

Federal Court



Cour fédérale

Date: 20220221

Docket: IMM-2110-21

Citation: 2022 FC 232

Ottawa, Ontario, February 21, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

BIODUN MUYINDEEN OKETOKUN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Biodun Muyideen Oketokun, seeks judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, dated March 15, 2021. The RAD confirmed the decision of the Refugee Protection Division [RPD] which found that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons set out below, I am dismissing this application for judicial review.

Background

[3] The Applicant is a citizen of Nigeria. He claims that he fears persecution in Nigeria due to his bisexuality. He claims that his bisexuality was discovered in secondary school in 1987 and that he was suspended from school for a month and required to cut the grass. Further, that in December 2003, his uncle caught the Applicant and his same sex partner, Arasi, in an intimate situation. The Applicant claims that he and Arasi were also caught kissing at school in February 2004 and were beaten and publically shamed. Learning of this incident, the Applicant's parents pressured him to marry a woman, which he did in 2007, and together they have three children. The Applicant claims that an Islamic organization, the Masjid Muslim Association, became aware of his bisexuality and in December 2016, threatened to kill him or report him to the Nigerian authorities.

[4] The Applicant left Nigeria for the United States [US] on January 14, 2017. He remained in the US without status until June 25, 2019, when he entered Canada by an unofficial entry point. He claimed refugee protection soon after.

[5] In a decision dated January 28, 2020, the RPD dismissed the Applicant's claim. The determinative issue was credibility. It found the Applicant not credible because of material omissions from his Basis of Claim [BOC] form, his inconsistent and evolving testimony and his delay in leaving Nigeria. Given the totality of its credibility concerns, the RPD denied the

Applicant's claim. The Applicant appealed to the RAD. It is the RAD's decision that is the subject of this judicial review.

RAD's Decision

[6] The RAD stated that it had listened to the audio recording of the RPD hearing and that it had conducted an independent analysis of the record and the Applicant's submissions. In its reasons, the RAD addressed each of the RPD's challenged negative credibility findings. The RAD concluded that the RPD correctly found that the Applicant is not a credible witness and that he failed to provide sufficient credible evidence to establish that he will face a serious possibility of persecution pursuant to s 96 of the IRPA or a risk of harm as described in s 97.

Issue and standard of review

[7] Only one issue arises in this matter and it is whether the RAD's decision was reasonable.

[8] The parties submit, and I agree, that the reasonableness standard of review applies to this judicial review of the merits of the RAD's decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 23-25).

Analysis

[9] The Applicant challenges negative credibility findings of the RAD.

[10] First, the Applicant submits that the RAD erred in drawing a negative credibility inference due to a misapprehension of the evidence. He submits that it was unjustifiable for the RAD to find that the RPD erred in its recollection of the Applicant's initial testimony on the reason for Arasi's absence at the Applicant's wedding, but then to uphold the credibility finding. The Applicant further submits that the RAD's finding on this point is confusing. He contends that the RAD refers to "different reasons" and "evolving testimony", but fails to actually point out what those reasons are or how the testimony on this subject is evolving. In any event, the Applicant contends that his testimony on the 2003 incident and the reasons why Arasi did not come to his wedding was consistent.

[11] I do not agree with the Applicant. The RAD found that the RPD erred in its recollection of the Applicant's testimony. Specifically, that the RPD understood the Applicant's testimony to have been that the reason Arasi did not attend the Applicant's wedding was that he did not know the family well when, in fact, the Applicant's testimony was that Arasi did not attend because he and the Applicant were trying to keep from the Applicant's now spouse that they were not heterosexual. Thus, the RAD recognized the error but, as it states, found that the RPD was ultimately correct in drawing an adverse inference with respect to the Applicant's evolving testimony in this area. Contrary to the Applicant's submissions, the RPD's misapprehension of the evidence was not carried over into the RAD's analysis.

[12] Rather, the RAD conducted its own analysis, which was not based on the RPD's misapprehension of the evidence. The RAD noted that the alleged incident in 2003, when the Applicant brought Arasi to his family home where the pair were caught by the Applicant's uncle

in an intimate moment, was a key event in the Applicant's claim and triggered his family to pressure him to marry a woman. The RAD stated that this would appear to be a compelling reason why Arasi did not attend the wedding. Yet, the Applicant had given different reasons for this and had been unable to explain his evolving testimony on the point.

[13] As can be seen from a review of the RPD hearing transcript, the Applicant first testified that Arasi did not attend his wedding because they did not want the Applicant's now wife to find out about their relationship. He later testified that Arasi's absence was due to the 2003 incident and/or to his relationship with the Applicant's family. Although he was asked to explain why he gave two different answers, the Applicant failed to do so.

[14] And while the Applicant asserts a lack of clarity in the RAD's reasons on this point, a review of the reasons and record leaves no doubt the RAD was referring to the differing reasons the Applicant gave to explain Arasi's absence from the Applicant's wedding. Nor do the reasons of an administrative decision makers have to be perfect (*Vavilov* para 91).

[15] In sum, it was entirely open to the RAD to identify a non-fatal error of fact made by the RPD but, having conducted its own analysis of the record and based on the Applicant's unsatisfactorily explained inconsistent testimony, to still confirm the RPD's adverse credibility inference (*Amiryar v Canada (Citizenship and Immigration)*, 2016 FC 1023 at para 19; *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at para 16). The RAD did not err in this regard.

[16] The Applicant next submits that the RAD erred by impugning his credibility because of omissions in his BOC form. The Applicant submits that the BOC is not an encyclopedia. He asserts that the RAD erred in stating that the 2004 incident was a turning point after which the Applicant's parents began pressuring him to get married. The Applicant notes that he did not write in his BOC form that the 2004 incident was a turning point. He also submits that the RAD erred in making an adverse credibility finding because he did not mention in his BOC form that his uncle beat him after the 2003 incident. He notes that he mentions in his BOC that classmates at school beat him. And, although his BOC did not mention 4 years of ongoing threats from the Masjid Muslim Association, which he testified about at his hearing before the RPD, this is the type of information hearings are made for. The Applicant submits that the RPD and the RAD were error searching in order to make him look not credible.

[17] I also see no error in the RAD's confirmation of the RPD's adverse credibility findings because of omissions in the Applicant's BOC form. It is well established that all the important facts and details of a claim must be included in the initial BOC form, and the failure to include them can affect a claimant's credibility (*Adekanbi v Canada (Citizenship and Immigration)*, 2022 FC 38 at para 24; *Occilus v Canada (Citizenship and Immigration)*, 2020 FC 374 at para 20; *Ogaulu v Canada (Citizenship and Immigration)*, 2019 FC 547 at para 18; *Zeferino v Canada (Citizenship and Immigration)*, 2011 FC 456 at para 31). Further, the Applicant's arguments about the RAD's use of the words "turning point" and about the fact that he indicated in his BOC form that he was beaten at school are irrelevant. The Applicant omitted to include in his BOC form that his uncle beat him after discovering him and Arasi in an intimate situation in 2003; that his parents were aware of the 2003 incident and began pressuring him to get married following

this incident (rather or as well as after the 2004 incident); and, significantly, that he started to receive threats from the Masjid Muslim Association in 2012. The RAD found that these were all significant and material events relating to the basis of the Applicant's claim and that he had not satisfactorily explained the omissions. In my view, it was reasonable for the RAD to confirm the RPD's adverse credibility findings based on these omissions that were concerned with the central aspect of the Applicant's claim – his bisexuality. I also find that the Applicant's submission that the RAD was "error searching" is without merit.

[18] Further, having read the transcript of the RPD hearing, I see no error in the RAD's finding that the Applicant's testimony in respond to questions about the threat allegedly posed by the Masjid Muslim Association was at times vague and evolving and did not adequately address the concerns raised. The RAD concluded that this significantly undermined the credibility of the Applicant's allegations as well as his credibility overall. Accordingly, the RAD reasonably confirmed the RPD's adverse credibility findings in that regard.

[19] The Applicant also submits that the RAD erred in finding that the reliability of the email evidence was undermined by the absence of identity documents to corroborate that these emails were from the individuals alleged. He submits that the RAD failed to take into account documentary evidence found in the National Documentation Package establishing that individuals are often unwilling to assist bisexual and homosexual Nigerian refugee claimants. The Applicants notes that aiding LGBTQ individuals is a crime in Nigeria.

[20] This argument cannot succeed. Both the Applicant's wife and Arasi provided emails intended to corroborate the Applicant's claim, which the RAD noted were brief and reiterated that Applicant's allegations in broad strokes. In other words, they were willing to and did provide the emails to assist the Applicant with his claim. However, the RAD found that the reliability of the emails was undermined by the absence of identity documentation, which could reasonably have been obtained. Further, that the evidence was not sufficiently reliable and probative. The RAD agreed with the RPD that, based on the cumulative credibility concerns identified with respect to central elements of the Applicant's claim, his credibility was undermined and there were reasons to doubt his sworn testimony. The email evidence was insufficient to overcome those concerns. This finding was open to the RAD. As stated in *Lawani v. Canada (Citizenship and Immigration)*, 2018 FC 924, a lack of credibility concerning central elements of a refugee protection claim can extend and trickle down to other elements of the claim and be generalized to all of the documentary evidence presented to corroborate a version of the facts (at para 24). Nor does the Applicant challenge the RAD's finding in this regard. I find that it was reasonable for the RAD to afford little weight to the email evidence and to confirm the RPD's adverse credibility finding.

[21] Finally, the Applicant submits that the RPD and the RAD erred by not conducting a separate s 97 analysis.

[22] The RAD noted that the RPD explicitly found that the Applicant had failed to establish, on a balance of probabilities, his sexual orientation as a bisexual man and that the RAD made the same finding. It found that the Applicant's claim is based only on his fears of harm based on his

alleged bisexuality, which has a nexus to a Convention ground, and that he alleged no other risk profile. As his claim under s 96 failed on credibility grounds, the same claim based on the same facts, allegations and evidence would necessarily fail under s 97.

[23] I see no error in this finding. The jurisprudence, as cited by the RAD and otherwise, supports that where a refugee claimant's allegations in support of a claim under s 97 are the same as those advanced in support of a claim under s 96 and the allegations have been found not to be credible – which is the circumstance in this matter – the RPD and the RAD are under no obligation to undertake a second analysis as there would be no foundation for a claim under s 97 (*Kaur v. Canada (Citizenship and Immigration)*, 2012 FC 1379 at paras 50-51; *Orukpe v. Canada (Citizenship and Immigration)*, 2020 FC 674 at para 28; *Ali v Canada (Citizenship and Immigration)*, 2019 FC 859, at paras 44-46; *Chukwunyere v. Canada (Citizenship and Immigration)*, 2021 FC 210 at para 18).

[24] In conclusion, the Applicant has not established that the RAD committed reviewable errors in its negative credibility findings. The decision is justified in relation to the relevant factual and legal constraints that bear on the decision and is reasonable (*Vavilov* at para 99).

JUDGMENT IN IMM-2110-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;
2. There shall be no order as to costs; and
3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2110-21

STYLE OF CAUSE: BIODUN MUYINDEEN OKETOKUN v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE USING ZOOM

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