

Federal Court



Cour fédérale

**Date: 20210107**

**Docket: IMM-181-20**

**Citation: 2021 FC 23**

**Ottawa, Ontario, January 07 2020**

**PRESENT: Mr. Justice Annis**

**BETWEEN:**

**RISIKAT OMOLARA ADELANI  
ADEFIKAYO MUJARB ADELANI  
ADEFISAYO MURQSUUD ADELANI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] The Applicants seek judicial review of the decision from the Refugee Appeal Division (RAD) dated December 13, 2019, which confirmed the refusal of the refugee claim of the Applicants as they were found to be neither Convention refugees, nor persons in need of protection pursuant to the *Immigration and Refugee Protection Act*, SC 2011, c 27, ss 96–97 (1).

[2] For the following reasons, the Court dismisses this application for judicial review.

## II. Background

[3] The principal Applicant (PA) and her sons are citizens of Nigeria and are claiming refugee protection for risk to life or of serious harm by family, community and Nigerian authorities because of the PA's sexual orientation and same-sex activities.

[4] The PA alleges that she will be persecuted in Nigeria because she is bisexual.

## III. Contested Decision

[5] The RAD applied a standard of correctness to the RPD's decision, finding it had no meaningful advantage assessing credibility. It conducted its own independent analysis of the evidence, including the recording and the transcript of the hearing, and the documents submitted.

[6] The Refugee Protection Division (RPD) rejected the asylum claim on grounds of credibility in proving that she was bisexual. Although the RAD concluded that the RPD erred in one adverse finding concerning the failure to provide photos or other evidence of her long-term relationships in Nigeria, it was insufficient to prevent confirmation of the RPD's decision.

[7] The RAD agreed with the RPD's finding that the late disclosure of the PA's current relationship in Canada at the hearing raised an adverse credibility inference about the genuineness of the relationship. The inconsistency between the PA and her partner's response as

to when they last saw each other at the PA's residence also raised credibility concerns. The RAD also found that the absence of hotel receipts in Nigeria and the fact that the PA didn't attempt to obtain them once in Canada cast doubt on her claim that she met regularly with her former same-sex partner. As well, the PA's statement that precautions were taken against being caught, but that she and her former partner never discussed concerns of being caught by the partner's husband – considering that he hired the partner's driver that brought her to the hotels – also led to a finding that the hotel rendez-vous did not take place.

[8] The RAD also agreed with the RPD that the unsworn letters from family members, attendance logs from LBGTQ organizations in Toronto and the psychotherapist report where the PA self-reported she is bisexual, did not establish that the PA was bisexual and were insufficient to outweigh the credibility concerns with her testimony.

[9] The RAD similarly found that the post-traumatic stress disorder (PTSD) described in the psychotherapist report did not account for or eliminate the significant concerns about the inconsistencies and lack of detail in the PA's testimony. The RPD had considered this diagnosis and found the PA was clear, coherent and did not display cognitive difficulties in answering questions.

[10] Due to the cumulative effect of the multiple omissions and inconsistencies in the evidence, the RAD concurred with the RPD's conclusion that the PA did not establish on the balance of probabilities that she was bisexual, being the basis of the refugee claim.

[11] Lastly, in the absence of establishing the PA's sexual orientation, the national documentation regarding persecution of bisexuals in Nigeria, was not applicable.

#### IV. **Issues**

[12] The Court accepts the Applicants' statement of issues as follows:

- 1) Whether the RAD erred in relying on evidence gathered in an RPD proceeding where there was a violation of natural justice and procedural fairness;
- 2) Whether the RAD erred in its assessment of the PA's sexual identity;
- 3) Whether the RAD erred in its assessment of the documentary evidence tendered;  
and
- 4) Whether the RAD erred by failing to engage in a *sur place* analysis.

#### V. **Standard of Review**

[13] In accordance with the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, the framework to determine the standard of review is based on the presumption that an impugned decision is reasonable, with two exceptions that do not apply here. The Federal Court must then review the impugned decision under the standard of reasonableness. Both parties agree that this is the applicable standard.

[14] The principal issue concerns the determination of the RAD that the PA was not credible, and that she, and therefore her family, do not face a serious possibility of persecution or likelihood of harm because of her sexual orientation as a bisexual.

[15] As such, the principal issue is that of the reasonableness of the assessment of findings of fact regarding credibility. With regard to assessed findings of fact, the Supreme Court has ruled that the reviewing court can only intervene in “exceptional” circumstances (*Ibid* at paras 91–92). This excludes the reweighing of the evidence by the reviewing court. Essentially this means that so long as there is some probative evidence to support the finding, without clear errors or speculation, and no process forms of error committed in the course of the assessment (e.g., failing to consider relevant tendered evidence), the finding is not subject to the Court’s interference.

## VI. Analysis

### A. *Preliminary submission regarding Unfairness and a Sur Place Claim*

[16] The Respondent raises a preliminary submission that the Applicants’ allegations of a breach of procedural fairness and failure to assess a *sur place* claim were not raised before the RAD and should not be considered in judicial review, citing *Canada (Minister of Citizenship and Immigration) v K(R)*, 2016 FCA 272 at para 6), *Marinaj v Canada (Citizenship and Immigration)*, 2020 FC 548 at para 41 citing *Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321). The Court is in general agreement with these submissions. Nonetheless, it will consider the substantive submissions of the Applicants on these issues.

[17] The Applicants submitted that the *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* (SOGIE Guidelines) expressly recognize the issue of difficulty in testifying in general. In this case, they argue that the issue is exacerbated by the attendance at the hearing of her eighteen-year-old son and the uncomfortableness this caused the PA in testifying.

[18] However, “[i]t should not come as a surprise to a claimant or to [their] lawyer that proving sexual identity may well require more than simply the sworn testimony of the claimant” (*Fida v Canada (Citizenship and Immigration)*, 2015 FC 784 at para 9). The SOGIE Guidelines do not serve as a cure-all for evidentiary issues in this regard (*see Okunowo v Canada (Citizenship and Immigration)*, 2020 FC 175 at para 66).

[19] The PA was advised that since her eldest child was an adult, he had the right to be present at the hearing. Furthermore, the RAD indicated that it would not be discussing intimate details.

[20] In support of the submission, the Applicants referred to section 7.3.1 of the Guidelines. The relevant wording of this provision reads: “[q]uestioning should be done in a sensitive, non-confrontational manner. Open-ended questions should be employed where appropriate.” No examples of breach of these directions were brought to the Court’s attention.

[21] The Applicants also submitted that the RPD failed to accommodate the PA with respect to section 3.9 of the Guidelines. This provision requires the separation of claims or appeals where “the individual wishes to assert an independent claim or appeal based on sexual

orientation or gender identity or expression”. There was no demand for a separation of claims or appeals brought to the attention of the Court. Mostly, the Applicants intermingle the Guidelines submission with an argument that the RAD erred in relying on evidence gathered in the RPD proceeding where there was “a violation of natural justice and procedural fairness.” They submit that the PA was obviously not comfortable in discussing the details of her same-sex relationship in front of her children.

[22] The RAD quite correctly indicated that, in situations where a lack of corroborative evidence is not uncommon, “it is not only correct but necessary for the RPD to question the claimant in detail about their sexual identity and history.” The Court was not directed to any circumstance where intimate details were the subject of questions from the RAD, nor that the panel was insensitive towards the PA.

[23] This is largely confirmed by an exchange when the Applicants’ counsel intervened as follows:

COUNSEL: I think she's...she's...she's concerned that the son is going to hear the nitty gritty and all the details of relationship and that's what she was trying to tell the interpreter that she would prefer the son not to hear the full details of...so I don't know if you're going to question her about intimate details she doesn't want the son to hear that

PRESIDING MEMBER: Yeah at this point we don't have any questions regarding anything intimate

COUNSEL: Okay alright, alright yeah

PRESIDING MEMBER: I can see that you're...you're upset, I know that this can be very difficult would you like to just take a moment to...to compose yourself

PRINCIPAL CLAIMANT: No

[24] In reliance on *Mohajery v Canada (Minister of Citizenship and Immigration)*, 2007 FC 185 at para. 32, the Applicants submitted that the RAD erred in not engaging in a *sur place* analysis where it found no credible evidence supporting a bisexual orientation based on the evidence in the country of origin.

[25] The RAD found that the evidence did not support a finding of a bisexual relationship in Canada. Similarly, it did not err when advertent to the limited probative value of the *sur place* evidence said to support her bisexual relationship consisting of letters from the LGBTQ organizations in Toronto. They only listed attendances at an orientation program and at support group meetings to prove the PA's sexual orientation.

[26] The Court rejects the Applicants' submission that they were treated with unfairness, or that the RAD acted in contradiction to the SOGIE Guidelines.

**B. *Late Disclosure of Current Relationship***

[27] The PA entered into a same-sex relationship in Canada in March 2018, yet did not disclose this until just before the RPD hearing in November 2018. The RAD found that even if her counsel did not ask her about it in advance, it was a serious omission and drew an adverse inference regarding her credibility and the genuineness of the current relationship.

[28] There is probative evidence to support the RAD's conclusion. The PA, an educated woman, made considerable efforts to find evidence to support her alleged bisexuality. She provided no explanation why she would not have advised her lawyer about the highly salient



evidence of a bisexual relationship in Canada. In addition, as one of the RPD panel members pointed out in questioning, she had amended her BOC on October 30, 2018 with additional information. She described attendance at 519 sessions whereat she obtained support for being a bisexual. Yet, she failed to reference her current relationship.

[29] *Irvbogbe v Canada (Citizenship and Immigration)*, 2016 FC 710 at para 32 stands for the proposition that the failure to mention an alleged same-sex partner serves to undermine the credibility. That matter involved an applicant who was involved in an alleged same-sex relationship.

[32] The RAD also noted, as found by the RPD, that the Applicant's alleged same sex partner was not mentioned in his BOC. The RAD agreed with the RPD that, because the Applicant's entire claim rested on his identity as a bisexual, it was reasonable to expect that if he was involved with a same sex partner in Canada that he would have included this information in his BOC, as it would have provided direct evidence of his bisexuality. I note that jurisprudence has established that omissions from a BOC narrative may ground adverse credibility findings where the omission is significant, material or central to the claim (*Akhigbe v Canada (Citizenship and Immigration)*, 2002 FCT 249 at paras 15-16 (Fed TD); *Samseen v Canada (Citizenship and Immigration)*, 2006 FC 542 at paras 14-17). Although the Applicant is correct that minor inconsistencies are not grounds to undermine his credibility, the RAD clearly found this inconsistency to be significant. As the RAD noted, the Applicant's sexuality is the basis for his claim and, because he was represented by counsel when he prepared his BOC, he would have known the importance of proving this aspect of his claim. In my view, this conclusion and the RAD's finding that the credibility of the Applicant's allegation that he was involved in a same sex relationship in Canada was thereby undermined were reasonable.

[30] The Court finds no basis to intervene with respect to the RAD conclusion that the late disclosure reflects negatively on the genuineness of the alleged bisexual relationship in Canada.

C. *Inconsistency in the Last Time PA and Partner Saw Each Other*

[31] The Applicants argue that the inconsistencies in the PA's statements and those of her partner are explained by the fact that they were not asked identical questions by the RPD on this topic. The PA was asked "other than this morning" when is the last time that she saw her partner, to which she answered it was the weekend prior, at her house. The partner witness was asked when was the last time she had met at the PA's house, where she in turn indicated that it was the night before the hearing, i.e. Monday night. The witness distinguished this visit from the time when at the PA's house the previous weekend, being the answer of the PA to her question.

[32] The RAD agreed that the questions were different, but not sufficiently enough to explain the inconsistent answers which resulted from the different questions. The point is that the PA gave a different answer from that of the witness as to when they were last together regardless of differences in the questions.

[33] The PA's explanation when questioned on the difference in the wording was her misunderstanding in that she thought the question was "when was the last time we had an (sic) intercourse." The question asked was "when was the last time you saw your partner." The RPD cannot be criticized for not accepting the PA's explanation of misunderstanding the question. The question was unambiguous, not mentioning intercourse or sex with her partner, which up to that point appears not to have been raised by the RPD.

[34] The Applicants appear to argue that it was incumbent on the RPD to ask follow-up questions as to why the PA misunderstood the question, or what led her to misunderstand it. This was her lawyer's task in re-examination.

[35] The RAD found the different answers concerning a recent event just before the hearing sufficiently significant to undermine the PA's credibility about the genuineness of the relationship. The Court finds no apparent error or misapprehension of evidence in determining this factual finding, or that the inconsistencies were not sufficiently significant to cast doubt on the legitimacy of the alleged relationship.

[36] The Applicants submitted that the RAD did not consider whether the RPD adhered to paragraph 7.4.1 of the SOGIE Guidelines that indicate that, "Decision-makers should examine whether there are cultural, psychological or other barriers that may reasonably explain the inconsistency." The Court concludes that there were no apparent barriers that would apply in the circumstances when the questions were not framed to raise cultural or psychological issues. In effect, the Applicants are requesting the Court to reweigh the evidence, which is not its task.

D. *Lack of Hotel Receipts*

[37] The RAD concluded that while resident in Canada the PA could have provided hotel receipts or reservation confirmations to corroborate her meetings with her longer-term partner in Nigeria. The RAD similarly concluded that the failure to make efforts to obtain receipts cast doubt on her claim that she met frequently with her former partner in a same-sex relationship.

[38] The Applicants submit that the RAD did not consider the PA's explanation that she did not attempt to get the receipts because she did not think they were needed.

[39] Section 11 of the *Refugee Protection Division Rules*, SOR/2012-256 provides that "[t]he claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them."

[40] The Applicant testified in reply to questions from her counsel that she would not be able to obtain documents from the last hotel where she was arrested. Although acknowledging this, the RAD's finding focuses on the failure to make efforts to obtain receipts from the other hotels. As was noted by the RPD, the Applicants were represented by an experienced immigration counsel. The Court concludes that the Applicants have not demonstrated exceptional circumstances that would justify rejecting the finding of a failure of the PA to corroborate her alleged bisexual relationship in Nigeria with objective evidence, or to provide an explanation for not doing so.

E. *Failure to Raise Precautions for Hotel Meetings*

[41] The RPD noted that the PA stated that she and her former recent partner in Nigeria took precautions against being caught together by staying at different hotels to have sex. Yet, the partner arrived at these hotels with a driver who worked for her husband. The driver waited for her outside the hotels. The driver assisted the husband in discovering the PA and her partner together, leading to her flight to Canada.

[42] The partner advised the PA that she told the driver that she was going to meetings with friends. When asked whether her partner was concerned by this if her husband would find out about the meetings, the PA indicated merely that the subject was not discussed with her.

[43] Given the sensitive nature of their meetings and the significant risks associated with extramarital same-sex encounters in Nigeria, the RAD agreed with the RPD's conclusion that the PA demonstrated a lack of concern about being caught. This was found to be inconsistent with her allegation that she took the precaution of meeting at various hotels to avoid discovery of her relationship. The RAD concluded that a person would be concerned about regularly meeting at hotels and would take precautions about how they arrived there, such as being dropped off at another location and making her own way to the hotel.

[44] The Applicants argue that a refugee claimant's credibility cannot be impugned on the basis of a third party's actions, especially when the claimant was not privy to the third party's decision-making process, citing *Fei Chan Lin v Canada (Citizenship and Immigration)*, 2014 FC 683 at para 21 in support. This case is distinguishable on the facts. In this matter, the partner and PA were engaged in a joint venture of sorts with shared risks of serious consequences if caught. The failure to raise such concerns with the partner provided a further basis for the RAD to conclude that the PA did not have a bisexual relationship with partners in Nigeria.

[45] The RAD's confirmation of the RPD's factual assessment that the PA should have evinced concerns about her partner's failure to take more appropriate risk-avoidance steps, and to

have voiced those concerns, cannot be described as an exceptional or speculative finding meriting rejection.

F. *Absence of Supporting Documents*

[46] The RAD provided reasonable explanations to allocate little probative value to the Applicants' supporting documents. Besides noting that the letters from the PA's family members were not sworn, it is generally recognized that such evidence lacks objectivity, thereby diminishing its weight. In any event, it comes down to a request that the Court reweigh the evidence.

[47] The RAD similarly did not err in minimizing the probative value of the psychotherapist report when based on a 60-90 minute interview: see generally *Moffat v. Canada (Citizenship and Immigration)*, 2019 FC 896, paras. 72 et seq. Nor was it demonstrated how the alleged PTSD could explain the PA's inconsistencies, such as her inability to recall recent situations such as the last time she saw her alleged current partner before the hearing. The conclusion of the RAD finding that the PA was clear and coherent when answering questions without displaying any cognitive difficulties cannot be overruled by expert evidence without clear references from the transcript demonstrating a series of problematic areas of her testimony that could be considered to be consistent with the expert's opinions.

G. *Lack of Detail about Former and Current Partners*

[48] While indicating being mindful of the SOGIE Guidelines, the RPD nevertheless drew a negative inference from the failure of the PA to provide an explanation of how her relationship progressed from being strangers to intimate with her partners in the context of Nigeria's prohibition against same-sex relationships.

[49] The RAD expressed a similar concern about the PA's failure to explain in more detail some favourable characteristics of her partners, particularly for the Nigerian partners. Nevertheless, the RAD acknowledged that a lack of such detail would be insufficient to conclude that there were no same-sex relationships, but simply corroborated other concerns about the genuineness of her evidence that she was bisexual.

[50] As described, the Court has a limited jurisdiction to engage issues involving evidentiary conclusions regarding their weight or sufficiency unless exceptional in nature, which it does not find to be the case here. Besides, the RAD by mitigating the negative effect of this conclusion means that any alleged fault cannot be seen as a standalone reviewable error. At best, it would be a finding to be considered in support of the Court's intervention in relation to other concerns on more central issues, none of which were proved.

VII. **Conclusion**

[51] The Court concludes that the RAD decision is reasonable as described in the above reasons. Accordingly, the Court dismisses this application for judicial review. No questions were requested to be certified for appeal and none are certified.



**JUDGMENT in IMM-181-20**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. No questions are certified for appeal.

“Peter Annis”

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Judge

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

**DOCKET:** IMM-181-20

**STYLE OF CAUSE:** RISIKAT OMOLARA ADELANI, ADEFIKAYO  
MUJARD ADELANI, ADEFISAYO MURQSUUD  
ADELANI and THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** DECEMBER 17, 2020

**JUDGMENT AND REASONS:** ANNIS, J.

**DATED:** JANUARY 7, 2021

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