

Federal Court



Cour fédérale

**Date: 20190326**

**Docket: IMM-3298-18**

**Citation: 2019 FC 375**

**Ottawa, Ontario, March 26, 2019**

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

**BETWEEN:**

**AJEGBU IDIMOJU, INNOCENT  
IBEACUCHI CHIDIEBERE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, Innocent Idimogu, applies for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (RPD) which rejected his claim for refugee protection. He claimed refugee protection on the basis of the risks he faced as a gay man in Nigeria.

[2] The RPD found that the Applicant lacked credibility and dismissed his claim. The Applicant submits that the decision contains a number of key errors and must be overturned.

I. Background

[3] The Applicant is a citizen of Nigeria. He says that he had his first same-sex experience when he was sixteen years old, with another teenager named Tony. He hid his sexual orientation from his family. The following year, the Applicant moved to the United States where he lived with his uncle and his uncle's family for six years. The Applicant states that he did not have any sexual relationships while he was in the United States, because he feared that his sexual orientation would be discovered. When his visa expired he was apprehended and returned to Nigeria.

[4] Upon his return to Nigeria, the Applicant began to live as a gay man, and had several short-term relationships. He renewed his sexual relationship with Tony. The Applicant rented a bungalow, which he shared with another family. He says that on one occasion, he was in his room having sex with Tony when his neighbour walked into the room and discovered them. The neighbour reported the Applicant to his landlord, who said he was evicting the Applicant and reporting him to the police. The Applicant stated that both his neighbour and his landlord were Muslim clerics who condemn homosexuality.

[5] The Applicant and Tony fled to Tony's cousin's home where they stayed for a few nights, and then went to Lagos, where the Applicant made arrangements to come to Canada. He claimed refugee status based on his sexual orientation and risk of persecution if returned to Nigeria.

[6] The RPD rejected the claim because it found the Applicant not credible. As discussed in greater detail below, the RPD found the Applicant's narrative to lack plausibility, and rejected the affidavits filed by the Applicant, as well as the other supporting evidence he filed. Overall, the RPD concluded that the Applicant had not established the central basis of his claim – that he is a gay man.

## II. Issues and Standard of Review

[7] The Applicant raises a number of issues with the RPD decision, but I find that this case turns on the question of whether the RPD decision is unreasonable, and in particular, whether the RPD committed a reviewable error in its treatment of the Applicant's narrative and supporting evidence, including the affidavits and the explicit photographic evidence the Applicant sought to introduce at the hearing.

[8] The standard of review regarding the assessment of evidence by the RPD is reasonableness. Reasonableness review “is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome” (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18).

[9] The reasonableness standard applies to the RPD's assessment of the evidence before it, including fact-finding, the findings concerning the genuineness of documents, and its interpretation of documentary evidence (*He v Canada (Citizenship and Immigration)*, 2019 FC 2 at paras 17-19). It is well-established that this Court should show significant deference to the RPD's credibility findings, because it has the advantage of observing the witnesses who testify

and it may have expertise in the subject matter the reviewing court does not have (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 42 [*Rahal*]).

### III. Analysis

[10] The RPD stated that “[t]he determinative issue in this case is credibility. The panel finds the claimant not to be credible in respect of his alleged sexual orientation.” The Applicant argues that this finding is not based on a reasonable assessment of the evidence and should be overturned. The decision rests on the RPD’s findings in regards to the Applicant’s narrative, in particular the incident in his home, the RPD’s rejection of the affidavits, as well as the other documentary evidence and the RPD’s refusal to admit into evidence photographs the Applicant attempted to file at the hearing. I will consider each of these in turn.

#### A. *The incident in the home*

[11] The RPD found the Applicant’s narrative to lack plausibility. The Applicant testified that his risk of harm originated from one key incident: when he took Tony to his apartment and they began to have sex. His neighbour walked in on them, and then reported the Applicant to the landlord, who in turn reported him to the police. The RPD found this story lacked plausibility, essentially because the Applicant testified that he and his neighbour went into each other’s living quarters in the home on a regular basis “freely and unannounced... ‘all the time’.”

[12] The RPD found that given the general risk in a homophobic country like Nigeria, and the risk of discovery in a home in which the neighbour had free and open access to the Applicant’s living quarters, it made no sense for the Applicant to take Tony back to his home to engage in

sexual relations. The Applicant had testified that he had no sexual relationships during his six years in the United States, because he feared being discovered. On this point the RPD remarked: “If this was an issue for the claimant in the United States, the claimant did not explain how this would not also be an issue in a homophobic country like Nigeria.” The RPD found it implausible that the Applicant would take such a risk in Nigeria, in light of his testimony about the extent to which his neighbour regularly came into his living quarters.

[13] The Applicant argues that this implausibility finding is unreasonable. The jurisprudence makes clear that plausibility findings “should be made only in the clearest of cases, i.e., if the facts as presented are outside of the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant” (*Valtchev v Canada (Citizenship and Immigration)*, 2001 FCT 776 at para 7).

[14] Further, the Applicant submits that the RPD’s statement that it applied the *IRB Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* (the *Guideline*) is not sufficient because the RPD failed to demonstrate how the *Guideline* was applied in this case (citing *Yoon v Canada (Citizenship and Immigration)*, 2010 FC 1017 at para 5).

[15] This Court has overturned decisions where the implausibility findings were based on “an extensive ‘microscopic’ examination of issues irrelevant or peripheral to the claim” (*Mohacsi v Canada (Citizenship and Immigration)*, 2003 FCT 429 at para 20). The Applicant asserts that a plausibility conclusion requires a finding, stated in clear and unmistakable terms, that the events

could not have happened that way (*Gabilia v Canada (Citizenship and Immigration)*, 2016 FC 574 at para 38).

[16] In *Cooper v Canada (Citizenship and Immigration)*, 2012 FC 118 [*Cooper*], Justice Donald Rennie reviewed the principles which govern the assessment of credibility. He stated, at paragraph 4: “A board is entitled to make findings of credibility based on implausibility, common sense and rationality: *Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228 [*Hilo*]; *Lubana [v Canada (Citizenship and Immigration)]*, 2003 FCT 116.” Justice Mary Gleason stated the same point in slightly different language in *Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2012 FC 1155 at paragraph 10: “[d]ealing more specifically with credibility findings that rest on plausibility determinations, this Court has often cautioned that such determinations are best limited to situations where events are clearly unlikely to have occurred in the manner asserted, based on common sense or the evidentiary record...” (see also *Rahal* at para 44). Justice Catherine Kane summarized the law in *N’kuly v Canada (Citizenship and Immigration)*, 2016 FC 1121 at paras 25-26 [*N’kuly*]: “... a finding of implausibility must be rational, sensitive to cultural differences, and clearly expressed.... Further, the RPD should provide an evidentiary base against which the plausibility of an applicant’s evidence may be judged.”

[17] Applying this jurisprudence to the RPD decision in this case, and bearing in mind the deference which must be shown to the RPD’s findings of fact and credibility determinations, I do not find the RPD’s finding on this point to be unreasonable. It is not based on a “microscopic” assessment of peripheral issues, and the evidentiary base for the conclusion is explained. In the particular circumstances of this case, it was not unreasonable to find the Applicant’s story to be

lacking in plausibility, given his evidence that his neighbour came into his living quarters unannounced on a regular basis, the fact that his neighbour and landlord are Muslim clerics who disapprove of homosexuality, taking into account the general social context and degree of homophobia in Nigeria, and the fact that the Applicant stated that he refrained from same-sex relationship while living in the United States out of fear of being discovered.

[18] I find that this is the kind of plausibility finding the RPD is entitled to make, based on common sense and rationality, in light of the particular evidence in this case (*Hilo; Cooper; N'kuly*). I also find that the RPD's reasoning was consistent with the *Guideline*. While the RPD did not support each element of its reasoning with a specific reference to the *Guideline*, this was not a reviewable error. There is no indication that the RPD was insensitive or unaware of the particular challenges an applicant faces in establishing his or her sexual orientation; indeed, the RPD makes specific reference to this in its decision. The failure to annotate its decision with specific references to the *Guideline* was not unreasonable in the case at hand.

B. *The affidavits*

[19] The Applicant filed two affidavits in support of his claim, one from his former boss, and one from Tony's cousin. The RPD found both to be problematic. The former boss stated that his business had been attacked and he suffered damages and lost customers because his former employee (the Applicant) had been caught committing a homosexual act. The boss said that the Applicant faced "legal consequences here with me because his criminal act has cost my company a lot." Despite all of these problems, the Applicant testified that his boss gave him money before he fled the country, which the Applicant stated he used to pay for his escape to Canada.

[20] The RPD expressed several concerns with this evidence. The RPD doubted that the boss would give the Applicant money and provide a positive affidavit, after experiencing an attack on this store and loss of customers because of the Applicant's actions.

[21] The RPD also cast doubt on the cousin's affidavit. The cousin stated that the police are seeking the Applicant, and that he will face years in prison and torture if caught. The cousin further stated that the Applicant's name was on a "list of most wanted people who committed sodomy and fled the country" and that he would be killed by the authorities or members of the general public if he returned to Nigeria.

[22] The RPD had various credibility concerns with this affidavit. First, it made no sense that "given the terrible consequences the claimant allegedly faces in Nigeria for having had sex with Tony, the affiant would bring attention to his own family member's sexual misdeed in a sworn document and thus, make him more vulnerable to police arrest and/or community retribution." Second, the Applicant had testified that neither he nor Tony had told the cousin why they were fleeing when they stayed with him, and thus the cousin would only be aware of the reason if he had been told by the Applicant. This tended to diminish the weight of his evidence. Finally, the RPD noted that there was no evidence that Nigeria kept a "most wanted list" of homosexuals, and it found that the cousin had exaggerated the gravity of the Applicant's situation.

[23] The Applicant argues that the RPD made a number of errors in rejecting these affidavits. He points to the RPD's finding that the affidavit from the boss contains grammar and spelling errors, and argues that this in itself is a basis to overturn the decision (citing *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 23). The Applicant also challenges the RPD



finding that it is not credible that the boss would have all of the information set out in his affidavit but only provide it to the Applicant after he was contacted by him to provide an affidavit. The Applicant offers a number of explanations as to why the boss could have provided this affidavit, despite the problems he experienced due to the Applicant's conduct in Nigeria. He submits that the findings of implausibility must therefore be overturned.

[24] The Applicant also contends that the findings regarding the cousin's affidavit are in error. There is no reason to discount the statement that the Applicant and Tony had engaged in a sexual relationship, since this fact was "notorious" in Nigeria. Therefore, the cousin would not be reluctant to swear to these facts in an affidavit, and doing so would not increase the risk to Tony. Since the RPD did not ask for an explanation regarding the most wanted list, it cannot make a credibility finding against the cousin on this basis. Finally, the RPD erred in referring to the ease with which fraudulent documents can be obtained in Nigeria. The Applicant argues that the mere mention of the general availability of fraudulent documentation in a country as a basis to dismiss the evidence, as the panel has done, here is a reviewable error.

[25] I am not persuaded that the RPD made any errors which warrant overturning its findings on these issues. To begin, it is important to recall the guiding principle stated by Madam Justice Gleason in *Rahal* at para 42:

First, and perhaps most importantly, the starting point in reviewing a credibility finding is the recognition that the role of this Court is a very limited one because the tribunal had the advantage of hearing the witnesses testify, observed their demeanor and is alive to all the factual nuances and contradictions in the evidence. Moreover, in many cases, the tribunal has expertise in the subject matter at issue that the reviewing court lacks. It is therefore much better placed to make credibility findings, including those related to implausibility. Also, the efficient administration of justice,

which is at the heart of the notion of deference, requires that review of these sorts of issues be the exception as opposed to the general rule.

[26] I adopt this approach in assessing the RPD's findings here. And although I do not endorse all of the RPD's statements regarding this evidence, that in itself is not a basis for finding that the decision is unreasonable. The whole idea of reasonableness review, in contrast to review on a standard of correctness, is that the decision must be examined to determine whether it falls within a "range of reasonable outcomes" on the facts and the law. Here, for example, it is not entirely clear what the RPD means when it says "... it is not credible that the boss would have all of this information available to him, and that he only made it available after the claimant contacted him from Canada." As the Applicant argues, this is not a basis to doubt the credibility of the boss' affidavit, since he presumably had no other reason to make the information available and the Applicant must be entitled to make out his case. I also agree with the Applicant that the comments regarding the quality of the English in the affidavit are of doubtful value as a means of assessing credibility in these circumstances.

[27] I find, however, that these comments are not the substantial basis for the RPD's credibility findings in regards to the affidavits. The RPD raised plausibility concerns with both affidavits, which are explained in some detail, grounded in the evidence, and not based on unfounded cultural assumptions. This is precisely what the law requires, and I do not find that the RPD's conclusions are unreasonable in the circumstances. For example, the Applicant was unable to point to any objective documentary or other evidence to support the assertion that Nigeria keeps a "most wanted list" of persons alleged to be homosexual who have fled the country. It was not unreasonable for the RPD to doubt this statement in the cousin's affidavit, or

to conclude that it was intended to exaggerate the risks faced by the Applicant. The other findings are similarly supported in the record.

[28] Furthermore, the RPD refers to the availability of fraudulent documents in Nigeria at the end of its analysis, after it has made specific findings regarding the credibility of these particular affiants in these particular circumstances. This is not unreasonable.

[29] Following its hearing, the RPD provided the Applicant with an opportunity to submit further information to assist him in establishing his sexual orientation, and the Applicant submitted letters from two community organizations. The Applicant argued that the RPD erred in giving little weight to these letters. It is not necessary to review these arguments in detail, since I find the treatment of this evidence by the RPD to be reasonable in the circumstances.

C. *The explicit photographs*

[30] At the hearing before the RPD, the Applicant sought to submit in evidence some explicit photographs that he said were saved on his digital camera. The Applicant did not provide prior notice of his intention to file this evidence, and his counsel acknowledged at the hearing that he had not seen the photographs. The RPD refused to view these photographs, mainly on the basis that these types of photographs would be of little evidentiary value in establishing the Applicant's sexual orientation in the circumstances. This finding lies well within the expertise and mandate of the RPD, and I do not find that it exercised its discretion in an unreasonable manner.

IV. Conclusion

[31] For these reasons, I am dismissing this application for judicial review.

[32] No question was proposed for certification by the parties, and none arises in the circumstances of this case.

**JUDGMENT in IMM-3298-18**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

“William F. Pentney”

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Judge

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

**DOCKET:** IMM-3298-18

**STYLE OF CAUSE:** CHIDIEBERE AJAEGBU IDIMOBU, INNOCENT  
IBEABUCHI v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 18, 2019

**JUDGMENT AND REASONS:** PENTNEY J.

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**APPEARANCES:**

Jeffrey L. Goldman

FOR THE APPLICANT

Judy Michaely

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Jeffrey Goldman Law  
Barrister and Solicitor  
Toronto, Ontario

FOR THE APPLICANT

Attorney General of Canada  
Toronto, Ontario

FOR THE RESPONDENT