Federal Court  Cour fédérale

Date: 20170103

Dockets: IMM-1850-16
IMM-1851-16

Citation: 2016 FC 1422

Ottawa, Ontario, January 3, 2017

PRESENT: The Honourable Madam Justice Strickland

Docket: IMM-1850-16

BETWEEN:

NGOZI PATRICIA IKEJI

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

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THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] These are the applications for judicial review of a negative Pre-Removal Risk Assessment ("PRRA") decision dated March 29, 2016 (IMM-1851-16) and a decision by the same immigration officer ("Officer") on the same date refusing the Applicant's application for permanent residency on humanitarian and compassionate (H&C) grounds (IMM-1850-16). The two applications were heard together.

[2] For the reasons that follow I find both decisions to be reasonable.

Background

[3] The Applicant is a citizen of Nigeria. She entered Canada in July 1998 at the age of 19. Two months later she made a claim for refugee protection on the basis of political opinion. She alleged that, following the publishing of an article which was critical of the regime, she and ten colleagues who authored the article were twice detained and raped by soldiers. The Immigration and Refugee Board ("IRB") did not believe that the events described by the Applicant occurred and rejected her claim on May 10, 1999. A Post-Determination Refugee Claimant in Canada Risk Analysis and Decision ("PDRCC"), dated September 15, 2000, concluded that there was insufficient persuasive evidence to support that the Applicant would be specifically targeted or subjected to an objectively identifiable risk if she were required to return to Nigeria.

[4] The Applicant was scheduled to be removed from Canada in June 2001 and was denied a stay of removal. The Applicant did not depart and continued to live in Canada without legal

status. She submitted a PRRA on July 16, 2015 in which she alleged a new risk, that she fears returning to Nigeria as she identifies her sexual orientation as bisexual. She claimed that because of this she has been disowned and ostracized by her family and is at risk because of laws in place in Nigeria that criminalize homosexuality. On September 23, 2015 she filed an H&C application for permanent residence from within Canada, pursuant to s 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), on the basis of her establishment in Canada, lack of establishment in Nigeria, generalized risk in Nigeria, economic and social hardships associated with leaving Canada, the best interests of a child, her sexual orientation and a medical condition, anemia.

Decisions Under Review

i) The PRRA Decision

[5] The Officer found, based on the totality of the evidence provided, that the Applicant had not established, on a balance of probabilities, her sexual orientation as bisexual.

[6] In reaching this conclusion the Officer noted that the Applicant's supporting affidavit stated that when she left Nigeria she was in denial of her sexual identity but had come to accept who she was shortly after her arrival in Canada in 1998 and lived openly. Despite this, she had failed to disclose her sexual orientation as a risk to the IRB, which entity was in a position to grant her protection. She also failed to declare her sexual orientation and that it was a basis of her fear of return, in her subsequent PDRCC application. Nor did a psychological report, dated August 1999, or the supporting affidavit of her friend, Catherine Uchendu, both included in

support of the PDRCC, refer to her sexual orientation. Subsequently, in her July 28, 2015 affidavit made in support of the PRRA, Ms. Uchendu stated that she has known the Applicant since the summer of 1998 and was fully aware of her past and that she had been mistreated and was not very lucky in both her heterosexual and bisexual relationships.

[7] The Officer noted that the reports of a social worker and psychotherapist submitted in support of the PRRA indicated that the Applicant was in a long term relationship with Stacy which appeared to have commenced shortly after the Applicant's arrival in Canada. Further, that the Applicant implied in her affidavit that she and Stacy were in a long term relationship and living together. However, the Applicant had produced insufficient evidence of this common law relationship and her affidavit was general in nature and provided little detail. The Officer found that there was insufficient evidence to establish that the Applicant was bisexual based on the evidence that she provided with respect to her alleged long term relationship with Stacy.

[8] Additionally, the Applicant's relationship with Stacy was at odds with her immigration history. Mr. Frank Ficker had submitted a spousal sponsorship on behalf of the Applicant on February 10, 2001 and the Applicant had indicated in her IMM8 (H&C application) that she was in a genuine marriage with Mr. Ficker from December 10, 2000 to July 13, 2013. However, during the same period, she was allegedly in a common law relationship with Stacy. The Applicant had provided no explanation for this apparent overlap.

[9] The Officer acknowledged an August 17, 2015 letter from the Metropolitan Community Church of Toronto ("Metropolitan Church") and August 2015 documents from the 519 Space for

Change organization ("519 Centre") but found, while these established a connection to a community, they did not establish the Applicant's sexual orientation. The Officer also acknowledged the affidavits of Ms. Uchendu and of Mr. Newman Obike, which stated that they were aware of the Applicant's sexuality as a bisexual female, but assigned them minimal weight on the basis that they were written by her friends who had a vested interest in the outcome of the application. The Officer also noted that the statements made in the affidavits with respect to the Applicant's sexual orientation were general and lacked detail.

[10] The Officer noted that the Applicant has resided in Canada since 1998 but provided no other information or details of any other relationships other than the one with Stacy when she first arrived. The Officer stated that it would be reasonable to presume that the Applicant could and would provide sufficient details of her bisexual orientation.

[11] For all of these reasons, the Officer concluded that the Applicant had not established her sexual orientation on a balance of probabilities.

ii) H&C Decision

[12] The Officer stated that the Applicant based her H&C application on the grounds of establishment, best interests of the child and country conditions related to her personal circumstances. As to establishment, the Officer found that the Applicant had been in Canada for nearly 18 years but that this alone was not sufficient to warrant an exemption. And, although she claimed to own and operate a business, she had provided insufficient evidence to support that claim or that she had established herself to such a degree that an exemption from having to apply

for permanent residence status from outside Canada was warranted. The Officer noted that the Applicant had no family in Canada but acknowledged letters of support provided by her friends, Ms. Uchendu and Mr. Obike and that they had attested to their friendship, as well as the letters from the 519 Centre and the Metropolitan Church. However, the Officer found that while these demonstrated that the Applicant had established friendships and made community connections, she was not satisfied that the evidence established that separation would cause the Applicant hardship.

[13] For essentially the same reasons as set out in the PRRA decision, the Officer found that, based on the totality of the evidence, the Applicant had not presented sufficient evidence to establish on the balance of probabilities her sexual orientation as a bisexual.

[14] As to the Applicant's claim that she considers Ms. Uchendu's son, who was born in December 2012, as her own son, maintaining regular contact, seeing him once a week and speaking with him daily, and Ms. Uchendu's letter stating that Joshua would be devastated were the Applicant to leave Canada, the Officer found that there was insufficient evidence of a level of dependency wherein the Applicant's departure would negatively impact the child or that the child's best interests would not be met should the Applicant be required to apply for permanent residence status from outside Canada.

[15] The Applicant had also submitted that she was receiving psychotherapy and that it continued to assist her in recovery from her past experiences and to come to terms with her sexual orientation. She submitted that it was important to continue to receive that treatment but

that she could not do so in Nigeria as bisexuality is taboo and was the place where she was sexually assaulted. The Officer concluded that the Applicant had provided insufficient evidence that she is receiving ongoing psychotherapy and that returning to Nigeria would compromise her recovery. The Applicant also claimed that she suffered from anemia which she treats with vitamins, iron pills and eating healthy. The Officer found that she had provided insufficient evidence that she would not receive adequate care for her condition in Nigeria.

[16] Finally, as to the Applicant's submission that she has never worked in Nigeria and had no family or community there to assist her, the Officer found these statements to be speculative and unsupported. Further, she had arrived in Canada at age 19 with few skills, work experience or family but was able to establish a network, find work and attend courses. The Officer was not satisfied that she could not achieve the same in Nigeria.

[17] The Officer concluded, upon examination of all of the circumstances presented by the Applicant, that the requested exemption was not justified on H&C considerations and denied the request.

Issues

[18] In my view, the issues arising from both decisions are as follows:

(1) In the PRRA decision, did the Officer render a veiled credibility determination, and so err in failing to conduct an oral hearing?

(2) Were the Officer's decisions reasonable?

Standard of Review

[19] The Applicant submits that the standard of review of a PRRA or H&C decision is reasonableness on questions of fact or mixed fact and law and correctness for questions of law and that the standard of review for the decision as a whole is reasonableness. The Respondent submits that the factual findings of a PRRA or H&C officer are reviewable on a reasonableness standard.

[20] Reasonableness is the standard of review for questions of veiled credibility findings. (*Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 738 at para 40 ("*Chekroun*"); *Angulo Lopez v Canada (Citizenship and Immigration)*, 2012 FC 1022 at paras 20 and 24; *Zeng v Canada (Citizenship and Immigration)*, 2015 FC 49 at paras 14 and 16). While the jurisprudence is divided on the standard of review applicable to a PRRA officer's decision respecting an oral hearing, I have previously found that this is reviewable on the reasonableness standard as a PRRA officer decides whether to hold an oral hearing by considering the PRRA application against the requirements of s 113(b) of the IRPA and the factors in s 167 of the *Immigration and Refugee Protection Regulations*, Can. Reg. 2002-227 ("IRP Regulations") which is a question of mixed fact and law (*Chekroun* at para 40; *Seyoboka v Canada (Citizenship and Immigration)*, 2016 FC 514 at para 29).

[21] I agree that the standard of review of decisions of PRRA and H&C officers is reasonableness (*Wang v Canada (Citizenship and Immigration)*, 2010 FC 799 at para 11 ("*Wang*"); *Chen v Canada (Citizenship and Immigration)*, 2016 FC 702 at para 13; *Belaroui v*

Canada (Citizenship and Immigration), 2015 FC 863 at paras 9-10; *Herrera v Canada (Citizenship and Immigration)*, 2015 FC 261 at para 6-7; *Aleziri v Canada (Citizenship and Immigration)*, 2009 FC 38 at para 11; *Din v Canada (Citizenship and Immigration)*, 2013 FC 356 at para 5; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Betoukoumesou v Canada (Citizenship and Immigration)*, 2014 FC 589 at para 16; *Ogunyinka v Canada (Citizenship and Immigration)*, 2015 FC 595 at para 19) and that the appropriate standard of review for issues of procedural fairness is correctness (*Wang* at para 11; *Khosa v Canada (Citizenship and Immigration)*, 2009 SCC 12 at para 43; and *Liu v Canada (Citizenship and Immigration)*, 2008 FC 836 at para 11).

ISSUE 1: In the PRRA decision, did the Officer render a veiled credibility determination, and so err in failing to conduct an oral hearing?

Applicant's Position

[22] The Applicant submits that where credibility is a determinative issue in a PRRA application, pursuant to s 113(b) of the IRPA and s 167 of the IRP Regulations, an applicant is entitled to an oral hearing. Failure to conduct a hearing in that circumstance is a breach of procedural fairness. In this matter, there was no oral hearing and, therefore, to the extent that the Officer rendered a credibility determination, the decision is in error (*Liban v Canada (Citizenship and Immigration)*, 2008 FC 1252 ("*Liban*")).

[23] Further, in *Chekroun*, the applicant therein had provided a letter from an LGBTQ organization and had failed to disclose his sexual orientation in his refugee claim. There the officer was found to have erred in failing to give the applicant's sworn affidavit the presumption

of truthfulness and requiring corroborating evidence in the absence of reasons to doubt its truthfulness. Similarly, in this matter, the Applicant had provided her affidavit and some corroborating evidence, including a letter from an LGBTQ organization. It is therefore at least arguable that the Officer simply did not believe her and so erred in failing to conduct an oral hearing.

Respondent's Position

[24] The Respondent submits that the cases cited by the Applicant with respect to veiled credibility findings are distinguishable and refers to several decisions of this Court which found that findings on sufficiency of evidence were not cloaked credibility findings (*Herman v Canada (Citizenship and Immigration)*, 2010 FC 629 at paras 16-18 ("*Herman*"); *Sayed v Canada (Citizenship and Immigration)*, 2010 FC 796 at paras 30-38; *Ullah v Canada (Citizenship and Immigration)*, 2011 FC 221 at paras 27-35; *Gao v Canada (Citizenship and Immigration)*, 2014 FC 59 at paras 32-47 ("*Gao*"); *Ibrahim v Canada (Citizenship and Immigration)*, 2014 FC 837 at paras 21-29 ("*Ibrahim*")). The Respondent submits that it is important to recognize the distinction between being persuaded that the Applicant has met his or burden of proof and simply disbelieving the Applicant.

[25] The Respondent submits that in this case the evidence that was proffered by the Applicant to establish her sexual orientation was weak and could not have satisfied the evidentiary burden. There was no veiled credibility finding and no oral hearing was required (*Herman* at paras 16-17).

[26] As to the Applicant's argument that the Officer erred in failing to give her affidavit the presumption of truthfulness, in *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA) ("*Maldonado*") the Court held that testimony is presumed to be true unless there is a valid reason to doubt its truthfulness. However, in this case, the Applicant asserted that she was in a long term, common law relationship with Stacy during the same period of time that she was married to her husband. No explanation was provided for this discrepancy, which the Applicant appeared to have deliberately withheld from the Officer. The discrepancy was sufficient to overcome the presumption that her affidavit was true and justified the Officer assigning it little weight.

Analysis

[27] Justice Kane of this Court, in *Gao*, noted that it can be difficult to distinguish between a finding of insufficient evidence and a finding of credibility:

> 32 I note that in some cases it is difficult to draw a distinction between a finding of insufficient evidence and a finding that the applicant was not believed i.e. was not credible. The choice of words used, whether referring to credibility or to insufficiency of the evidence is not solely determinative of whether the findings were one or the other or both. However, it can not be assumed that in cases where an Officer finds that the evidence does not establish the applicant's claim, that the Officer has not believed the applicant.

[28] In *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 ("*Ferguson*"), a PRRA officer found that the applicant therein had provided insufficient evidence to establish that she was lesbian. The only evidence was a written submission by her counsel and the officer found that this was not probative evidence. The applicant argued that the officer had really made

a credibility finding. Justice Zinn disagreed, finding that the PRRA officer's reasoning simply suggested that he neither believed nor disbelieved the Applicant but was left unconvinced:

> 34 It is also my view that there is nothing in the officer's decision under review which would indicate that any part of it was based on the Applicant's credibility. The officer neither believes nor disbelieves that the Applicant is lesbian - he is unconvinced. He states that there is insufficient objective evidence to establish that she is lesbian. In short, he found that there was some evidence - the statement of counsel - but that it was insufficient to prove, on the balance of probabilities, that Ms. Ferguson was lesbian. In my view, that determination does not bring into question the Applicant's credibility.

[29] The Applicant refers to the *Liban* and *Chekroun* decisions as being analogous to this matter. While I agree that there are factual similarities with those cases, I find that they are nevertheless distinguishable. Unlike *Liban*, in this case the Officer did not place considerable emphasis on the credibility findings of the IRB. And in this matter the Officer provided reasons for assigning low probative value to the evidence submitted by the Applicant.

[30] This case is also distinguishable from *Chekroun*, in which the officer had failed to state why the applicant's evidence alone was insufficient to establish his sexual orientation and there was no conflicting evidence or inconsistencies to bring that evidence into question. Here the Officer explained that the Applicant's affidavit was vague and lacked detail about the Applicant's alleged long term relationship with Stacy. In that regard, in her affidavit the Applicant stated only that from 1998 to 2001 she was very active within Nigerian community associations in Toronto. However, she had to sever all ties because of the backlash she experienced after she became open with her lesbian partner. She stated "after years of promises to sponsor me as a common-law partner" the relationship had ended.

[31] Nor did the Applicant make any mention of her marriage in her affidavit and in her PRRA application she did not answer the question as to her present marital status. But, as noted by the Officer, there was evidence disclosed in the Applicant's H&C application demonstrating that the Applicant claimed that she was in a genuine marriage with Mr. Ficker from 2000 to 2013. Thus, the marriage appeared to overlap with the time of her alleged common law relationship with Stacy. While there may have been a reasonable explanation for this, none was provided in the Applicant's affidavit and the onus to do so lay with her (*Moreno Corona v Canada (Citizenship and Immigration)*, 2012 FC 759 at para 27; *Borbon Marte v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 930 at para 39 ("*Borbon Marte*"); *Sufaj v Canada (Citizenship and Immigration)*, 2014 FC 373 at para 39; *Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760 at para 41; *Gao* at para 45).

[32] In my view, the lack of detail as to her relationship with Stacy and the failure to address her marriage was a valid reason to doubt the truthfulness of the Applicant's affidavit and thereby rebut the *Maldonado* presumption.

[33] This matter is more analogous to *Ferguson* as the Officer is weighing the evidence and making a finding that the legal standard has simply not been met. As stated by Justice Zinn in *Ferguson*, not all evidence is of the same quality, and while an applicant may meet the evidentiary burden because evidence of each essential fact has been presented, the applicant may not have met the legal burden because the evidence presented does not prove the facts required on the balance of probabilities. As in *Ferguson*, the legal burden of proof would be met in this case if the Applicant proved her sexual orientation to the Officer, on the balance of probabilities.

However, the determination of whether the evidence presented meets the legal burden depends very much on the weight given to that evidence (*Ferguson* at paras 23-24) and deference must be given to PRRA officers in their assessment of the probative value of evidence before them. If that assessment falls within the range of reasonableness, it should not be disturbed (*Ferguson* at para 33; also see *Gao* at paras 41-44; *Herman* at paras 17-18).

[34] As in *Herman*, I am satisfied that in these circumstances the Officer was not cloaking adverse credibility findings in conclusions that the evidence adduced by the Applicant was not sufficient. Rather, it was open to the Officer to conclude, without making an adverse credibility finding, that the evidence adduced was not sufficient to establish, on a balance of probabilities, the Applicant's sexual orientation. Accordingly, an oral hearing was not required.

ISSUE 2: Were the Officer's decisions reasonable?

i) PRRA Decision

Applicant's Position

[35] The Applicant submits that the Officer's decision is unreasonable given the evidence before her. The Officer erred in treating the Applicant's delay in disclosing risk based on her sexual orientation, from the time of the RPD hearing and her PDRCC to the time of her PRRA, as a credibility concern *per se* (*Chekroun*). Further, the evidence disclosed that the LGBTQ community in Nigeria and in Canada is highly stigmatized. Therefore, it would not be unreasonable for the Applicant to be reluctant to disclose her sexual orientation to anyone, including Canadian authorities.

[36] And, while the Officer found that the Applicant's affidavit was vague on details of her same sex relationship in Canada, was not corroborated, and did not explain how she was in a genuine marriage to a man at the same time as she was in a common law relationship with Stacy, her affidavit did state that she had been in a same sex relationship and was ostracized by the Nigerian community when this became known. Details could have been requested and provided at an oral hearing, which did not occur.

[37] The Applicant submits that while the letter from the LGBTQ organization did not confirm the Applicant's sexual orientation and participation may not be restricted to members of that community, this was not a basis for dismissing it out of hand as it was probative. The Officer erred in doing so.

[38] The Officer also erred in assigning minimum weight to the affidavits of the Applicant's friends on the basis that they have a vested interest in the outcome and lack details. The Applicant submits that this Court has dismissed this reasoning as it fails to apply the presumption of truthfulness to the affidavits and fails to recognize that the affiants may, as here, be providing first-hand eyewitness evidence. It was also unreasonable for the Officer to conclude that the Applicant was required to have had other same sex relationships in order to establish her sexual orientation.

[39] The Applicant also submits that pursuant to the Supreme Court of Canada's decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*"), psychological assessments should not be dismissed out of hand. In this case, the Officer says

virtually nothing about the psychotherapist's report and does not question its opinion that the Applicant suffers from mental health conditions. The Officer therefore ignored this important evidence or at least failed to provide clear reasons for dismissing it.

Respondent's Position

[40] The Respondent submits that the Applicant's failure to disclose the risk at the first opportunity is a relevant consideration and, contrary to the Applicant's submission, a negative inference can be drawn based on the failure to present this risk at an earlier proceeding. In this case, it was reasonable for the Officer to point out that the Applicant could have raised this risk on two prior occasions. The Applicant does not state definitively in her affidavit that she was not aware of her sexual orientation at the time of the refugee hearing. The PRRA is meant to consider new risk not be a second refugee hearing. In any event, the Officer's decision did not turn on the Applicant's failure to disclose the evidence earlier but rather it was premised on multiple evidentiary considerations. Given the multiple bases for the decision, it was not an error for the Officer to take into consideration the Applicant's failure to disclose her sexual orientation earlier.

[41] The Respondent submits that the PRRA is a paper based application and an oral hearing is warranted only in exceptional circumstances. As such, there was no requirement for the Officer to have convened a hearing in order to reconcile deficiencies in the Applicant's affidavit. Rather, the onus was on the Applicant to put the best evidence forward.

[42] The Respondent submits that the Officer's treatment of the remaining evidence was reasonable. The letters from the 519 Centre and the Metropolitan Church did not vouch for the Applicant's sexual orientation and they could not have been interpreted as such. The affidavits of the Applicant's two friends were vague and, although Ms. Uchendu had also provided an affidavit in support of the Applicant's PDRCC application, it had not mentioned the Applicant's sexual orientation. Further, self-serving affidavits cannot themselves demonstrate risk on a balance of probabilities. The Officer did not err in affording them minimal weight.

[43] The Officer's treatment of the psychologist's report was also reasonable as the Applicant's claim for protection was not based on her inability to receive treatment in Nigeria but on her sexual orientation. The report was based on a single interview with the Applicant in which the Applicant self-reported her experiences. The Respondent submits that the psychotherapist could not have vouched for the Applicant's sexual orientation under these circumstances. Accordingly, no error arose from the Officer not having made a finding that the report contributed to establishing her sexual orientation.

[44] Nor did the Officer require the Applicant to provide evidence about other same sex relationships in Canada as asserted by the Applicant. The Officer simply noted that the Applicant had lived in Canada for 17 years, had told the psychologist that she was dating women exclusively, yet she provided no description of any other same sex relationships. This was a reasonable factor for the Officer to consider.

[45] The Respondent submits that the Officer's conclusions were reasonable and, given the Officer's expertise in assessing the weight of the evidence, she should be given deference. The onus was on the Applicant to have established her sexual orientation on a balance of probabilities and she has failed to do so.

Analysis

[46] I am not convinced that the Officer was making a credibility finding when noting that the Applicant had not identified her sexual identity in the IRB and PDRCC proceedings. In any event, while claimants coming from countries where sexual orientation is highly stigmatized or unlawful may understandably be reluctant to disclose their sexual orientation to the authorities when arriving in Canada, the Applicant does not state in her affidavit that this was the reason why she did not previously raise her sexual orientation, nor does she provide any reason for not having done so. Her affidavit states only that between 1998 and 2001 she was active within Nigerian community associations but had to sever her ties with them "…after I became open with my lesbian partner". Thus, it is unclear both when she began the referenced relationship and when she severed her ties with the Nigerian community associations and whether this was before or after her IRB and PDRCC hearings.

[47] In this regard, the onus was on the Applicant to establish her claim with evidence that would meet the evidentiary and legal burden. She was represented by counsel and would have been advised that a hearing is not the norm for a PRRA and that she must put her best foot forward to establish her sexual orientation on the balance of probabilities (*Gao* at para 45).

[48] Further, the Officer did not dismiss the documents from the 519 Center or the August 17, 2015 letter from the Metropolitan Church. The Officer found that they served to indicate a connection to the community but that membership did not establish the Applicant's sexual orientation as a bisexual. Additionally, that there was insufficient evidence that membership or active participation in the organizations was restricted to persons who identify themselves as LGBTQ. I would note that the July 23, 2015 letter from the 519 Centre stated only that the Applicant had volunteered with PrideHouse TO during the Para/Pan Games which took place from June 8 to 26, 2015. In that regard, she had completed her orientation and donated 16 hours of volunteer time. A letter dated August 10, 2015 states that the Applicant completed a newcomer orientation session in August 2015 and had since been attending and participating in weekly support meetings and LGBT related workshops. The August 17, 2015 letter from the Metropolitan Church states that the Applicant had attended the peer support group seeking support for her claim to remain in Canada due to her sexual orientation, began attending Sunday services in early July 2015 and had started to volunteer as a receptionist. In my view, the Officer's assessment of the documents from the 519 Centre and Metropolitan Church was reasonable. In that regard, I also note that the Applicant's participation with both groups immediately preceded her PRRA submission on July 16, 2015, and that there was no evidence on the record before the Officer indicating any such participation prior to this, even though the Applicant submitted that she had been open about her relationship with her same sex partner sometime between 1998 and 2001.

[49] The Officer's treatment of the affidavits from the Applicant's friends, affording them minimal weight, was also reasonably open to her. While I agree with the Applicant that it was

not open to the Officer to dismiss the affidavits solely because her friends have a vested interest in the outcome of the application (*Cruz Ugalde v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 458 at paras 23-28; *Haq v Canada (Citizenship and Immigration)*, 2015 FC 380 at para 11; *Tabatadze v Canada (Citizenship and Immigration)*, 2016 FC 24 at paras 4-6), the Officer also found that the affidavits are general in nature and lack any detail about when the deponents became aware of the Applicant's sexual orientation or any details of the same sex relationship with Stacy. In that regard, I note that Ms. Uchendu states that she and the Applicant have known each other for well over 15 years and that she is very much aware of the Applicant's sexuality as a bisexual female, yet she makes no reference to the alleged long term common law relationship with Stacy or any other relationship.

[50] As to the Applicant's assertion, in reference to the Officer's conclusion that her own affidavit was vague and lacked details, that details could have been requested and provided in an oral hearing, as noted above, credibility was not at issue and, therefore, an oral hearing was not required. Further, a PRRA officer's role is to evaluate and weigh the evidence before him or her and make a reasonable finding, not to set out for an applicant what evidentiary elements should be provided in order to meet this burden (*II v Canada (Citizenship and Immigration)*, 2009 FC 892 at para 22). The onus was on the Applicant to ensure that all relevant evidence was before the PRRA officer and the Officer was only obliged to consider that evidence. She was not required to solicit the Applicant for better or additional evidence (*Ormankaya v Canada (Citizenship and Immigration)*, 2010 FC 1089 at para 31; also see *Ibrahim* at paras 27-28; *Borbon Marte* at para 39).

[51] The Officer reasonably found that the Applicant's affidavit was vague and lacking in detail. She does not identify Stacy by name or say when her relationship began or ended. Nor does she say when and where they lived together only that "…after years of promises to sponsor me as a common-law partner, turned her back on me…". Given the vagueness of her affidavit, it was also reasonable for the Officer to find that the Applicant had failed to provide sufficient corroborating evidence of the existence of the common law relationship, such as joint bank statements, rental agreement or a statement from her former partner. Such documentation could reasonably be expected in the circumstances of a long term relationship and the Applicant offered no explanation in her affidavit as to why it was not or could not be provided. Additionally, the Applicant had made no reference to her 13 year marriage to Mr. Ficker in her PRRA application which appears to have overlapped her alleged common law relationship with Stacy. This too provided a reasonable basis upon which corroborating documents could be sought, the absence of which goes to the weight of the Applicant's statements.

[52] The Applicant notes the Officer's finding that she has not provided information about any other same sex relationships, aside from the one with Stacy, and asserts that it was unreasonable for the Officer to conclude that the Applicant was required to have had other same sex relationships to establish her sexual orientation. In my view, this is a mischaracterization of the Officer's reasons. The Officer noted that the Applicant had lived in Canada for over 17 years and that it would be reasonable to presume that she could have provided sufficient details of her bisexual orientation. Further, that the social worker had stated in his report that the Applicant was dating women exclusively, but that the Applicant had not provided any details of other relationships. The Officer was not requiring the Applicant to have had more same sex

relationships or suggesting a stereotype. Rather, given her own evidence that she had been open about being a bisexual since at least 2001 and that she dated women exclusively, that it was reasonable to expect that she would provide some information in support of her claim, given that sexual orientation was the reason that she claims to fear returning to Nigeria. In any event, the Officer's decision is not based solely or primarily on this finding.

[53] The Officer mentioned both the July 24, 2015 report of a psychotherapist ("Psychotherapist Report") and the August 13, 2015 report of a social worker ("Social Worker Report") in the context of the establishment of the Applicant's sexual identity. It is true that the Officer's reasons do not address the psychotherapist's clinical impression that the Applicant exhibits symptoms consistent with post-traumatic stress disorder ("PTSD"), generalized anxiety disorder and major depressive disorder. However, the psychotherapist's clinical impression does not speak to the question of the Applicant's sexual orientation. Rather, it was based on the Applicant's narrative and, on that basis, accepted her description of her sexuality. Thus, while the Officer did not make a finding as to the probative value of the psychotherapist's report in establishing her sexual orientation, in these circumstances this is not fatal. Further, and as discussed below, *Kanthasamy* is distinguishable because the Officer in this case did not accept the psychological diagnosis (*Kanthasamy* at paras 47-48; *Sitnikova v Canada (Citizenship and Immigration)*, 2016 FC 464 at para 36).

[54] Viewed in whole, the Officer's decision that the Applicant had not provided sufficient evidence to establish her sexual orientation as a bisexual was reasonable and fell within the range

of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 ("*Dunsmuir*")).

ii) H&C Decision

Analysis

[55] Subsection 25(1) of the IRPA gives immigration officers the discretion to exempt foreign nationals from the ordinary requirements of the IRPA, such as applying for permanent residence and obtaining a visa before entering Canada, if the officer is of the opinion that such relief is justified on H&C considerations relating to the foreign national, including the best interests of a child directly affected.

[56] The Applicant submitted that her sexual orientation as a bisexual was such a factor. In that regard, she repeated her PRRA submissions that the Officer had unreasonably found, on the balance of probabilities that she had presented insufficient evidence to establish her sexual identity as a bisexual. For the reasons set out above, it is my view that the Officer did not err in this regard.

[57] The Applicant also asserted that the Officer unreasonably considered her establishment in Canada as an H&C factor. The Officer noted that while the Applicant claimed that she has been self-employed since 2006, owning a business called "Trina Fashion and Things Inc.", and that she provided documentation of the business including the corporate registration, income tax returns, bank statements and financial documents, these are all in the name of her friend,

Ms. Uchendu. The Applicant explained that Canadian identification is needed to register a business but the Officer found that there was insufficient evidence to support that claim. More significantly, that there was insufficient evidence from Ms. Uchendu to explain that the business actually belongs to the Applicant, and not herself, as the documents indicate.

[58] The Applicant submits that in her affidavit she explained why the business was registered in her friend's name but that she operated it. This is true, but the Officer did not accept that she had provided sufficient evidence to support that explanation. I see no error in that finding as there is nothing in the record which addresses that point.

[59] The Applicant also submits that, contrary to the Officer's decision, Ms. Uchendu's letter did confirm that the business is the Applicant's. In my view there is no merit to this submission. In her letter Ms. Uchendu states only that "at the store she [Applicant] works hard. The store is called: Trina Fashion and Things at 830 Sheppard Ave. W. in Toronto. She is very passionate about fashion and selling clothing and accessories. I know she is easily approachable."
Ms. Uchendu went on to note that she works as a registered nurse at a hospital. Her letter makes no reference to the ownership of Trina Fashion and Things. Nor does Ms. Uchendu's affidavit make any reference to the business. Further, and as noted by the Respondent, in a medical record found in the record the Applicant had reported that she works under the table at her friend's clothing store. Based on the record before her, in my view, the Officer did not err in concluding that the Applicant had provided insufficient evidence as to the business ownership.

[60] The Applicant also submits that the Officer's assessment of her establishment was unreasonable as in several other cases this Court has found H&C applications to have been unreasonably refused where establishment was of a far lesser degree than in this case and that the Officer gave insufficient reasons for this conclusion. In my view, the cases cited by the Applicant are distinguishable in that they consider situations where establishment was well documented and extraordinary or exemplary.

[61] Further, more recent jurisprudence suggests that maintaining employment and integrating into the community does not necessarily constitute an unusually high degree of establishment. In *Persaud v Canada (Citizenship and Immigration)*, 2012 FC 1133, this Court held that:

> 44 The assessment of the degree of establishment allows for a proper determination on whether an applicant would suffer hardship if required to apply for permanent residence from abroad (see *Raudales v. Canada (Minister of Citizenship & Immigration)*, 2003 FCT 385, [2003] F.C.J. No. 532 (Fed. T.D.) at paragraph 19). This Court has quashed H&C decisions where establishment has been assessed without adequate reference to the particular circumstances of the applicant (see *Singh v. Canada (Minister of Citizenship & Immigration)*, 2009 FC 1062, [2009] F.C.J. No. 1322 (F.C.) at paragraph 11; and *Amer v. Canada (Minister of Citizenship & Immigration)*, 2009 FC 713, [2009] F.C.J. No. 878 (F.C.) at paragraphs 12 and 13).
>
> 45 In this case, the officer considered the applicants' employment, community involvement and education in Canada. These factors were all relevant to the assessment of the degree of establishment, as provided in the IP-5 Manual. However, it is notable that maintaining employment and integrating into the community does not necessarily constitute an unusually high degree of establishment (see *Ramotar v. Canada (Minister of Citizenship & Immigration)*, 2009 FC 362, [2009] F.C.J. No. 472 (F.C.) at paragraph 33).

[62] Further, as stated by Justice Snider in *Dan Shallow v Canada (Citizenship and Immigration)*, 2012 FC 749, unless the establishment is exceptional and not of the applicant's own choosing, this will not normally be a factor that weighs in favour of the applicant. At best, this factor will usually be neutral (para 9).

[63] The Officer in this case acknowledged that the Applicant has been in Canada for a significant period of time, almost 18 years. However, the Officer found that the length of time spent in Canada is not in and of itself sufficient to warrant an exemption and then went on to consider various other factors. In that regard, the Officer noted the evidence as to the Applicant's claim of being self-employed in Canada since 2006. Additionally, the Officer noted that while the Applicant has no family in Canada, she provided the letters of support from the Applicant's friends, as well as from the 519 Centre and the Metropolitan Church. The Officer found that while these demonstrate friendships and connections to a community, she was not satisfied that they established that her removal would cause hardship.

[64] The Officer engaged with the facts and found that the evidence was not sufficient to establish that the Applicant had established herself to such a degree than an exemption to apply for permanent residence from outside Canada was warranted. This finding was reasonably open to her and I do not agree that the Officer made an unclear determination by merely stating a conclusion.

[65] I also do not agree that the Officer's decision runs afoul of *Kanthasamy*, on the basis that she assessed the Applicant's establishment solely through the lens of "hardship", as the

Applicant submits, rather than a broader equitable determination. In *Kanthasamy* the Supreme Court of Canada stated that:

> 33 The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to all relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.

[66] In my view, reading the decision in whole, the Officer's reasons do not suggest that she improperly applied a hardship analysis, rather, she considered all of the relevant H&C factors in the context of the evidence in reaching her conclusion. Nor did the Applicant provide any support for her submission that the equitable analysis now required by *Kanthasamy* means that the mere fact of presence in Canada, even when an applicant is here without status, is to be considered as a positive establishment factor. In any event, the Officer did not refer to the fact that the Applicant was out of status when considering the duration of her stay in Canada.

[67] The Applicant also submits that the Officer dismissed her concerns of economic and social hardship upon return to Nigeria which was unreasonable and not responsive to the evidence that Nigeria is plagued by a poor economy, health and security concerns.

[68] However, the Officer noted that the Applicant had stated that she had left Nigeria when she was 19 years old, she had never worked in that country and has no family or community that

could help her and found these statements to be speculative and unsupported. Further, that the Applicant had arrived in Canada with very few skills, work experience, no family and very few friends but was able to establish a network, find work and attend courses. The Officer was not satisfied that she could not accomplish the same in Nigeria, where she grew up and is somewhat familiar with the surroundings, culture and social fabric. She had also gained work experience in Canada which might assist with her reintegration which would undoubtedly include a period of adjustment and even a period of difficulty. This finding was reasonably open to the Officer (*Gonzalez v Canada (Citizenship and Immigration)*, 2009 FC 81 at para 25; *Mooker v Canada (Citizenship and Immigration)*, 2007 FC 779 at para 15; *Gonzalo v Canada (Citizenship and Immigration)*, 2015 FC 526 at para 16; *Rahman v Canada (Citizenship and Immigration)*, 2009 FC 138 at paras 43-44).

[69] It is also to be recalled that the Officer did not accept that the Applicant had established her sexual orientation. Therefore, she was not required to address this within the economic and social factors analysis. In my view, the Officer's reasons disclose a reasonable basis for her determination that the Applicant had not provided sufficient evidence to support that generalized social and economic factors were sufficient to warrant an exemption. The Officer was not required to specifically mention each piece of documentary evidence in reaching her conclusion (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (FC) at para 16; *Gallai v Canada (Citizenship and Immigration)*, 2015 FC 52 at para 43).

[70] As to the best interests of Ms. Uchendu's son, the Officer acknowledged that the Applicant considers the boy as her own son and maintains regular contact, by seeing him once a

week and talking to him on a daily basis. Further, that Ms. Uchendu stated in her letter that the boy would be devastated if the Applicant were to leave Canada. The Officer stated that she recognized that having a network of persons in his life who cared about him and played an active role in his life is important, however, she was not satisfied that his best interest would be affected by the outcome of the H&C application. The Officer found that there was insufficient evidence as to the level of dependency between the Applicant and the boy such that his best interest would be negatively impacted or that his best interest will not be met should the Applicant be required to apply for permanent residence from outside Canada.

[71] The Applicant submits that the Officer erred by conflating best interest with basic needs. I am not convinced that the Officer conducted a basic needs analysis. I would also note that this is not a situation such as *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813, referenced by the Applicant, where the issue was whether a Canadian born child would leave Canada with his or her foreign national parent(s) who were being removed from Canada to a less advantageous environment. Here there is no question of the child leaving Canada and his mother to go to Nigeria with the Applicant. In my view, in the circumstances of this matter and given the limited evidence that was before her, the Officer sufficiently considered the best interests of the child (*Kanthasamy* at paras 38-39, referencing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817) and determined that there was insufficient evidence as to his level of dependency on the Applicant.

[72] The Applicant also submits that the Officer erred in her treatment of the Psychotherapist Report and the Social Worker Report. Specifically, that the Officer unreasonably dismissed the

psychological harm that the Applicant would face from the loss of counselling and therapy in Canada relating to her sexual orientation and the trauma she experienced from sexual assault in Nigeria. Further, that the Officer's approach was not in conformity with the Supreme Court of Canada's decision in *Kanthasamy*.

[73] The Officer noted that in her affidavit the Applicant stated that she is receiving psychotherapy which continues to assist her in her recovery from past experiences and to come to terms with her sexual orientation. She claimed that it was important that she continue to receive that treatment but could not do so in Nigeria because bisexuality is taboo and it was the place where she was assaulted. As noted by the Officer, however, the letter from the social worker was dated August 13, 2015 and stated that the social worker had had three appointments with the Applicant and, while he had not seen the Applicant in a counselling session, he was still available to offer support when she could make it to appointments.

[74] The Officer also noted that the July 24, 2015 Psychotherapist Report made no reference to the Applicant currently receiving psychotherapy or any other ongoing treatment. The Officer found that the Applicant had provided insufficient evidence that she is receiving ongoing psychotherapy and that returning to Nigeria would compromise her recovery. Further, that her statement that she continues to need therapy to come to terms with her sexual orientation was at odds with her statements that she entered into a same sex relationship and lived that lifestyle openly yet only sought the need for therapy within the last year.

[75] I note that the Officer had determined that the Applicant had not established her identity as a bisexual woman. The Officer also noted that the Applicant's refugee claim "was based on a fear that she was gang raped by authorities who arrested her for criticising the regime. The panel [IRB] determined the events described by the applicant never occurred and rejected her claim". Thus, the Applicant's assertion that she was receiving psychotherapy and required this to assist her in her recovery from her past experiences and come to terms with her sexual identity contradicted the prior factual findings of the IRB and the factual finding of the Officer. Nor did the reports support the Applicant's assertion that she was actually receiving the therapy that she claimed she required.

[76] It is of note that, in her PRRA, the Applicant did not put forward new evidence to challenge the IRB's finding that the alleged sexual assault did not occur. Instead, she relied on that same allegation which had previously been rejected by the IRB to support her H&C claim, stating in her affidavit that she would be traumatized if she were returned to Nigeria because she had been subjected to a brutal sexual assault there. The narratives she provided to the social worker and psychotherapist were also based on this allegation, which provided a foundation for their findings.

[77] Thus, unlike *Kanthasamy*, here the factual basis for the Applicant's psychological conditions was not clearly established and uncontradicted, nor was the psychologist's diagnosis accepted by the Officer.

[78] Finally, the Applicant submits that the Officer unreasonably dismissed evidence that she would not receive adequate care for her anemia in Nigeria. The Officer found that there was insufficient evidence that the Applicant could not avail of adequate treatment in Nigeria, which she is treating in Canada with vitamins, iron pills and eating healthy. The Applicant submits that she could not afford such care. The Respondent submits that the Applicant has not pointed to any evidence that she provided to the Officer which specifically states that such treatment would be unavailable in Nigeria. In my view, based on the record before the Officer, it was reasonable for her to conclude that there was insufficient evidence that the Applicant would not have access to treatment for anemia.

[79] In conclusion, the Officer did not err in her consideration of the relevant H&C factors and turned her mind to the specific circumstances of the Applicant's case. The Officer's determination that the evidence did not establish that the H&C factors were such that they would support the Applicant's exemption from applying for permanent residence from outside Canada falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at para 47).

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

4. A copy of this Judgment and Reasons will be placed on file IMM-1851-16.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1850-16
STYLE OF CAUSE:	NGOZI PATRICIA IKEJI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-1851-16
STYLE OF CAUSE:	NGOZI PATRICIA IKEJI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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DATED:	JANUARY 3, 2017

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