

Federal Court



Cour fédérale

Date: 20170223

Docket: IMM-2881-16

Citation: 2017 FC 222

Ottawa, Ontario, February 23, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

SONIA IRENOSEN ISESELE

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ms. Isesele, is a young female from Nigeria who claimed refugee status in Canada. Her refugee claim was dismissed because her identity documents contained a discrepancy in regard to her year of birth. This is a judicial review of the denial of her permanent residence application on humanitarian and compassionate [H&C] grounds.

[2] For the reasons that follow, this judicial review is granted as the H&C Immigration Officer's [the Officer] analysis and conclusions on the issue of sexual orientation are unreasonable.

I. Background

[3] Ms. Isesele claims she was born on August 8, 1998 in Edo State, Nigeria. Following the death of her mother in 2012, she was sold into marriage by her father to an older man who had two other wives and several children. During the two years she was in this marriage, she says she was subjected to verbal and physical abuse and rape.

[4] In 2014, with the help of a smuggler, Ms. Isesele left Nigeria for Canada. She provided the smuggler with her birth certificate and two photos, which her smuggler used to obtain a passport and other documents.

[5] Upon arrival in Canada, Ms. Isesele claimed refugee protection. Her claim was denied because she was in possession of two birth certificates with different birth years. The Refugee Protection Division [RPD] concluded that she had failed to establish her identity. The Refugee Appeal Division concurred with the RPD's decision.

[6] Ms. Isesele submitted an H&C application on the grounds of establishment, the best interests of the child [BIOC], and she also claimed to be at risk in Nigeria as she began to identify as bisexual while in Canada.

II. H&C Decision

[7] With respect to her age, the Officer notes that although Ms. Isesele failed to provide convincing evidence that she was under the age of eighteen (18), as the Province of Ontario considered her a minor, the Officer decided to undertake a BIOC analysis. However, the Officer states that given the uncertainty of Ms. Isesele's age, she did not place significant weight on the BIOC factor in the overall assessment of Ms. Isesele's H&C application.

[8] The Officer also found that there was insufficient evidence demonstrating a negative impact on Ms. Isesele if she were to leave Canada, mainly due to the deficiency in evidence related to her identity.

[9] With respect to Ms. Isesele's sexual orientation, the Officer accepted that she was a bisexual woman. However, the Officer concluded that Ms. Isesele would not face discrimination amounting to hardship in Nigeria, because there was insufficient evidence to establish that she would return to a part of Nigeria where Sharia law was imposed. The Officer notes that bisexuality is more tolerated in Nigeria than male same-sex activity and that there were low reported incidents of corrective rape, forced marriages and psychological violence committed against bisexual women. Finally, the Officer notes that Ms. Isesele could maintain a low profile about her sexual orientation.

III. Issue

[10] The following issue is determinative of the outcome of this application:

I. Did the Officer err in assessing the issue of sexual orientation?

IV. Analysis

A. *Standard of Review*

[11] The applicable standard of review of an H&C decision is reasonableness (see *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18).

I. Did the Officer err in assessing the issue of sexual orientation?

[12] The Officer accepts that Ms. Isesele is bisexual and notes that the law in Nigeria prohibits same-sex marriages and practices. The Officer also accepts that it is “socially taboo” to be a homosexual in Nigeria.

[13] The Officer’s decision contains the following remarks:

“...there is little evidence that the applicant engages in any public behaviour that would cause others to perceive her as a bisexual women. She does not state that she lives openly, she has told very few people that she trusts[...]Consequently, I find that the applicant will not return to a situation of discrimination resulting in much hardship because her personal preference is to remain extremely private about her sexual orientation.”

[14] It is clear from these remarks that the Officer is implying that as long as Ms. Isesele keeps her bisexuality private, she can avoid discrimination. However, this Court has held that requiring a woman to hide her relationship with another woman in order to avoid punishment, could be a serious interference with basic human rights, and therefore amount to persecution (*Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282 at para 29).

[15] Additionally, it was unreasonable for the Officer to assume that Ms. Isesele would not face discrimination and hardship, as long as she maintained a low profile and refrained from engaging in any public behaviour or expression that might indicate that she is a member of the LGBTQ community. The Officer needed to consider what would happen if Ms. Isesele's identity were to be discovered in Nigeria, and not whether it is likely that it would not be discovered (see *Sheikh v Canada (Citizenship and Immigration)*, 2014 FC 264 at paras 10 and 14).

[16] Further, in *Kanthisamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, the Supreme Court of Canada explained that an Applicant only needs to show that he or she is a member of a group that is discriminated against and is not required to present any direct evidence that he or she would personally be the target of discriminatory action if deported (see paras 53 and 56).

[17] The Officer did not properly apply the test for determining the adequacy of state protection. As such, the Officer's conclusion cannot be characterized as justified, transparent or intelligible (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[18] For the reason above, the Officer's conclusion on the issue of sexual orientation is unreasonable. Accordingly, this application for judicial review is allowed and the matter is remitted to a different Officer for reconsideration in accordance with the law.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision is set aside and the matter is remitted for redetermination by a different officer;
2. No question of general importance is proposed.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2881-16

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