

Federal Court



Cour fédérale

**Date: 20180110**

**Docket: IMM-2594-17**

**Citation: 2018 FC 21**

**Ottawa, Ontario, January 10, 2018**

**PRESENT: The Honourable Madam Justice McDonald**

**BETWEEN:**

**CHINEDU TOCHUKWU IKEME**

**Applicant**

**and**

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

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant is a citizen of Nigeria and claims refugee protection under ss. 96 and 97 of the *Immigration and Refugee Protection Act* [IRPA] because he is a homosexual. His claim was denied by the Refugee Appeal Division [RAD] on the basis of lack of credibility. For the reasons that follow this judicial review is dismissed.

I. Background

[2] The Applicant alleges that from 1999 – 2010 he was in a long term relationship with a man named EN. The relationship ended with EN's death in 2010. The Applicant claims that he conducted this relationship in secret because of the perceptions of homosexuals in Nigeria and the consequences of a public gay relationship.

[3] In 2013, the Applicant states that he started to see another man in Nigeria named OO.

[4] In 2014, the Applicant left Nigeria to attend an internship in Mexico. In 2015, the Applicant came to study in Canada.

[5] After arriving in Canada, the Applicant claims that he was informed that OO was caught kissing another man in a club and subsequently arrested. Upon arrest, the police discovered a video on OO's phone depicting the Applicant and OO having sex. The Applicant alleges that his father found out, and his father now insists that he return to Nigeria to undergo a ritual to remove the "curse" of homosexuality. The Applicant also fears the police and general persecution in Nigeria.

[6] In November 2016, the Refugee Protection Division [RPD] denied the Applicant's refugee claim. He appealed to the RAD.

II. RAD Decision

[7] The RAD noted that the Applicant's credibility as a gay man was the determinative issue, and accordingly held that it was not required to conduct a section 97 analysis.

[8] The RAD, like the RPD, noted that the determinative issue was the identity of the Applicant as a homosexual. In considering this, the RAD reviewed the RPD's analysis of the Applicant's evidence.

[9] Regarding the Applicant's relationship with EN, the RPD noted an absence of any documentary evidence from the Applicant regarding EN's death or his funeral. While the RPD acknowledged that keeping such evidence could be risky because of Nigerian attitudes towards homosexuals, it found it concerning that the Applicant did not even attend EN's funeral, in light of his evidence that they spent "everyday together." Although the RAD found that the RPD may have been "overzealous" in seeking documentary evidence from the Applicant considering societal attitudes, the RAD fundamentally agreed with the RPD's credibility finding.

[10] The RAD next addressed the Applicant's relationship with OO. The Applicant argued that the RPD erred when it determined that the Applicant's credibility was undermined in absence of documentary evidence such as emails, text messages, and telephone records between the Applicant and OO. The RAD disagreed, and held that there at least should have been text messages between the two given the fact that OO works in the computer business and had a cellphone where the recording involving the Applicant was found.

[11] The RAD considered photographs, which the Applicant alleged depicted him and his boyfriends. The RPD found that they did not establish a same sex relationship and so assigned them no probative value. The RAD agreed that photographs do not establish sexual identity.

[12] The RAD affirmed the RPD's decision to assign no weight to an email from the Applicant's older brother and an affidavit from the Applicant's younger brother. The email was offered to corroborate the Applicant's story that he was being sought by the police because of his outing as a gay man. The affidavit stated that the Applicant's life in Nigeria was in danger from his family and the police. The RAD held that both documents could not establish sexual identity and could not overcome the credibility concerns cited by the RPD.

[13] Finally, the RAD rejected letters from a mental health counselor and from a gay support group in Toronto, because they did not overcome the general credibility findings and could not establish the Applicant's homosexual identity.

### III. Issues

[14] The parties agree that the issues are as follows:

- A. Did the RAD err in its credibility findings regarding the Applicant's homosexuality?
- B. Did the RAD err by not undertaking a s.97 analysis?

IV. Standard of Review

[15] The standard of review on credibility findings is reasonableness (*Liang v Canada (Citizenship and Immigration)*, 2017 FC 1020 at para 7). This Court should not lightly interfere with credibility findings made by the RAD and the RPD, which fall into the heartland of their jurisdiction (*Yan v Canada (Citizenship and Immigration)*, 2017 FC 146 at para 18).

[16] The s.97 question involves the RAD's interpretation of its home statute, and the interplay of the statutory requirements with its credibility findings. The standard of review for this question is also reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35).

A. *Did the RAD err in its credibility findings regarding the Applicant's homosexuality?*

[17] The Applicant argues that the RAD inappropriately impugned his credibility by insisting on documentary evidence, when much of that evidence could not be produced because the Applicant had to conduct his relationships in secret. The Applicant argues that there is a presumption that his evidence is truthful, and the RAD did not point to alternative evidence to doubt the truthfulness of the evidence offered by the Applicant.

[18] On judicial review, the court is highly deferential to RPD and RAD credibility findings, so long as they are reasonable and not microscopic or overzealous (*Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 44).

[19] Accordingly, this Court has held that the RPD and the RAD are entitled to make reasonable findings based on implausibilities, inconsistencies, and omissions (*Hohol v Canada (Citizenship and Immigration)*, 2017 FC 870 at para 19 [*Hohol*]).

[20] A general finding of a lack of credibility based on these inconsistencies can extend to all relevant evidence provided by an Applicant (*Lawal v Canada (Citizenship and Immigration)*, 2010 FC 558). Findings based on implausibility of evidence should be only made in the clearest of cases (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7), but even if explanations given by an Applicant regarding this evidence can be plausible, the RAD is entitled to find otherwise (*Krishnapillai v Canada (Citizenship and Immigration)*, 2007 FC 563 at para 11).

[21] Significantly for this case, as it pertains to sexual orientation, a lack of corroborating evidence of one's sexual orientation, absent negative rational credibility or plausibility findings related to that issue, is not enough to rebut the presumption of truthfulness which extends to all applicants (*Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282 at para 38; *Hohol*, at para 21).

(1) Relationship with EN

[22] The RAD relied on the RPD's credibility finding and impugned the Applicant's credibility because he did not attend EN's funeral. The RAD also found that the RPD may have been overzealous in insisting on documentary evidence from the funeral, but ultimately concluded that the RPD's credibility findings were reasonable.

[23] These are all reasonable findings based on the evidence. As above, the RAD is entitled to rely on internal inconsistencies in the Applicant's story. As the RAD noted, it is irrational to believe that the Applicant would see EN everyday but not attend the funeral. While the Applicant relies on *Leke v Canada (Citizenship and Immigration)*, 2007 FC 848 at para 20 for the proposition that the RAD should not insist on evidence of a relationship that was conducted in secret, the RAD expressly noted the cultural difficulties with homosexuality in Nigeria, and the good reasons why the Applicant may not have corroborative evidence. Instead, the negative credibility finding was drawn based on a perceived inconsistency; though the Applicant testified that he was attending a youth service program at the time of the death, the RAD found that if the Applicant spent every day with EN, he would have attended the funeral.

[24] This is a reasonable finding based on the evidence, and is not outside of the range of acceptable outcomes because it is directly related to the material issue—the Applicant's sexual orientation.

(2) Relationship with OO

[25] The RAD affirmed the RPD's negative credibility findings respecting the lack of documentary evidence on the Applicant's relationship with OO. Specifically, the RAD found it incredible that the Applicant had no email or text exchanges with OO given OO's computer business and the fact that OO owned a cell-phone (on which the alleged sex tape existed) and laptop computer.

[26] Similarly, these findings are reasonable, based on internal inconsistencies in the Applicant's story.

[27] Further, the Applicant offered no independent evidence of the relationship. While the Applicant argues that sexual orientation claims must be assessed with the a view to the difficulty of establishing orientation (*Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760 at para 42), and the fact that the Applicant expressly conducted all of his communications with OO by private phone call, the RAD specifically turned its mind to this consideration, and rejected the Applicant's explanation for failing to provide this information. The communications which the RAD and RPD sought in this case *are* private communications, and there is no reason why the Applicant could not have produced them, even in light of the necessary secretiveness which would define a Nigerian homosexual relationship.

[28] While negative inferences cannot be drawn solely from the failure to provide corroborating documents (*Amarapala v Canada (Minister of Citizenship and Immigration)*, 2004 FC 12), here however the RAD rejected the explanation offered by the Applicant for failing to provide this evidence. Therefore, it can draw that inference (*Radics v Canada (Citizenship and Immigration)*, 2014 FC 110 at paras 30-32).

[29] In the absence of corroborative evidence and the other negative credibility findings, it was not unreasonable for the RAD to expect evidence of private communications to establish sexual orientation.



(3) Photographs

[30] The RAD rejected the photographs offered by the Applicant because the photographs alone do not establish sexual orientation.

[31] Further, the RAD's assessment of evidence should not be reconsidered and substituted on judicial review (*J.M. v Canada (Citizenship and Immigration)*, 2015 FC 598 at para 48).

[32] In these respects, the RAD's finding was reasonable.

(4) Letters

[33] The RAD assigned no weight to an email and affidavit from the Applicant's two brothers, on the grounds that the evidence could not (1) overcome the general credibility concerns and (2) could not establish the Applicant's sexual identity or previous relationships.

[34] This was a reasonable finding. Although evidence cannot be rejected simply because it is not arm's length (*Kailajanathan v Canada (Citizenship and Immigration)*, 2017 FC 970 at para 16), the evidence must be corroborated to have probative value (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 27).

[35] In this case, there was little evidence to corroborate the evidence offered by the Applicant's brothers. In fact, for example, the brother's letter did not speak to the determinative issue: the Applicant's same sex relationships. Given the possible self-serving nature of the letter,

and the previous credibility findings, the RAD was entitled to give little weight to the letter and the email.

[36] Absent error, on judicial review it is not the role of this Court to reweigh the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61), and for that reason these credibility findings were reasonable.

(5) Letters of Support

[37] The Applicant put forward letters from a mental health counselor and a Toronto advocacy group. The RAD generally rejected this evidence because it could not conclusively prove that the Applicant was a homosexual.

[38] For the same reasons as above, the RAD's assessment of evidence is owed deference. There is no basis for the Court to intervene.

B. *Did the RAD err by not undertaking a s.97 analysis?*

[39] This Court has held that the tests under s.96 and s.97 are distinct (*Ahmad v Canada (Minister of Citizenship and Immigration)*, 2004 FC 808 at para 21). For that reason, as noted in *Bouaouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at para 41 [*Bouaouni*], negative credibility findings against an applicant under s.96 of the IRPA do not necessarily mean that an applicant is not a person in need of protection under s.97. This is

because s.97 of the IRPA primarily contains an objective assessment of risk, and so credibility is not necessarily determinative.

[40] However, a separate s.97 analysis does not always need to be done. The analysis of objective risk under s.97 must still be individualized (*Bouaouni*, at para 41), so that there is a connection between the general evidence and the applicant.

[41] Accordingly, as the Federal Court of Appeal held in *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at para 3 [*Sellan*], a general negative credibility finding can dispose of a s.97 claim in absence of analysis “unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim.”

[42] In this case, the negative credibility finding under s.96 extends to s.97 because the findings go to the core of the Applicant’s protection claim. Whether the Applicant is a person in need of protection is heavily dependent on his status as a homosexual, which was not found credible under s.96. Therefore, the credibility findings under s.96 were not peripheral to this core issue. There was further no objective, corroborative evidence to support a separate analysis under s.97, as required by *Sellan*. While there is general country conditions evidence in the record to support the claim that homosexuals are persecuted in Nigeria, that evidence is only relevant if the Applicant’s status as a homosexual is proven. The RAD was not satisfied that there was enough evidence on the record to establish that allegation.

[43] Before the RPD, the onus was on the Applicant to provide evidence of the central aspects of his claim, and if necessary, to explain why he did not do so, according to Rule 11 of *the Refugee Protection Division Rules*, SOR/2012-256. The Applicant failed to do so, and so the RAD is entitled to take note of this failure.

[44] In the circumstances, the RAD was entitled to extend the s.96 credibility findings to the s.97 analysis. This was reasonable and there is no basis for this Court to intervene.

**JUDGMENT in IMM-2594-17**

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

1. The application for judicial review is dismissed.
2. No question is certified.

"Ann Marie McDonald"

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Judge

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

**DOCKET:** IMM-2594-17

**STYLE OF CAUSE:** CHINEDU TOCHUKWU IKEME v THE MINISTER OF  
IMMIGRATION, REFUGEES AND CITIZENSHIP

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** DECEMBER 6, 2017

**JUDGMENT AND REASONS:** MCDONALD J.

**DATED:** JANUARY 10, 2018

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