

Federal Court



Cour fédérale

**Date: 20130809**

**Docket: IMM-6791-12**

**Citation: 2013 FC 850**

**Ottawa, Ontario, August 9, 2013**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**ANESU BUWU**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**INTRODUCTION**

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated May 24, 2012 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

## **BACKGROUND**

[2] The Applicant is a 23-year-old citizen of Zimbabwe who claimed refugee protection on the basis of her sexual orientation. The Applicant fears harm at the hands of her father and other relatives. Her father belongs to a sect of the Anglican Church which is strongly opposed to same-sex relationships.

[3] The Applicant first realized she was a lesbian in high school, and she had her first and only relationship with a woman named Ruth. She and Ruth kept this relationship secret; it ended when the Applicant's family sent her to South Africa to complete high school for educational reasons. The Applicant divulged she was a lesbian to a close friend she made in South Africa. This friend shared that information with others and the Applicant was bullied. She convinced her father to send her to continue her schooling somewhere else, and was accepted to study at a Malaysian university. While there, the Applicant noticed intolerance toward some male gay students at the university who were often scolded and verbally attacked in public. She also noticed that people in Malaysia seemed uncomfortable with non-Muslims. As a result, the Applicant applied to Stouffville College in Canada, and was accepted. The Applicant was granted a Canadian student visa, valid from December 31, 2010, to March 30, 2012.

[4] In late November 2011, the Applicant left Canada for Zimbabwe for the Christmas holidays. While there, her father told her that she was expected to get married soon and that he had found a man that he intended her to marry. At this point, fearing she would be forced into something she did not agree with, she felt she had to disclose her sexual orientation. That turned out to be dangerous: upon the disclosure, her brother, father, and mother all physically attacked her. She managed to

escape the attack when her uncle pushed her parents and brother off. The Applicant fled her home and went to a friend's house. Her father shouted behind her that he would kill her if he found her.

[5] Her Canadian visa still valid, the Applicant left Zimbabwe on December 4, 2011, and arrived in Canada a day later. She made an in-land refugee claim in Toronto two weeks after arriving.

[6] The Applicant's refugee hearing was held on May 24, 2012. The Applicant entered 21 exhibits into evidence, including letters from the 519 Community Centre, Reverend Hawkes of the Metropolitan Community Church of Toronto, a women's drop-in shelter where the Applicant volunteered, and the AIDS Committee of Durham Region; pictures of the Applicant next to several apparently gay people and places; college documents; and documentary evidence about the treatment of homosexuals in Malaysia and Zimbabwe.

[7] The RPD rejected the Applicant's claim on June 6, 2012.

## **DECISION UNDER REVIEW**

[8] The RPD found that there was no credible basis for the Applicant's claim, and made the following findings:

- "it [was] implausible that [the applicant] could not remember the country or the names of those individuals who she hung around with and passed her time [in Malaysia];"
- "... Malaysian culture, although it was not tendered into evidence ... it is a well known fact that Malaysians do tolerate gays and lesbians ... That information can be found in country documents or just in general knowledge;"

- "... she attended Cruze (sic) and Tango, a bar that she frequents, however, the Panel is aware that that particular bar is mostly frequented by gay men and not so much by lesbians, the reason that the Panel is aware of that is because in the numerous sexual orientation claims that have appeared before [it], that has been reiterated to me on multiple times. That claimant was not able to give me the name or location of any of the lesbian bars, cafes or restaurants which are readily available in what she called the gay village;"
- "The claimant was not able to produce any letters or affidavits from any former partners and when asked, testified that she did not believe she needed them and she had lost contact with those individuals;"
- "[The letter from the 519 Community Centre] does not clearly indicate what her sexual orientation is;" and
- "...there is no mention of her sexual orientation [in the letter from Reverend Hawkes]; other than that she became an active member in order to support her claim for refugee protection."

[9] The RPD was not convinced that the Applicant was living as a lesbian in Canada, and found that she had failed to produce documentation that would be reasonably available to her to support her claim. As the Applicant's allegations and testimony were deemed not credible, her claim was rejected under both section 96 and section 97 of the Act.

## STATUTORY PROVISIONS

[10] The following provisions of the Act are applicable in this proceeding:

### Convention refugee

**96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race,

### Définition de « réfugié »

**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être

religion, nationality, membership in a particular social group or political opinion,

persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

[...]

[...]

### **Person in Need of Protection**

### **Personne à protéger**

**97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that

(ii) elle y est exposée en tout lieu de ce pays alors que

country and is not faced generally by other individuals in or from that country,

d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[...]

[...]

#### **No credible basis**

#### **Preuve**

**107 (2)** If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim.

**107 (2)** Si elle estime, en cas de rejet, qu'il n'a été présenté aucun élément de preuve crédible ou digne de foi sur lequel elle aurait pu fonder une décision favorable, la section doit faire état dans sa décision de l'absence de minimum de fondement de la demande.

## **ISSUES**

[11] The Applicant raises the following issue in this application:

- a. Did the RPD err in finding that the Applicant was not credible and that the claim has no credible basis: (i) by relying on findings of fact that are contrary to the evidence;

(ii) by making unreasonable plausibility findings; and (iii) violating natural justice by failing to give her an opportunity to respond to concerns?

## **STANDARD OF REVIEW**

[12] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[13] The core of the issue raised in this application revolves around the RPD's evaluation of the Applicant's credibility. In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA), the Federal Court of Appeal held that the standard of review on a credibility finding is reasonableness. Further, in *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773, at paragraph 21, Justice Max Teitelbaum held that findings of credibility are central to the RPD's finding of fact and are therefore to be evaluated on a standard of review of reasonableness. Finally, in *Aguilar Zacarias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155, Justice Mary Gleason held at paragraph 9 that the standard of review on a credibility determination is reasonableness.

[14] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable

outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

[15] The Applicant’s ability to fully present her case is a matter of procedural fairness (*Kamara v Canada (Minister of Citizenship and Immigration)*, 2011 FC 243 at paragraph 34). In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)* 2003 SCC 29, the Supreme Court of Canada held at paragraph 100 that “It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions.” Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)* 2005 FCA 404 at paragraph 53 held that the “procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty.”

## **ARGUMENTS**

### **The Applicant**

#### **The Applicant’s Experience in Malaysia**

[16] The Applicant argues that the RPD’s finding that it is “implausible that she could not remember the country or the names of those individuals [the gay students in Malaysia] who she hung around with and passed her time” is perverse.



[17] The Applicant points out that other international students were peripheral to her claim, and that she never claimed to have spent any time with them. The Applicant elaborated on this issue in her oral testimony as follows:

Applicant: And there were some students at the school who were foreign I remember who came just a bit after I came. They were gay and it showed, it was really evident in the way they dressed, the way they spoke, and they were often rejected and they had verbal comments from students. They did not even stay long at the university, and from that point I started to feel really unwelcome...

[...]

Applicant: I did interact with them [the other gay international students].

RPD: Okay. Where were the other students from, the sexual orientation students, the internationals? Do you know where they were from?

Applicant: I don't know the particular country.

RPD: Oh, just curious, if you know.

Applicant: It – I'm not – I know that it was in Europe, but I'm not sure which country it is. It was not an English-speaking country.

RPD: Just from what I know from Malaysia, they're tolerant towards sexual orientation. So just curious.

[18] Furthermore, the RPD never asked the Applicant whether she knew the name of these students, yet it found her not to be credible for not knowing them. Failure to answer a question that was never asked is not a rational ground for finding an applicant not credible (*Aden v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 416 (CA) [*Aden*]). The Applicant did know where the other students were from. She testified that they were from Europe, but she just did not know which country.

[19] The Applicant also argues that the RPD's comments in the Decision about the attitude of Malaysians towards gays and lesbians are baseless and perverse. The RPD found at paragraph 10 of the Decision that "although it was not tendered into evidence ... it is a well known fact that Malaysians do tolerate gays and lesbians." The Applicant argues that even without evidence about Malaysia, this finding is perverse since it was based on the RPD's personal views and not on evidence (*Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282).

[20] More importantly, the Applicant actually did enter into evidence five documentary exhibits about the treatment of gays and lesbians in Malaysia. These can be found at pages 162 – 171 of the Certified Tribunal Record. These documents paint a strikingly different picture from the conclusion reached by the RPD, and render the Decision perverse and unreasonable. There was nothing implausible about the Applicant's testimony about her experiences in Malaysia, and the Applicant submits that the RPD erred by drawing a negative inference in this regard (*Liu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 135).

### **The Applicant's Familiarity with Lesbian Establishments**

[21] The RPD found at paragraph 11 of the Decision that the Applicant was not able to express how she has been openly living as a lesbian in Canada. The RPD was concerned that the Applicant did not know the names of any lesbian bars or cafes. Once again, however, this question was never put to the Applicant. It was therefore unreasonable for the RPD to rely on it (*Aden*, above).

[22] The Applicant was asked where she socializes, and she replied that she frequents a bar called “Crews and Tangos” (sic) and another called “Play”. She submits that the RPD’s concern that Crews and Tangos was mostly frequented by gay men and not lesbians was never raised at the hearing. Not only does this violate procedural fairness because the Applicant could not have anticipated this concern (*Malala v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 94), the RPD’s personal knowledge is just wrong. The Applicant has filed a print-out from the bar’s website in the present application which reads as follows:

Located in the heart of Toronto’s gay village, Tango shares a patio with the Crews Complex bar. It tends to attract a crowd of mostly lesbian women, but their doors are open to all. ... Tango is a lesbian bar where everyone is welcome. ... Tango is the only women’s bar in the Gay ghetto, it is also the largest and, with the demise of the Rose in ’97, now the longest running in the city.

[23] The Applicant submits that the RPD’s negative credibility finding on this issue was entirely groundless.

### **Letters from the Applicant’s Previous Partners**

[24] The RPD also found the Applicant not credible because she did not file letters or affidavits from any former lesbian partners. The Applicant explained in her PIF and testified that she only had one relationship: in Zimbabwe, with Ruth, in 2006. She could not get a letter from Ruth because, as she explained at the hearing roughly six years later, she had lost all contact with her. The Applicant also explained that she had friendships in Canada, but she did not consider these to be lesbian relationships and so did not think it appropriate to advance affidavit evidence from these women.

[25] The RPD indicated that it understood why the Applicant could not obtain evidence from Ruth, but then found her not credible for failing to provide this evidence. The Applicant submits it was an error for the RPD not to accept her explanation as to why she could not present evidence of her relationship with Ruth (*Kalu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 400).

[26] In any case, evidence of relationships is not required to establish one's sexual orientation. The fact that the Applicant has not had a serious same-sex relationship should not be taken as evidence that she is not "leading the life of a lesbian." The Applicant testified that she is not in a serious relationship because this is the first time she has been able to openly live as a lesbian, and she is still getting to know people. This should have been accepted by the RPD. Instead, the RPD demanded evidence from her that is impossible to produce (*Ghebremichael v Canada (Minister of Citizenship and Immigration)*, 2012 FC 873).

### **The Applicant's Participation in the Lesbian Community**

[27] The Applicant submitted evidence that she is actively involved in the Lesbian Gay Bi-sexual and Transgender (LGBT) community in Toronto. The RPD rejected this evidence because it did not actually say what her sexual orientation is. The Applicant submits that this approach is perverse; the RPD cannot simply refuse to give any weight to her participation in the LGBT community while finding that she does not "live as a lesbian." Not only that, the RPD ignored supportive evidence submitted by the Applicant, such as a letter from the AIDS Committee of Durham and photographs.

[28] The Court considered similar evidence in *Leke v Canada (Minister of Citizenship and Immigration)*, 2007 FC 848 at paragraph 33:

The Court is satisfied that it was patently unreasonable for the Board to dismiss the applicant's membership in the 519 Church Street Community Centre as proof of his membership in an organization that serves minorities like him in and near the City's Gay Village. As such, the Board erred by its disregard or misapprehension of the evidence before it.

[29] In the absence of proof of a relationship, all the Applicant could do was prove active involvement in the LGBT and testify about her identity as a lesbian. In this case, she did both. In sexual orientation claims, applicants often lack evidence because sexual orientation is extremely personal, and persecution on this ground often involves suppressing any public manifestation of this orientation. The RPD was not sensitive to these concerns in this case.

#### **The RPD's Finding of No Credible Basis for the Applicant's Claim**

[30] Not only was the RPD's approach to the Applicant's claim overzealous and based on personal opinions and a myopic understanding of what it means to be a lesbian, it went on to find that there was no credible basis for the Applicant's claim. Given the seriousness of such a finding, it is to be strictly construed (*Kouril v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 728). For the RPD to make this finding, it must examine whether there was any credible evidence, and express reasons for such a finding. It failed to do so in this case.

[31] The Applicant submits that her claim was nowhere close to meeting the "no credible basis" standard in subsection 107(2) of the Act. There was in fact sufficient credible and trustworthy evidence upon which this claim could have been accepted. The Applicant requests that her judicial review be allowed, and requests an order of costs.

## **The Respondent**

### **The Applicant's Experience in Malaysia**

[32] The Respondent acknowledges that the RPD committed factual errors in regards to this issue, but asserts that those errors were immaterial to the result of the Decision (*Nyathi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1119 at paragraphs 18, 24). The Applicant is not seeking refugee protection in Malaysia, and the RPD's analysis of country conditions there does not detract from the fact that the Applicant produced insufficient evidence to establish that she is a lesbian.

### **The Applicant's Familiarity with Lesbian Establishments**

[33] The Applicant has taken the RPD's findings about her inability to list lesbian establishments out of context in her arguments. The RPD stated that "The claimant was not able to express to me as to how she is living openly here in Canada." The concern was with regards to the Applicant's inability to present a more robust understanding of Toronto's gay environs, and her day-to-day existence as a lesbian in Canada.

[34] As is evident from the transcript of the hearing (pages 200-201 of the CTR), the RPD did not want the Applicant to "list" lesbian establishments; the RPD was inquiring about any lesbian establishments where she socializes outside of Crews and Tango and Play. The Respondent submits that it was not unreasonable for the RPD to conclude that the Applicant's knowledge of two establishments did little to corroborate that she is a lesbian.

[35] Even if the RPD committed a factual error over whether or not Crews and Tango is a lesbian bar (which the Respondent does not concede as the credibility and weight of the Applicant's post-hearing evidence has not been tested), such an error does not detract from the fact that the Applicant's familiarity with these establishments is not sufficient to prove that she is a lesbian.

### **Letters from the Applicant's Previous Partners**

[36] The Respondent points out that the RPD did not make a credibility finding with regards to the lack of evidence from any former partners. The RPD found that the Applicant had failed to provide sufficient evidence to corroborate her claim, which is a distinction that Justice Russel Zinn highlighted in *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at paragraphs 22-28, 34.

### **Evidence of the Applicant's Participation in the LGBT Community**

[37] The Applicant asserts that the RPD failed to consider letters evidencing her participating in the LGBT community, and imposed a restricted definition of what it means to be a lesbian. The RPD did not have an obligation to refer to every document in front of it (*Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65 at paragraph 3) and even a cursory review of the documents submitted by the Applicant shows that they would be unlikely to convince the RPD that she is a lesbian. Photos of the Applicant with different people and a letter from the AIDS Committee of Durham do little to evidence the Applicant's sexual orientation.

[38] Furthermore, the RPD's Decision does not stand for the proposition that the only way to prove a refugee claim based on sexual orientation is to provide evidence of same-sex relationships.

The Applicant simply failed to put forward evidence that should have been reasonably forthcoming, such as letters from people who knew she was a lesbian, either in Toronto or elsewhere. The basis of the Decision is that the Applicant failed to produce sufficient evidence to prove her claim.

### **Costs**

[39] Apart from disagreeing with the “no credible basis” finding, the Applicant has not articulated what “special reasons” exist that would justify an award of costs. Accordingly, the Respondent submits that there is no reason for the Court to deviate from Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/2002-232.

### **ANALYSIS**

[40] The determinative in this case was credibility. The RPD finds that the Applicant is not credible with respect to her sexual identity as a lesbian based upon a range of factors. The Respondent concedes that the RPD made mistakes, but argues that they do not matter. I disagree.

[41] The RPD found it implausible that the Applicant would not know the names or countries of origin of gay students “who she hung around with and passed her time” in Malaysia. The CTR makes it clear that the Applicant never said these students were people she hung around and passed her time with. In fact, the RPD never asked the Applicant if she knew the names of the students.

[42] The RPD makes the following inexplicable finding, at paragraph 10 of the Decision:

Further, I am aware of Malaysians and the Malaysian culture, although it was not tendered into evidence and is not tendered into evidence because Malaysia is not a country that the claimant is making a claim against, but it is a well known fact that Malaysians do tolerate gays and lesbians and that although the country is 80



percent Muslim they are very tolerant to other denominations and do not harass or bother other minorities. That information can be found in country documents or just in general knowledge.

[43] The RPD cannot rely upon and make findings based upon so-called personal knowledge that is never put to the Applicant. This is procedurally unfair. Not only that, the Applicant actually filed country documentation on Malaysia that demonstrates severe intolerance of homosexuality in that country. The RPD does not refer to this documentation, but relies upon its personal opinion that is never put to the Applicant.

[44] Something similar occurs in paragraph 11 of the Decision:

The claimant was not able to express to me as to how she is living openly here in Canada since she has been here. She testified that she attended Cruze [*sic*] and Tango, a bar that she frequents, however, the Panel is aware that that particular bar is mostly frequented by gay men and not so much by lesbians, the reason that the Panel is aware of that is because in the numerous sexual orientation claims that have appeared before me, that has been reiterated to me on multiple times. The claimant was not able to give me the name or location of any of the lesbian bars, cafés or restaurants which are readily available in what she called the gay village.

[45] The RPD again relies upon personal and extrinsic knowledge that is never put to the Applicant. Evidence placed before me by the Applicant from the *Crews and Tango* website reveals the following:

Located in the heart of Toronto's gay village, Tango shares a patio with the Crews complex bar. It tends to attract a crowd of mostly lesbian women, but their doors are open to all...

Tango is a lesbian bar where everyone is welcome...Tango is the only women's bar in the Gay ghetto. It is also the largest and, with the demise of the Rose in '97, now the longest running in the city.

*Crews and Tango profile on www.Toronto.com, Ex. E, p. 71*

In what can only be described as a complex, Crews/Tango combine drag, karaoke and DJs under one roof, in the same night; popular with boys and girls.

*Crews and Tango profile in Xtra! Newspaper, Ex. E, p. 72*

[46] As the CTR reveals, the RPD never asked the Applicant to list the lesbian establishments whose names she is accused of not knowing in order to support a finding on no credibility.

[47] The Applicant's credibility is further questioned because of her failure to file letters or affidavits from "any former partners" in a situation where she testified that she only had one real relationship back in high school in Zimbabwe before 2006, and this relationship was secret. She testified that she had lost contact with the female involved. When she explained this at the hearing, the RPD said it understood. Yet somehow an explanation that was understandable at the hearing became support for a negative credibility finding in the reasons.

[48] The evidence of her sexual orientation that the Applicant did submit is considered against the background of the previous negative credibility findings. The evidence from 519 Church Street Community Center and the Rev. Brent Hawkes is given little weight because it does not indicate directly what her sexual orientation is. This is clearly a mistake because the letter of April 18, 2012 from the Metropolitan Community Church of Toronto specifically refers to the Applicant's sexual orientation:

By engaging herself in the various community programs such as attending MCCT Refugee Support Group, Anesu has also had the opportunity to share her concerns about life as a lesbian living in Zimbabwe. MCC Toronto takes an active role in generating awareness of prejudice and oppressive behaviour around the world, allowing Anesu to remain in Canada will no doubt ensure her

personal safety and enable her to make a productive contribution to our community.

Anesu has described experiences of homophobia in Zimbabwe and has expressed fears of returning to her country because of her sexual orientation.

This evidence clearly states that the Applicant is a lesbian. Overall, the whole Decision is unfair, unsafe and unreasonable and must be returned for reconsideration by a differently constituted RPD.

[49] The Applicant has asked that she be awarded costs in this matter. She reasons that the Decision is so indefensible that it was perverse of the Respondent to force her to take it to judicial review. I agree. The Decision is blatantly unfair and unreasonable. The RPD's attitude to the facts of the Applicant's testimony is cavalier and the RPD demonstrated a complete lack of awareness of the procedural fairness issues involved. The Decision as a whole is an embarrassment to our refugee process. With the resources and legal talent available to the Respondent, the Respondent had to know how bad the Decision was. Yet, the Respondent has forced the Applicant to take this matter to Court. As the Court of Appeal pointed out in *Ndungu v Canada (Minister of Citizenship and Immigration)* 2011 FCA 208 at paragraph 7(6)(v), "Special reasons justifying costs against the Minister may be found where:

(v) the Minister unreasonably opposes an obviously meritorious application for judicial review.

In my view, this is just such a case.

[50] The parties agree there is no question for certification and the Court concurs.

**JUDGMENT**

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

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted panel of the RPD.
2. The Respondent will pay the Applicant's costs of this application on a solicitor and client basis.

“James Russell”

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Judge

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

**DOCKET:** IMM-6791-12  
**STYLE OF CAUSE:** ANESU BUWU v MCI

**PLACE OF HEARING:** Toronto  
**DATE OF HEARING:** July 3, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** RUSSELL J.

**DATED:** August 9, 2013

**APPEARANCES:**

Leigh Salsberg FOR THE APPLICANT  
Christopher Ezrin FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Leigh Salsberg FOR THE APPLICANT  
Barrister and Solicitor  
Toronto, Ontario  
  
William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of Canada