husband to learn of her sexual orientation. The applicant stated that her husband always attended her meetings with her lawyer.

[28] Despite the adverse decisions and the outstanding removal order, it appears that no steps were taken to enforce the order. However, according to Ms. Petersen, the applicant "was at risk of physical deportation from the country at any moment."

[29] In June 2017, the applicant travelled by bus from her home in Brooklyn Park, Minnesota, to Plattsburgh, New York. From Plattsburgh she took a taxi to a border crossing near Lacolle, Quebec, where she made a claim for refugee protection on June 17, 2017.

[30] After spending a short time in Montreal, the applicant made her way to Toronto. With the assistance of a Toronto-based lawyer (not Mr. Navaneelan), the applicant completed a BOC form in support of her claim for refugee protection, including a narrative. She signed this document on July 6, 2017. It was filed with the IRB the next day.

[31] On September 14, 2017, the applicant's lawyer filed an amended BOC (signed by the applicant the same day) which added three additional family members who lived in Nigeria – two half-brothers and one half-sister – to the list of family members she had provided in her original BOC. None had been included in the original BOC despite instructions on the form to list, *inter alia*, "brothers and sisters, including half-brothers and half-sisters." The applicant was not asked at her hearing why she had originally omitted these three family members.

[32] Along with the amended BOC, on September 14, 2017, the applicant's lawyer also filed a letter from one of the half-brothers and another from the half-sister. Both letters were dated August 21, 2017, and were commissioned on the same date before the High Court Registry, Ijebu-Ode, Nigeria. Both letters state that the authors had not known that the applicant was bisexual until they each learned this from a cousin, Bukky Thomas. Neither mentions when this disclosure occurred or under what circumstances.

[33] The applicant also filed a letter (dated August 15, 2017) from B.K. which confirmed that the two had had a six-month relationship in 2003.

[34] In addition, the applicant filed a report dated August 11, 2017, from Dr. Gerald M. Devins, a clinical psychologist. Dr. Devins had met with the applicant for a single session (of unspecified duration) that same date. In Dr. Devins' opinion, the applicant met the diagnostic criteria for stressor-related disorder with prolonged duration.

[35] Finally, shortly before her RPD hearing, the applicant filed letters and photos demonstrating her participation in the LGBTQ community in Toronto.

[36] The RPD rejected the applicant's claim on credibility grounds. In particular, the RPD held that the applicant's delay in claiming asylum in the U.S., her brief reavailment to Nigeria in 2001, and her failure to disclose her bisexuality when she did raise the issue of asylum, all indicated a lack of subjective fear on the applicant's part and, as a result, had a negative impact on the applicant's credibility. The RPD did not find the applicant's explanation for why she only made a claim with respect to Boko Haram reasonable. According to the RPD, "someone who claims to fear authorities in Nigeria because she is bisexual would have articulated that fear in her final efforts to stop her deportation from the US." Further, the RPD did not find credible the applicant's claim that she is bisexual. The RPD also found that the psychologist's report "is of minimal probative value" and that it "does not provide credible probative evidence that the claimant is bisexual." Finally, the RPD found that the evidence of the applicant's participation

in LGBTQ events "is not indicative of her sexual orientation as these events are open to all." The RPD does not mention the letter from B.K. or those from the applicant's half-siblings.

III. DECISION UNDER REVIEW

[37] The applicant appealed the RPD's decision to the RAD. She did not seek the admission of any new evidence.

[38] The applicant contended that the RPD had erred in its assessment of her credibility. She submitted that the factors the RPD had relied on – her failure to seek asylum in the United States, her delay in disclosing her sexual orientation, her return to Nigeria in 2001 – reflected a "microscopic" examination of the evidence. According to the applicant, the RPD had focused on "peripheral matters" and did not make "any serious effort" to examine the "core" of the applicant's claim – namely, her bisexuality. The applicant submitted that the RPD's approach was inconsistent with the Chairperson's Guideline for proceedings before the IRB involving sexual orientation and gender identity and expression (commonly known as the *SOGIE Guideline*). The applicant also pointed out that the RPD had failed to mention the letter from B.K., which went to "the core of the claim." Finally, the applicant contended that the RPD erred in discounting the value of the psychological report and the evidence of her involvement with the LGBTQ community.

[39] The RAD dismissed the applicant's appeal.

[40] The RAD noted that its role is to review the RPD's determinations for correctness. While also noting that it was permitted to defer to the RPD's credibility findings with respect to oral testimony if it found that the RPD "had a meaningful advantage in the circumstances," the RAD stated that the RPD did not enjoy such an advantage in this case.

[41] Noting that the RPD had dealt with the issues of delay in claiming protection and the applicant's sexual orientation in the same analysis, the RAD considered and analyzed the two issues separately.

[42] On the issues of delay in claiming asylum and, once it was claimed, the failure to mention fear of persecution on grounds of sexual orientation, unlike the RPD, the RAD accepted that the applicant may not have believed there was a compelling reason to seek asylum while there was an "alternative and feasible" basis on which she could regularize her status in the United States – namely, through the spousal sponsorship applications. However, the RAD concluded that the delay in claiming asylum after 2012 (i.e., after the sponsorship applications had failed and a removal order was issued) had an adverse impact on the applicant's credibility. The RAD noted that it had reviewed the *SOGIE Guideline* and the psychologist's report; nevertheless, it found the applicant's explanation for keeping her bisexuality a secret "unreasonable" and indicative of a lack of subjective fear.

[43] The RAD also drew a negative credibility inference based on the applicant's misrepresentations about fearing persecution from Boko Haram when she finally did raise the issue of asylum in the United States.

[44] The RAD summarized its findings on this issue as follows:

> The RAD finds that the Appellant's failure to claim asylum prior to knowing there was a serious possibility of removal to Nigeria, though not ideal, may have been reasonable. However, her failure to do so after becoming aware of the real possibility of removal to Nigeria combined with deliberately misrepresenting the basis for her alleged real fear, i.e. her sexual orientation, adversely impacts her credibility in general. After having independently and thoroughly considered the evidence and the *SOGIE Guidelines* [*sic*] I am unable to reach a different conclusion from the RPD pertaining to the Appellant's credibility in general.

[45] On the issue of the applicant's sexual orientation, the RAD found on the whole of the evidence, "including the Appellant's testimony, Dr. Devins' report, the letters from her family and documents of support from LGBTQI organizations in Toronto and the *SOGIE Guideline*," that it was not satisfied, on a balance of probabilities, that the applicant is bisexual. The RAD explained the basis for this finding as follows:

> The Appellant's conduct including her reasons and explanation for misrepresenting to US authorities that her fear of returning to Nigeria was of Boko Haram and not her sexual orientation, her failure to disclose her bisexuality to her lawyer until 2016/2017 even after her third husband became aware of her bisexuality in 2014, and she knew or ought to have known that her status in the USA was dangerously precarious, negatively impacts her credibility, in general, that cannot be outweighed by letters of support from her family or the woman with whom the Appellant allegedly had a relationship.

[46] In short, the applicant was not a credible witness and she "failed to adduce sufficient persuasive evidence to support her allegation that she is a bisexual person."

[47] Finally, the RAD found that, although the applicant had travelled to Nigeria before her bisexuality became known, it indicated a lack of subjective fear because she returned to her

alleged country of persecution while her immigration status in the U.S. was "precarious." However, the RAD noted that this finding was not determinative.

[48] For these reasons, the RAD dismissed the appeal and confirmed the RPD's determination that the applicant is neither a Convention refugee nor a person in need of protection.

IV. STANDARD OF REVIEW

[49] The parties agree, as do I, that the RAD's decision should be reviewed on a reasonableness standard.

[50] Reasonableness is now the presumptive standard of review, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10). There is no basis for derogating from the presumption that reasonableness is the applicable standard of review here. I also note that it was well established in pre-*Vavilov* jurisprudence that the issues raised by the applicant should be assessed on a reasonableness standard: see *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35.

[51] Reasonableness review "aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law" (*Vavilov* at para 82).

[52] The exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). Consequently, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96).

[53] Reasonableness review is a deferential form of review. While it has never meant "blind reverence" for or "blind submission" to statutory decision makers (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 48; *Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 41), in *Vavilov* "the Court re-emphasized that judicial review considers not only the outcome, but also the justification for the result (where reasons are required)" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 29). The reasonableness standard is meant to ensure that "courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13).

[54] Reasonableness review focuses on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). Where the decision maker has given reasons for the decision, a reviewing court must begin its inquiry "by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Vavilov* at para 84, internal quotation marks omitted). On review, "close attention" must be paid to a decision maker's written reasons; they "must be read holistically and contextually, for the very

purpose of understanding the basis on which a decision was made" (*Vavilov* at para 97). An assessment of the reasonableness of the decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13).

[55] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The reasonableness standard "requires that a reviewing court defer to such a decision" (*ibid.*). A court applying this standard "does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible outcomes that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem" (*Vavilov* at para 83).

[56] The burden is on the applicant to demonstrate that the RAD's decision is unreasonable. She must establish that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

V. ISSUES

[57] The applicant challenges the RAD's decision on three grounds which I would state as follows:

a) Is the RAD's credibility determination unreasonable?
b) Is the RAD's assessment of the corroborative evidence unreasonable?
c) Is the RAD's assessment of the applicant's reavailment unreasonable?

[58] As I will explain, it is only necessary to address the first of these issues.

VI. ANALYSIS

A. *Is the RAD's credibility determination unreasonable?*

[59] The applicant submits that the RAD made two fundamental errors in its assessment of her credibility. First, she argues that the RAD erred in finding that her delay in disclosing her sexual orientation in the United States – and, relatedly, her delay in seeking asylum in that country – adversely affected her credibility. Second, she argues that the RAD erred in finding that her failure to disclosure her sexual orientation when she did finally seek asylum in the United States – citing instead her fear of Boko Haram – also undermined her credibility.

[60] This case is somewhat unusual in that while there is an issue as to whether the applicant failed to make a timely claim for refugee protection in the United States, there is no issue that, when she finally did raise her need for asylum there, she did not base that claim on the ground she has now advanced in Canada. Consequently, the determinative issue is not whether an adverse inference can reasonably be drawn regarding the credibility of the applicant's current claim that she fears persecution in Nigeria simply from her delay in seeking asylum in the United States. Rather, the determinative issue is whether an adverse inference can reasonably be drawn regarding the credibility of the applicant's current claim that she fears persecution in Nigeria because she is bisexual from the fact that she did not raise this when she finally did seek asylum in the United States.

[61] I summarized the governing principles concerning the significance of delay in seeking refugee protection in *Chen v Canada (Citizenship and Immigration)*, 2019 FC 334 at para 24, and in *Guecha Rincon v Canada (Citizenship and Immigration)*, 2020 FC 173 at para 19. To reiterate:

a) Delay in seeking refugee protection is not determinative of the claim; rather, it is a factor the decision maker may take into account in assessing the claim's credibility (*Calderon Garcia v Canada (Citizenship and Immigration)*, 2012 FC 412 at paras 19-20).

b) In particular, delay can indicate a lack of fear of persecution in the country of reference on the part of the claimant (*Huerta v Canada (Minister of Employment & Immigration)*, [1993] FCJ No 271 (FCA), 157 NR 225). Put another way, delay can be probative of the credibility of the claimant's assertion that he or she fears persecution in the country of reference (*Kostrzewa v Canada (Citizenship and Immigration)*, 2012 FC 1449 at para 27).

c) Whether there has been delay and, if so, its length must be determined with regard to the time of inception of the claimant's fear as determined from the claimant's personal narrative.

d) The governing question is: Did the claimant act in a way that is consistent with the fear of persecution he or she claims to have?

e) Delay in seeking protection can be inconsistent with subjective fear because generally one expects that a genuinely fearful claimant would seek protection at the first opportunity (*Osorio Mejia v Canada (Citizenship and Immigration)*, 2011 FC 851 at paras 14-15).

f) When a claimant has not sought protection at the first opportunity, the decision maker must consider why not when assessing the significance of this fact. A satisfactory alternative explanation for why the claimant waited to seek refugee protection can support the conclusion that the delay is not inconsistent with the fear of persecution alleged by the claimant. Absent a satisfactory alternative explanation, it may be open to a decision maker to conclude that, despite what the claimant now says, he or she does not actually fear persecution and this is the real reason why protection was not sought sooner (*Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324 at para 17; *Dion John v Canada (Citizenship and Immigration)*, 2010 FC 1283 at para 23; *Velez v Canada (Citizenship and Immigration)*, 2010 FC 923 at para 28).

g) Whether an alternative explanation is satisfactory or not depends on the facts of the specific case, including the claimant's personal attributes and circumstances and his or her understanding of the immigration and refugee process (*Gurung v Canada (Citizenship and Immigration)*, 2010 FC 1097 at paras 21-23; *Licao v Canada (Citizenship and Immigration)*, 2014 FC 89 at paras 57-60; *Dion John* at paras 21-29).

[62] It will be apparent from the foregoing that, to assess the significance of delay in claiming refugee protection, three key factual questions must be answered. First, according to the claimant, when did their subjective fear of persecution crystalize? Second, when did the claimant first have an opportunity to make a refugee claim? And third, why, according to the claimant, did they not take up that opportunity? It is only unexplained delay after the fear has crystalized and after it was possible to seek protection that can reasonably support an inference

that the claim of subjective fear should not be believed because of the delay in seeking protection.

[63] In the present case, the analysis must begin with the question of when, according to the applicant, she came to fear she was at risk in Nigeria because she is bisexual.

[64] The RAD found that the applicant's "delay in applying for asylum, *after* she knew or ought to have known of the serious risk of removal to Nigeria in or around 2012, when she was issued her final removal order, negatively impacts her credibility" (original emphasis). I agree with the applicant that this determination is unreasonable. The assessment of the significance of the applicant's delay in seeking protection involves assessing the applicant's credibility on the basis of her own actions. Those actions, in turn, must be measured against the subjective fear advanced by the applicant (*Chen* at para 26). Even accepting as reasonable the RAD's determination that the applicant knew or ought to have known as of 2012 that she was at serious risk of removal to Nigeria, the applicant has never claimed that at that time she feared persecution in Nigeria because she is bisexual. At that time, her secret was still safe. This only changed in or around June 2014, with the applicant's ill-advised disclosure of her secret to her cousin. On the applicant's account, this is the point at which the fear that underlies her refugee claim in Canada crystalized. Her failure to seek asylum on this basis in the United States before this is simply irrelevant because, in the applicant's mind, she had no reason to. Consequently, to the extent that it did so, it was unreasonable for the RAD to base a negative credibility finding on the applicant's failure to seek asylum in the United States on the basis of her bisexuality between 2012 and, roughly, June 2014. On its own, however, this error is not determinative.

[65] There is no dispute that the applicant could have sought refugee protection in the United States as soon as her fear of persecution in Nigeria (because she was at risk of removal and her secret was now out) crystalized. The determinative issue, as I have already suggested, is whether the RAD unreasonably rejected the applicant's explanations for her not having done so and for seeking protection instead on the basis of her alleged fear of Boko Haram.

[66] The applicant offered two explanations for her failure to seek asylum in the United States on the basis of her fear of persecution in Nigeria because she is bisexual. One was that her lawyer was from Nigeria and she was concerned that the local Nigerian community would learn about her sexual orientation if she shared this fact with her lawyer. The other was that she did not bring her sexual orientation up with her lawyer because her husband always attended the meetings with her lawyer and she did not want him to learn of her sexual orientation.

[67] The applicant specifically challenged the RPD's assessment of this evidence in her appeal to the RAD. The RAD dealt with the applicant's explanations in the following way:

> The Appellant's explanation for belatedly disclosing that her alleged fear of returning to Nigeria was due to her sexual orientation was that she did not want the Nigerian community in the USA to find out about her sexual orientation. She alleges being unaware of solicitor-client privilege; she feared that her attorney in the USA, who is of Nigerian descent, might reveal her secret to the Nigerian community in the USA.
>
> Similarly, the Appellant's decision not to tell her third husband about her bisexuality is also for reasons of privacy rather than safety. There was no evidence to suggest that her third husband (or any of the Appellant's other former spouses) was abusive towards the Appellant.
>
> While there is no doubt that sexual orientation is an inherently private matter and that there are legitimate reasons for wanting it to remain as private as possible, I find it unreasonable, in the context

> of facing potential removal to a country where a person alleges fear of persecution based on sexual orientation, that the person would choose privacy over safety. Such action is indicative of a lack of subjective fear.

[68] In my view, there are several serious problems with this analysis that leave it lacking transparency, intelligibility, and justification.

[69] First, the RAD fails to make an express finding about the credibility of the applicant's claim to have been unaware of solicitor-client privilege. Even if, reading between the lines, one can infer that the RAD must have rejected the claim, there is still no explanation for why it did so. Given the importance of this issue, an explanation was required.

[70] Second, assuming (as the RAD must have done) that the law of solicitor-client privilege in Minnesota (where the communications took place) is the same as it is in Canada, the RAD seems to have simply presumed that the applicant's communications with her lawyer would have been privileged without considering whether this would be the case if, as the applicant claimed, her husband was present at the meetings.

[71] Third, there was no suggestion from the applicant that she did not want to disclose her bisexuality to her husband because she feared he would harm her physically. It is unclear why the RAD saw fit to introduce and then reject an issue which the applicant herself had not raised.

[72] Finally, and most importantly, the bald statement that it would be unreasonable for someone to choose privacy over safety is unreasonable when viewed against the backdrop of the

SOGIE Guideline and the emphasis that document places on the need for sensitivity to the particular circumstances of the individual claimant. The *SOGIE Guideline* stresses the importance of assessing the significance of any inconsistencies or material omissions in a claimant's account in light of any cultural, psychological or other barriers that may reasonably explain the inconsistency or the omission (see in particular paragraphs 7.4.1 and 7.7.1; see also *Yahaya v Canada (Citizenship and Immigration)*, 2019 FC 1570 at paras 14-15). Such factors can also have a direct bearing on the significance of a failure to make a timely claim for refugee protection (see *SOGIE Guideline*, paragraph 8.5.11; see also paragraph 61(g), above). As the introductory paragraph applicable to all the IRB Chairperson's Guidelines states, while the Guidelines "are not mandatory, decision-makers are expected to apply them or provide a reasoned justification for not doing so." See also *McKenzie v Canada (Citizenship and Immigration)*, 2019 FC 555 at paras 45-48.

[73] It was incumbent on the RAD to assess the applicant's actions in light of her individualized circumstances as disclosed in the record, including her age, her background, how long she claimed to have hidden her sexual orientation, her feelings of shame or embarrassment, the prevailing attitudes of her community, and so on. It failed to do so. The RAD's silence regarding the applicant's personal circumstances and the social and legal realities of someone who identifies as a sexual minority leaves the decision lacking transparency, intelligibility, and justification.

[74] This error also taints the RAD's finding concerning the applicant's "misrepresentation" of why she needed asylum in the United States.

[75] Having rejected the applicant's explanation for why she did not say that her sexual orientation put her at risk in Nigeria, the RAD then found that her "active misrepresentation" that the source of her fear of returning to Nigeria was Boko Haram "seriously impacts her credibility." The RAD does not explain why the applicant's attempt to seek asylum on the basis of a fear of Boko Haram was an "active misrepresentation." Certainly, the applicant has never admitted that, at the time she attempted to re-open her BIA appeal, she did not have a genuine fear of Boko Haram if she were to return to Nigeria. Without further analysis, it was unreasonable for the RAD to treat this as a matter of "active misrepresentation" instead of, at worst, an incomplete statement of the grounds of the applicant's fear of returning to Nigeria. Moreover, even if this constituted a "misrepresentation", its significance still had to be assessed in light of the applicant's particular circumstances before an adverse inference could reasonably be drawn (cf. *Gabila v Canada (Citizenship and Immigration)*, 2016 FC 574 at para 31).

[76] More fundamentally, the premise on which the adverse inference the RAD draws from the applicant's "misrepresentation" depends is that the applicant did not have a good reason to keep her alleged fear of persecution on the basis of her sexual orientation a secret from her lawyer or U.S. authorities. With the RAD's analysis of this issue having been found to be unreasonable, its inference from that premise is also unreasonable. The RAD could not reasonably find that the applicant's failure to advance what she now says is the true basis of her fear and, instead, advancing a different basis has a serious adverse impact on her credibility without first analyzing properly why the applicant says she was unwilling to reveal this additional basis at that time.

[77] In fairness to the RAD, it must be said that neither the RPD member nor counsel for the applicant at the RPD (again, not Mr. Navaneelan) did much to develop an evidentiary record that would assist in the determination of these important issues. No one attempted to clarify with the applicant who was the Nigerian lawyer whose discretion she did not trust. No one attempted to clarify when this lawyer was acting for her. No one attempted to probe the applicant's understanding of solicitor-client privilege or a lawyer's duty of confidentiality. No one asked the applicant why, if she did not trust the lawyer, she did not find another one. The applicant stated that her husband always attended her meetings with her lawyer. Although no one asked her which husband(s) or which lawyer(s) she was referring to, from the context it appears that she was referring to her third husband, Mr. Zeah, and to Ms. Petersen. However, no one asked the applicant why Mr. Zeah was still attending meetings with her lawyer after he decided to divorce the applicant after learning her secret in June 2014. Importantly, it appears that it would have been after that time that the applicant was preparing her application to re-open her BIA appeal.

[78] That being said, even on the inadequate record that was before the RAD, there may have been sound reasons for rejecting the applicant's explanation for why she did not seek asylum on the basis of her sexual orientation at the first opportunity. For example, the applicant must have trusted Ms. Petersen, who assisted her with the motion to re-open the appeal sometime after June 2014, because she eventually disclosed her bisexuality to her (albeit too late for this to assist her in the United States). Indeed, for her part, Ms. Petersen does not suggest that there was any concern about a lack of trust between herself and the applicant. Further, even if the applicant had once been reluctant to have Mr. Zeah learn about her bisexuality, this no longer mattered after he learned her secret in June 2014. If he was still present at the meetings after

this, when presumably the motion to re-open the BIA appeal was being discussed, there was no reason not to bring up something that he already knew. The respondent submits that the RAD's conclusion can be upheld as reasonable on this basis.

[79] The problem, of course, is that the RAD did not give any of these reasons for rejecting the applicant's explanation for not disclosing her sexual orientation when she finally raised the issue of needing asylum in the United States. It is not my role "to supply the reasons that might have been given and make findings of fact that were not made" (*Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, quoted with approval in *Vavilov* at para 97). As the Supreme Court of Canada held in *Vavilov*, where the reasons given by an administrative decision maker "contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision" (at para 96). As the majority went on to explain (at para 96):

> Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision.

[80] The RAD owed the applicant a reasonable explanation for why it rejected her explanation for not claiming asylum in the United States on the basis of her bisexuality at the first opportunity. It failed to provide one.

B. *The Implications of this Finding*

[81] The RAD made a number of other adverse findings concerning the applicant's credibility, including with respect to her foundational claim that she is bisexual. The applicant also challenges several of these findings in their own right. For present purposes, it suffices to state that I am not satisfied that these findings can be extricated from the error I have elucidated above. On the contrary, the RAD itself viewed the determination I have found to be flawed as central to its other determinations, stating as follows:

> In summary, the RAD finds the Appellant's evidence regarding the reasons for failing to disclose to US authorities and her lawyer that sexual orientation was the basis of her fear of returning to Nigeria and actively misrepresenting her fear was based on the Boko Haram go to the heart of her claim.
>
> The RAD finds that the foregoing is significant and that the Appellant has failed to act as a credible witness. The RAD finds the Appellant has failed to adduce sufficient persuasive evidence to support her allegation that she is a bisexual person.

[82] I agree with the RAD that these matters "go to the heart" of the applicant's claim. Equally, the RAD's analysis of the applicant's failure to make a timely claim for protection on the basis of sexual orientation in the United States goes to the heart of the decision to dismiss the appeal and to confirm the RPD's determinations. Given that this analysis is fundamentally flawed, there must be a new hearing. Since this is sufficient to dispose of this application, it is not necessary to address the other grounds raised by the applicant.

VII. CONCLUSION

[83] For these reasons, the application for judicial review is allowed, the decision of the RAD dated May 23, 2019, is set aside, and the matter is remitted for redetermination by a different decision maker.

[84] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA.* I agree that none arise.

JUDGMENT IN IMM-3817-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Appeal Division dated May 23, 2019, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3817-19
STYLE OF CAUSE:	FELICIA ZEAH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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JUDGMENT AND REASONS:	NORRIS J.
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APPEARANCES:

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