

Federal Court



Cour fédérale

Date: 20180117

Docket: IMM-2419-17

Citation: 2018 FC 45

Ottawa, Ontario, January 17, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**SHAWNA NASTASHA DOWNER
(A.K.A. SHAWNA NASTASIA DOWNER)**

Applicant

and

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

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD or the Board], dated May 9, 2017 [Decision],

which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under ss 96 and 97 of the Act.

II. BACKGROUND

[2] The Applicant is a citizen of Jamaica. She claims that she faces a risk of persecution in Jamaica on account of her sexual orientation. As a result, she fled Jamaica and arrived in Canada on April 2, 2015.

[3] Central to the Applicant's claim is an incident that she alleges took place at a hotel in Montego Bay in March of 2015. She claims that someone from her community saw her embracing another woman and that word of her sexual orientation quickly spread in her home community.

[4] The Applicant's refugee claim was rejected by the Refugee Protection Division [RPD] on February 4, 2016. The RPD found that she had not credibly established her sexual orientation. In her hearing before the RPD, the Applicant was represented by Dunstan Munro, a registered immigration consultant. Many of the RPD's concerns related to omissions from the Applicant's Basis of Claim [BOC] form.

[5] The Applicant appealed to the RAD but her appeal was dismissed on April 11, 2016. At this time, she was still represented by Mr. Munro. The Applicant alleges that Mr. Munro did not advise her that she could include documents to establish her sexual orientation.

[6] Dissatisfied with Mr. Munro's representation, the Applicant engaged new counsel and sought judicial review of the RAD's decision. This Court allowed the Applicant's first application for judicial review, on consent of the Respondent, because of concerns over her counsel's competence in her appearances before the Board. The Court remitted the matter back to the RAD for redetermination.

III. DECISION UNDER REVIEW

[7] In the redetermination, the RAD confirms the RPD's determination that the Applicant is not a Convention refugee or person in need of protection.

[8] After considering the RAD's role when reviewing the RPD's decision, the RAD reviewed the RPD's findings. The RAD highlighted that the RPD found the Applicant's testimony not credible. The RPD's credibility concerns were based on testimony about the Applicant's sexual orientation that the RPD considered vague, as well as testimony about the incident in Montego Bay that led to the Applicant's community discovering her sexual orientation, and testimony about the threats the Applicant faced after exposure of her sexual orientation.

[9] Regarding the Montego Bay incident, the RPD found that the Applicant's testimony was vague since it omitted details regarding who initiated the online relationship between the Applicant and the woman she was allegedly seen with. The Applicant's evidence was uncorroborated and the RPD found the Applicant's explanation for her inability to provide

corroboration inconsistent. The Decision noted that the RPD found the Applicant's answers about the precise nature of the embrace that led to her discovery similarly inconsistent.

[10] The RPD noted that the Applicant had not provided the names of the people who threatened her in her BOC form. The RPD considered this ambiguity "tantamount to an omission concerning the central issue in the claim" since it concerned the agent of persecution. Further, the RPD found that the Applicant's decision to remain in her parents' home after exposure reflected a lack of subjective fear inconsistent with the level of danger she alleged in her testimony.

[11] After summarizing the Applicant's submissions and argument, the RAD considered whether new evidence presented by the Applicant was admissible. The Applicant provided the RAD with internet communications with her former girlfriends and partners, a letter from a Jamaican police officer, and letters from friends and family members. The RAD accepted that the incompetence of the Applicant's former counsel means that the evidence was not reasonably available to the Applicant and therefore met the test for admissibility in s 110(4) of the Act. But the RAD concluded that none of the new evidence was admissible because it either lacked credibility or relevance as required by *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*].

[12] The RAD found that copies of the Whatsapp online communications with girlfriends in which the Applicant was referred to as "fancyface" lacked relevance because nothing

corroborated that the Applicant is the person identified as “fancyface” in the conversations. The RAD was therefore not satisfied that the communications involved the Applicant.

[13] The RAD also found that the letter from a Jamaican police officer, dated May 10, 2016, lacked credibility and relevance. The RAD noted that the incident described in the letter took place on March 23, 2015 and predated the Applicant’s arrival in Canada. The RAD found that it “simply makes no sense” that the Applicant would have failed to bring the letter to the RPD hearing if it was available after March 23, 2015 or to mention in her BOC that she had gone to the police. The Board also noted that the letter lacked letterhead and that it referred to a police report that the Applicant failed to produce. Further, the letter showed the Applicant’s willingness to go to the police. This contradicts her claim in her BOC narrative that homophobia among police officers made it dangerous for her to go to the police.

[14] The RAD rejected a letter from the Applicant’s sister because her knowledge of the Applicant’s sexuality is based on information provided to her by others and on information provided by the Applicant. A letter from the Applicant’s friend in Jamaica was also rejected because the source of her knowledge is unclear. Finally, letters from a friend in Canada and a friend of the family are also rejected because the writers had no direct knowledge of events in Jamaica.

[15] Because the RAD found all of the Applicant’s new documentary evidence inadmissible, it dismissed the Applicant’s request for an oral hearing under s 110(6) of the Act.

[16] The RAD also rejected the Applicant's argument that the RPD's credibility findings were undermined by her former counsel's incompetence. The RAD noted the Applicant's age and level of education and found that she was not prevented from fully participating in her hearing before the RPD. Though acknowledging that omissions in the Applicant's BOC narrative may be attributed to her former counsel, the RAD is satisfied that the Applicant's oral evidence did not depend on her former counsel's actions. On two occasions, the Applicant was able to provide the RPD with explanations as to why details were omitted from her BOC that did not depend on poor advice from her former counsel.

[17] The RAD found that inconsistency in the Applicant's testimony about the incident in Montego Bay was a sufficient basis for drawing a negative credibility assessment, since the incident was central to the Applicant's claim. The RAD also agreed with the RPD's finding that the Applicant's delay in leaving her parents' house reflected a lack of subjective fear inconsistent with the level of danger the Applicant alleged. The RAD found that the RPD was, therefore, correct to conclude that the Applicant did not receive threats from members of her community.

[18] The RAD concluded that there was insufficient credible evidence to find that the Applicant is a lesbian and at risk of persecution if returned to Jamaica.

IV. ISSUES

[19] The Applicant raises the following issues in this application:

1. Did the RAD unreasonably dismiss the Applicant's new evidence as not relevant or credible?

2. Is the RAD's credibility determination unreasonable?
3. Is the RAD's subjective fear determination unreasonable?
4. Did the RAD deny the Applicant procedural fairness by refusing her request to refer her claim back to the RPD for a re-hearing?

[20] The Respondent says that the issues amount to the following:

1. Is the RAD's conclusion that the new evidence filed by the Applicant did not meet the test in *Raza* unreasonable?
2. Is the RAD's conclusion that the Applicant lacked credibility unreasonable?

V. STANDARD OF REVIEW

[21] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], 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 settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[22] The standard of review applicable to the RAD's assessment of whether new evidence met the admissibility requirements of s 110(4) of the Act is reasonableness: *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29 [*Singh*].

[23] The standard of review applicable to the RAD's credibility findings and its application of the law to the facts of the case is reasonableness: *Alrashidi v Canada (Citizenship and Immigration)*, 2017 FC 930 at para 5; *Asfew v Canada (Citizenship and Immigration)*, 2017 FC 800 at paras 6-7; *Siddiqui v Canada (Citizenship and Immigration)*, 2015 FC 1028 at para 42 [*Siddiqui*].

[24] The RAD's decision not to refer the Applicant's claim back to the RPD for a re-hearing because there had been a breach of procedural fairness in the RPD hearing is reviewable under a correctness standard. See *Siddiqui*, above, at para 38; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*].

[25] 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 para 47 and *Khosa*, above, at para 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."

VI. STATUTORY PROVISIONS

[26] The following provisions of the Act are relevant in this application:

Convention refugee

96 A Convention refugee is a

Définition de réfugié

96 A qualité de réfugié au sens

person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(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

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

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

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

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

de la Convention — le réfugié — la personne qui, craignant avec raison d'être 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) 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;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

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

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

...

...

Procedure

110 (3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees

Fonctionnement

110 (3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de

and any other person described in the rules of the Board.

toute autre personne visée par les règles de la Commission.

...

...

Evidence that may be presented

Éléments de preuve admissibles

110 (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

110 (4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

...

...

Hearing

Audience

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

(b) that is central to the decision with respect to the refugee protection claim; and

b) sont essentiels pour la prise de la décision relative à la demande d'asile;

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

Decision

Décision

111 (1) After considering the appeal, the Refugee Appeal

111 (1) La Section d'appel des réfugiés confirme la décision

Division shall make one of the following decisions:

(a) confirm the determination of the Refugee Protection Division;

(b) set aside the determination and substitute a determination that, in its opinion, should have been made; or

(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.

Referrals

(2) The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that

(a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and

(b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.

Renvoi

(2) Elle ne peut procéder au renvoi que si elle estime, à la fois :

a) que la décision attaquée de la Section de la protection des réfugiés est erronée en droit, en fait ou en droit et en fait;

b) qu'elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen des éléments de preuve qui ont été présentés à la Section de la protection des réfugiés.

VII. ARGUMENT

A. *Applicant*

(1) New Evidence

[27] The Applicant submits that the RAD's rejection of the Whatsapp chats as not relevant was unreasonable. She points out that in her affidavit before this Court in her first application for judicial review, which was submitted as part of her new evidence before the RAD, she attested that she was the participant identified as "fancyface" and that the conversations were with former girlfriends and partners. Relevant evidence is "capable of proving or disproving a fact that is relevant to the claim": *Raza*, above, at para 13. The Applicant says that the conversations are relevant to establishing her sexual orientation and that she has had same-sex relationships. This sworn evidence was uncontradicted and entitled to the presumption of truth. See *Maldonado v Canada (Minister of Employment & Immigration)* (1979), [1980] 2 FCR 302 (CA) [*Maldonado*]. The Applicant says that she could not provide further corroboration of her identity as "fancyface" and that it was unreasonable for the RAD to require corroboration where such evidence is not available. See *Touraji v Canada (Citizenship and Immigration)*, 2011 FC 780 at para 27, citing *Owusu-Ansah v Canada (Minister of Employment & Immigration)* (1989), 98 NR 312 (FCA). The Applicant submits that the RAD should have at least conducted a hearing under s 110(6) of the Act to determine the credibility of this evidence.

[28] The Applicant also says that the RAD's rejection of the letter from the Jamaican police as not credible was unreasonable. She says that the finding that she should have provided the letter

to the RPD and that its contents contradicted her BOC narrative failed to account for her former counsel's incompetence. Furthermore, the letter purported to be from a foreign official source. The Applicant submits that the letter is therefore entitled to be treated as evidence of its contents unless there is a reason to doubt its authenticity. See *Rasheed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 587 at para 19. The Applicant notes that the RAD declined to take steps to verify the letter's authenticity despite having the capacity to do so, a practice criticized by this Court in *Paxi v Canada (Citizenship and Immigration)*, 2016 FC 905 at para 52.

[29] The Applicant submits that the letters from friends and family met the test for relevance in *Raza* as they related to her sexual orientation, and it was unreasonable for the RAD to reject them on that basis. The letter from her sister, Teresha Rhooms, described being told by others that the Applicant is a lesbian. The Applicant says that this is direct evidence of the perception that she is a lesbian in Jamaica and that it is the perception of her sexual orientation that created the risk of persecution. Similarly, the letter from her friend from Jamaica, Tameka Lobban, described the perception of the Applicant's sexual orientation within the Applicant's former community in Jamaica and Ms. Lobban's knowledge of the Applicant's lesbian relationship with another woman. The Applicant says that had the RAD found that these letters were relevant they would have justified a hearing under s 110(6) of the Act.

(2) Credibility Determination

[30] The Applicant submits that the RAD's credibility determination was unreasonable as it was based on an unclear finding of vagueness and focused on a single perceived inconsistency in her testimony.

[31] The Applicant notes that the RAD found that there was no inconsistency between the oral and written evidence she provided and that omissions from her BOC narrative were attributable to her former counsel. Despite this, the RAD accepted the RPD's finding that the Applicant's testimony was vague. The Applicant says that the RPD's findings on vagueness are intertwined with concerns over BOC omissions. Yet despite rejecting the RPD's findings on omissions the RAD provided no reasons of its own explaining what parts of her testimony are vague. The Decision only cited a perceived inconsistency when the Applicant modified her description of the Montego Bay incident from a compromising embrace to a hug. She says that to rely on a single inconsistency as an example of "vague" testimony unreasonably displaced the presumption of truthfulness from *Maldonado*.

[32] The Applicant submits that the perceived inconsistency derives from an inappropriate line of questioning by the RPD about why she did not actively hide her sexual orientation. This Court has held that a refugee claimant should not have to hide an immutable characteristic that could give rise to persecution. See e.g. *Okoli v Canada (Citizenship and Immigration)*, 2009 FC 332 at para 36. The Applicant says that no negative inference should be drawn from questioning about why she would risk homophobic violence since the refugee process is designed to assess the need for protection and such questioning is likely to produce defensiveness and confusion.

[33] The Applicant says that a minor inconsistency about how she embraced her partner cannot sustain a finding that she is not credible. She also suggests that there can be no inconsistency between her fear of persecution and risking an embrace in public. See *Strugar v Canada (Citizenship and Immigration)*, 2013 FC 880 at para 5. Nor is it implausible that others

could discover her same-sex relationship despite her attempts to keep it private. See *Boteanu v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 299 at paras 6-8.

[34] The Applicant submits that her testimony before the RPD was disorganized but not deliberately evasive. To the extent that they are adopted by the RAD, she takes issue with the RPD's specific vagueness findings and points out that her testimony, though often confusing and disjointed, contained no serious contradictions or inconsistencies. She says that all of her testimony must be considered in light of the inadequate preparation she received from her former counsel.

(3) Subjective Fear

[35] The Applicant further submits that the RAD's determination that her delay in leaving Jamaica reflected a lack of subjective fear was unreasonable. In *Gbremichael v Canada (Minister of Citizenship and Immigration)*, 2006 FC 547 at para 44, this Court held that "[i]t was open to the Board to find that the explanations provided for not leaving the country earlier did not sufficiently explain why the Applicants did not leave." The Applicant says that delay is therefore only a concern where it is unexplained. She explained that her delay was because her parents weren't at home immediately after the exposure of her sexual orientation. The RAD's failure to consider her explanation was unreasonable, particularly because her delay is justified by her being in hiding at the time.

(4) Re-hearing

[36] The Applicant submits that the RAD's decision not to return her claim to the RPD for a redetermination denied her the required level of procedural fairness. In her first application for judicial review, she maintained that she had been denied procedural fairness because of her former counsel's incompetent representation before both the RAD and the RPD. This included his failure to prepare her for providing oral testimony before the RPD. On consent of the Respondent, the Court agreed and returned the matter to the RAD for redetermination.

[37] In her submissions to the RAD, the Applicant requested that her claim be referred back to the RPD pursuant to s 111(1)(c) of the Act if the RAD was unwilling to substitute its own decision under s 111(1)(b) or hold an oral hearing under s 110(6). The Decision only expressly addressed her request for an oral hearing under s 110(6). But the RAD declined the Applicant's request for a re-hearing and found that she was not denied a fair hearing before the RPD, stating that she was not "constrained in any way from fully participating in the hearing." The Applicant says the RAD's finding contradicted this Court's conclusions in her first application for judicial review.

B. *Respondent*

(1) New Evidence

[38] The Respondent submits that the RAD reasonably concluded that the new material filed by the Applicant did not meet the tests for credibility, relevance or materiality in *Raza*. See *Singh*, above, at paras 38-49.

[39] Since the RAD found that the Applicant lacked credibility, it was entitled to reject her affidavit evidence that she was “fancyface” in the Whatsapp conversations. The Respondent says that it was open to the Applicant to file objective evidence linking the Whatsapp account to a cell phone number with proof that she was the owner of that cell phone.

[40] The Respondent points out that the Applicant testified before the RPD that she could not provide corroborating evidence of her communications with the woman from the Montego Bay incident because she deleted her Facebook account. Despite this, she produced printouts from Facebook Messenger in materials submitted to the RAD.

[41] The Respondent submits that it was reasonable for the RAD to give no weight to the letter allegedly from the Jamaican police. The letter was not on official letterhead, did not include the police report it referred to, and contradicted the Applicant’s statement in her BOC narrative that she would put her life in danger if she went to the police. The Respondent notes that in the Applicant’s affidavit sworn on February 17, 2016, she states that the police in Jamaica are homophobic and that she did not approach them.

[42] The Respondent submits that having found the new material inadmissible, the RAD reasonably concluded that it must proceed without an oral hearing. See *Singh*, above, at paras 48, 71; *Ozomba v Canada (Citizenship and Immigration)*, 2016 FC 1418 at para 21.

(2) Credibility

[43] The Respondent submits that the RAD's credibility findings were reasonable.

[44] Following *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, the RAD determined that it must apply a correctness standard to the RPD's findings of fact and mixed fact and law which raise no credibility issues. The RAD recognized that only in instances where the RPD has an advantage in assessing credibility should the RPD's findings be shown some deference. Despite this, the Respondent says that the RAD took issue with two of the RPD's credibility findings.

[45] The Respondent says that the RAD is entitled to make adverse credibility findings based on contradictions in an applicant's story or between an applicant's story and other evidence. See *Sheikh v Canada (Minister of Employment & Immigration)*, [1990] 3 FCR 238 (CA); *Leung v Canada (Minister of Employment & Immigration)* (1990), 74 DLR (4th) 313 (FCA); *Alizadeh v Canada (Minister of Employment & Immigration)*, [1993] FCJ No 11 (QL) (CA). The RAD may also make reasonable findings based on implausibility, common sense, and rationality and may reject evidence inconsistent with the probabilities affecting the case as a whole. See *Aguebor v Canada (Minister of Employment & Immigration)* (1993), 160 NR 315 (FCA); *Shahamati v*

Canada (Minister of Employment & Immigration), [1994] FCJ No 415 (QL) (CA); *Araya v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 626 at para 6.

[46] The Respondent submits that the Applicant's testimony before the RPD was vague, hesitant, and contradictory. The RAD considered this testimony, ignoring omissions from the Applicant's BOC narrative, and its conclusion that the Applicant lacked credibility was reasonable.

VIII. ANALYSIS

[47] I can see why both the RPD and the RAD found the Applicant's refugee claim difficult to assess. They described her testimony as being vague, hesitant and contradictory. My reading of the transcript of the RPD hearing suggests to me that the Applicant was rambling, oblique and muddled before the RPD. She could be dishonest or she could simply be someone whose personality causes her to speak and answer in an indirect and circuitous way. It is difficult to tell. In any event, the RPD and the RAD are the experts in this kind of assessment. The RPD was there and I was not. So I think I must defer to their characterization. See *Siad v Canada (Secretary of State)* (1996), [1997] 1 FCR 608 at para 24 (CA); *Alimi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 709 at para 31. This does not, however, end the matter.

[48] The RAD's Decision in this application was a redetermination. What happened was that on May 5, 2016, the Applicant filed an application for leave and judicial review of the decision of the RAD to deny her appeal, in Court File IMM-1873-16. In her application record for the leave application, she alleged that the RAD decision was in breach of procedural fairness due to

incompetence of previous counsel. By motion dated June 29, 2016, the Respondent consented to allow the application for leave and judicial review on the grounds that previous counsel's poor representation resulted in a breach of natural justice. By Order dated July 11, 2016, Justice Southcott of this Court allowed the application for leave and judicial review on these terms.

[49] The RAD fully acknowledged this situation and dealt with it as follows:

[52] The Appellant submits that the RPD's concern as to her vague, hesitant testimony and the lack of detail must be seen in light of her incompetent representation. The Appellant argues she is entitled to provide fresh testimony with the benefit of preparation by competent counsel. The Appellant also argues that where there is a breach of natural justice, the initial decision should not be upheld. The Appellant noted that this is not the fault of the RPD, but rather due to the failings of counsel.

[53] The RAD is not persuaded by the Appellant's argument. The RAD notes that the Appellant is a 30 year old woman with 13 years of formal education. She also has received a trade/apprenticeship certificate/diploma. The RAD further notes that there is no evidence in the record that the Appellant was constrained in any way from fully participating in the hearing. The RAD has reviewed the recording of the hearing in this regard.

[54] The RAD acknowledges the Appellant's argument that she failed to provide substantive information in her BOC because her counsel did not advise her to do so. The RAD notes that while the panel emphasized the Appellant's omissions in its findings, it also indicated there was no requirement for a claimant to provide exhaustive details in her BOC. The RAD further notes that while the panel made a number of findings based on omissions, there was no inconsistency between the Appellant's oral and written evidence.

[55] The RAD notes in regard to the omissions in the Appellant's BOC that on two occasions the Appellant provided an explanation other than merely stating she was unaware that details were required. In response to the panel's questions as to why Elizabeth was not mentioned in her BOC, the Appellant explained: because it was simple and did not hurt. In response to a question as

to her failure to mention the names of the perpetrators in her BOC, the Appellant explained she was afraid to do so.

[56] While the RAD finds that the Appellant has primary responsibility for the preparation of her BOC, unless there is evidence of physical or psychological vulnerability, in the context of the Federal Court decision noted above, it gives the Appellant the benefit of the doubt as to the omissions.

[57] The RAD finds however that the Appellant's oral evidence is not dependent on the actions of counsel as to her response to the panel's questions. The RAD has reviewed and assessed the recording of the hearing and finds the panel did not err as to its findings concerning the vagueness of the Appellant's responses.

[50] To begin with, when it comes to the acknowledged incompetence of former counsel, I don't think it is possible to draw a clear line between BOC omissions and documentation issues on the one hand, and preparedness to answer the RPD's questions on the other. The Applicant's whole performance before the RPD suggested someone who is confused and totally unprepared for what is expected of her. Her testimony could be dishonest or it could be simply confused because, not knowing what to expect, her delivery came across as vague and hesitant. In her affidavit in support of the application for leave and judicial review on Court File IMM-1873-16, the Applicant outlined the problems caused by former counsel's incompetence:

Firstly, is the poor preparation of my Basis of Claim Form which is wholly lacking in adequate detail. Secondly, is the lack of supporting documentation provided to the RPD in support of my claim. Mr. Munro submitted only a handful of documents and none, not a single document, was a personal document. All that he submitted were country conditions. Neither Mr. Munro nor anyone in your office specifically informed me of the documents that I should provide in support of my application for protection. I had absolutely no idea that I should be providing personal documents to establish my sexual orientation. Thirdly, is the lack of preparation for my RPD hearing. I met with Mr. Munro only a single time about three days before my RPD hearing and our meeting lasted only 30 minutes. This meeting was well after the document disclosure deadline for my claim. During that meeting, I

was not advised as to what the definition of a refugee was and few, if any, questions were posed of me. I believe that I was provided with virtually no guidance for or preparation for my refugee claim.

[51] This speaks to a general lack of guidance that is simply not considered by the RAD in its Decision as a possible reason for the vagueness and hesitancy found by the RPD and adopted by the RAD. The RAD acknowledged the Applicant's submissions on the "poor preparation for her written and oral testimony, a failure to advise regarding corroborating documentary requirements and inadequate legal submissions," but only accepted her submissions with regard to inadequate documentation:

[41] The RAD agrees however, as a result of the Federal Court's determination that the Appellant was denied natural justice and procedural fairness based on the failure of her counsel to advise her as to the provision of this documentation, that the documents meet the test in section 110(4) as they were not reasonably available to the Appellant before the RPD decision.

[52] The RAD concluded that the other aspects of incompetent representation by former counsel can be ignored because "the Appellant's oral evidence is not dependent on the actions of [her] counsel as to her response to the panel's questions." The RAD reviewed the recording of the hearing and "finds the panel did not err as to its findings concerning the vagueness of the Appellant's responses." But this totally misses the point. The issue was whether that vagueness could be attributed to the total lack of preparedness caused by previous counsel. The RAD ignored this issue, and refused a request for a re-hearing. In my view, this was not reasonable and the result is a continuing lack of procedural fairness in assessing this claim.

[53] In addition, in its redetermination, the RAD itself declined to observe the distinction it made between omissions in her BOC – which can be attributed to former counsel and a lack of procedural fairness – and oral evidence before the RPD, which the RAD finds “is not dependent on the actions of counsel.” In assessing the extremely important police letter which the Applicant submitted as new evidence before the RAD, the RAD had the following to say:

[44] The RAD has reviewed item ‘b’, the police letter. The RAD notes the letter is regarding an incident reported on March 23, 2015, before the Appellant left Jamaica and came to Canada. The RAD further notes the letter is addressed “To Whom It May Concern” and is clearly meant to confirm that the Appellant went to the police. The RAD finds it simply makes no sense that the Appellant would not have brought this letter to the hearing if in fact it was available on March 23, 2015, or at least have indicated in her BOC [or in] testimony in the hearing that she went to the police[.] The RAD further notes that there is no letterhead on this document reflecting an official document. The RAD also notes that the letter indicates that a report was prepared but no report has been disclosed. Finally the RAD notes the Appellant stated in her BOC that the police were as homophobic as the public, and she would place her life in danger by going to them.

[Footnote omitted.]

[54] It makes no sense to me that the RAD would give the Applicant “the benefit of the doubt” on BOC omissions and yet use those omissions as part of its reasons for rejecting the police letter.

[55] There are further problems with the RAD’s handling of the police letter. The RAD’s conclusion was that “this document lacks credibility and therefore relevance and is not admitted as new evidence.” In dealing with the new evidence, generally, the RAD confused and conflated “credibility” and “relevance.” The two are very different. Credible evidence can lack relevancy,

and relevant evidence can lack credibility. But evidence is not irrelevant simply because it is not credible. However, the RAD gives four reasons for rejecting the police letter:

1. It wasn't brought to the hearing even though it was available after the report was purportedly made on March 23, 2015, and the Applicant should at least have indicated in her BOC or oral testimony that she went to the police;
2. There is no letterhead reflecting an official document;
3. The letter indicates that a report was prepared but no report was disclosed; and
4. The Applicant stated in her BOC that the police were as homophobic as the public, and she would place her life in danger by going to them.

[56] The omission from her BOC is something upon which the RAD said it would give the Applicant the benefit of the doubt.

[57] Her failure to bring the letter to the RPD hearing or to mention in oral testimony that she went to the police cannot be disconnected from the incompetence of former counsel. Contrary to the RAD's finding that the letter was available after the report was made on March 23, 2015, the letter itself is dated May 10, 2016: after the Applicant had retained new counsel and initiated her application for leave and judicial review of the RAD's decision.

[58] Inconsistency between the production of the police letter and the Applicant's statement in her BOC that the police were homophobic and that she would "place [her] life in danger by going to them" needs some explanation but, once again, there is the issue of whether the BOC can be relied upon at all given the incompetence of previous counsel. And this is an inconsistency that was never put to the Applicant. There may well be a credible explanation, but the Applicant was not given an opportunity to address this concern.

[59] The fact that there is no letterhead to suggest this is an official document is certainly one factor relevant to assessing authenticity, and the failure to disclose the report may be significant, but what the RAD leaves out of account entirely are the other factors that support the document's authenticity and which contradict the RAD's conclusion that the police letter is not credible.

[60] The letter from Constable David Williams reads as follows:

To Whom It May Concern

Re: Incident reported by Shawna Nastasia Downer on March 23, 2015 resulting in the fear for her life.

On March 23, 2015 Ms. Shawna Nastasia Downer age 27yrs D.O.B. September 1, 1987 of Lucky Valley District, St. Catherine attended the police station where she shared concerns that she feared for her life.

She related to me that members of her family and wider community became aware of her sexual preference and as this information was being passed on so was the verbal abuse and threats.

Due to the nature of her report and the event of activities following I recorded her information and prepared a report.

In my opinion the information shared was of a personal nature and if Ms. Downer continues to reside in the area she will not be safe as I believe her report is a genuine one. I therefore recommend that she relocates and that sometime in the future seminar be held to inform and educate persons of the community and wider society on diverse behaviour.

For any further details please contact me at 876-988-1719 / 876-424-4951.

David Williams

11588Cons.

[61] Relevant factors that are not mentioned or assessed by the RAD are that the letter is signed, dated and provides the name, badge number, mailing address and phone number of the author.

[62] In submissions to the RAD, Applicant's present counsel made the following point:

This evidence is credible, as it appears to be as purported on its face, and is supported by a sworn affidavit. It also provides a contact number. If its credibility is not accepted, the Board has the resources to verify the letter by contacting the author through the Research Directorate.

[63] The RAD may feel that it has no obligation to make simple checks even when lives are at stake. I hope not, but what the RAD cannot do is to simply ignore evidence that contradicts its own conclusions. See *Cepeda-Gutierrez v Canada (Minister of Citizenship & Immigration)* (1998), 157 FTR 35 at para 17 (TD). In this case, the RAD ignored the important authenticating features of the letter and simply chose to base its credibility finding upon other factors that were either not conclusive in themselves or could be connected back to a BOC that could not be considered adequate because it was prepared by incompetent former counsel. And I think the RAD also has to answer the obvious question: Why would a dishonest applicant provide information that would allow the RAD to easily check her reliability on the whole basis of her claim? In my experience, liars are not in the habit of providing an easy means to check the reliability of their evidence. In this case, the RAD provides no reason for not making the check (reasons may exist but they are not explained) and failed to mention the Applicant's request that the RAD use the means at its disposal to dispel or confirm any credibility concerns.

[64] This letter is highly “relevant” to the Applicant’s claim that she was perceived as a lesbian by her community in Jamaica and was at risk for that reason. It should not have been excluded for irrelevance, and its credibility was not reasonably assessed.

[65] The RAD’s dismissal of the letter of Teresha Rhooms, the Applicant’s sister, as having no first-hand knowledge so that “this document lacks relevance as corroboration of the Appellant’s alleged lesbian identity,” overlooks aspects of this evidence that are not reliant upon the Applicant. Ms. Teresha Rhooms was told by a friend in Jamaica that the Applicant is a lesbian, and also received Facebook messages from the father of the Applicant’s child that the Applicant is a lesbian. This information at least suggests that the Applicant is perceived to be a lesbian by some people in Jamaica who know her, one of whom (the Applicant’s child’s father) appears to have known the Applicant quite intimately. This perception is relevant and it supports the Applicant’s case that she is in danger in Jamaica because she is perceived as being lesbian. The RAD did not need to accept this evidence, but it was unreasonable to exclude it as irrelevant and based entirely upon the Applicant’s own account, and not deal with it.

[66] The letter from Tameka Lobban is dismissed as follows:

The second letter from a friend, Tameka Lobban, provides only a brief and general repetition of the Appellant's allegations as to her lesbian identity. It is unclear as to the source of the letter writer's knowledge other than an indication that the Appellant confided in her about her sexuality. The RAD finds the letter lacks relevance as corroboration of the Appellant's alleged lesbian identity and therefore is not admitted as new evidence.

[67] Once again, Ms. Lobban’s letter speaks about community perceptions of the Applicant’s sexual orientation as well as her own observations of the Applicant’s friendship with a lesbian

person after leaving high school. This is highly relevant evidence. The RAD does not have to accept this evidence but it cannot be dismissed on the grounds that it is all irrelevant and is only based upon what the Applicant has told Ms. Lobban.

[68] The RAD placed a great deal of emphasis on the central incident in the Applicant's claim:

[58] The RAD finds the inconsistency in the Appellant's testimony concerning the alleged incident at Montego Bay is particularly significant. The Appellant initially testified that she met her friend in the hotel lobby and they embraced in a "compromising" way. The Appellant further testified that a person from her hometown witnessed this embrace and as a result, information was spread concerning the Appellant's sexual orientation. The panel questioned the Appellant as to why she would do this in public given the homophobic nature of Jamaican society. The Appellant responded by changing her testimony and indicated they merely hugged.

[59] The RAD notes that this alleged incident is central to the Appellant's claim as she further alleged that this resulted in the threats that required her to flee Jamaica and come to Canada. The RAD notes the panel drew a negative inference on the basis of the Appellant's inconsistent testimony and also omissions of details in her BOC. The RAD finds, that even without the omissions, the inconsistency concerning this incident that is central to the claim is a sufficient basis for drawing a negative inference.

[69] This negative credibility finding, found by the RPD and endorsed by the RAD, is based upon inconsistency, and not upon vagueness or hesitancy. The Applicant is found to have changed her testimony from a "compromising" embrace to a mere hug. This testimony occurs at pages 26-30 of the transcript of the hearing which I have read. There may be some problems with this testimony (e.g. the Applicant's logic is sometimes hard to follow) but there is no inconsistency of the kind relied upon by the RPD and the RAD.

[70] The Applicant says “she hugged me in a very compromising position” and the RPD attempted to explore with her why this would be dangerous and, more particularly, why they would greet each other in this way if it was dangerous to do so in Jamaica. There was discussion back and forth about the difference between “holding hands” in the hotel and in the street, but when it comes to answering the panel’s concerns, the Applicant has the following to say:

Q. So you are saying that holding hands in the hotel lobby is not dangerous.

A. It’s not dangerous in the hotel holding hands right in the hotel because it could be my mom always walking within a hotel and I hold her hand at that point.

Q. Right. And that would be my second line of questioning is, why would anyone misinterpret your interaction? Why would they think that this meant that you were a lesbian?

A. Because then women start going to the room. I’m in the hotel. I go to the room the way that person, with a strange person. She was a white girl, she was a Syrian white girl. The person who was at the hotel, I don’t know if there was working at the hotel that saw me, they were motives at the hotel. And that’s when he saw...

Q. Sorry, I didn’t understand what you just said, “motives” at the hotel?

A. The hotel, right? Someone saw me from my community. I don’t know if the person was working there or what their motives was there. And then most people sometimes would come there with somebody actually with another female, they notice [indiscernible 00:54:21] that they are in a relationship. Are they coming from different country and then meet with someone else. And because they saw me with that white person from somewhere else who was visiting the place, that when everything escalate and they went back to my community telling okay they saw me at that hotel with certain person and stuff to my parents.

Q. So, I’m not understanding why whoever this person is would instantly think that the interaction you had in the hallway or the lobby meant that you were a lesbian.

A. Because of what is happening there. See females these days together sometimes together doing holding hands and so forth. When I'm...

Q. So earlier in your testimony you said, when I asked if it's dangerous to be holding hands, you explained no one would know if...

A. It is dangerous on the street. I don't know if you get what I am saying. Let me explain to you. On the street in Jamaica, you cannot hold hands, you cannot even hug a female without they saying the wrong things; it is wrong. They say words, [indiscernible 00:55:29] like that, you know? "devils," excuse my language, [indiscernible 00:55:33] "fire... you dykes" and so forth like that. That's in the street and all over the place. As I said before it was in the hotel. Yes, he made that assumption I'm bring back to the community [indiscernible 00:55:43] and I am going to a hotel room. But when they did at the community no one asked me what I think, they started to banish me so Okay, yes, I'm a lesbian and so forth. I cannot glad they that they came out like that which I wanted to, but I couldn't go to the police to make a statement about that because my country is very homophobia. Then my mom is like, "Is this true? Why were you doing that?" because I'm always in St. Catherine. She start raising alarm now. Why would I be in St. Catherine and have to depart go to Montego Bay, something is not right because she knows this is not me, I'm a Christian, I don't go to certain places. That's when the alarm state to raise.

[71] What the Applicant appears to be saying is that it was dangerous because she was seen going to a room with a white female. There is no change of testimony from a "compromising" embrace to a mere hug. In fact, the Applicant is difficult to follow because of her way of expressing herself. She does not even use the word "embrace" or "way." She says "she hugged me in a very compromising position." This could mean that the hug itself was compromising or "position" could refer to the whole situation. The RPD explored this and the Applicant's answer appears to me that what gave her away as a lesbian was that she met a strange white female and was seen going to a hotel room with her.

[72] There are similar problems in other areas of questioning in the transcript. What the RPD and the RAD describe as vagueness and hesitancy often appear to me to be more about the Applicant's idiosyncratic rambling and muddled way of expressing herself. However, I do not need to go any further with this analysis because, based upon errors I have already identified, this matter needs to be reconsidered. The RAD itself described the Applicant's testimony about the Montego Bay incident as "particularly significant," but the negative credibility finding is based upon an inconsistency that does not appear in the transcript.

[73] I do not wish to suggest that the Applicant's testimony was free of inconsistencies, but certain key findings of the RAD, as set out above, contain reviewable errors that render the whole Decision unsafe.

[74] I think the real problem in this case was that the RAD decided that the procedural fairness problems caused by the Applicant's first counsel that resulted in the matter being referred back for reconsideration could be solved by simply listening to the transcript. I don't think they could. When the Applicant appeared before the RPD, the problem was not just that she was not advised about documentation and the BOC had not been properly prepared. The problem was also that she only had a brief meeting with her counsel and, as she put it in her affidavit, "I believe that I was provided with virtually no guidance for or preparation for my refugee claim." The procedural unfairness of this situation could not be cured by simply listening to the transcript and assessing the Applicant's response to RPD questioning. However, having decided to proceed in this way, the RAD reached conclusions – some of which I have described above – that required it

to exclude relevant evidence and interpret the RPD hearing in ways that do not stand up to scrutiny.

[75] In my view, the only fair way to address the procedural fairness problems that arose from previous counsel's incompetence and the seemingly total lack of meaningful guidance leading up to the RPD hearing was to grant the Applicant's request for a re-hearing before the RPD and, in my view, it was unreasonable and incorrect of the RAD not to grant this request.

[76] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-2419-17

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different RAD member.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2419-17

STYLE OF CAUSE: SHAWNA NASTASHA DOWNER, (A.K.A. SHAWNA NASTASIA DOWNER) v THE MINISTER OF IMMIGRATION, REFUGEES, AND CITIZENSHIP CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 23, 2017

JUDGMENT AND REASONS: RUSSELL J.

DATED: JANUARY 17, 2018

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