Federal Court  Cour fédérale

Date: 20191119

Docket: IMM-1464-19

Citation: 2019 FC 1457

Ottawa, Ontario, November 19, 2019

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

TONIA ESE ORIA-AREBUN

Applicant

and

THE MINISTER OF CITIZNESHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Ms. Oria-Arebun, is a Nigerian woman who identifies as bisexual. She fears persecution on the basis of her sexual orientation.

[2] Ms. Oria-Arebun alleges that in late October 2015, she allowed a friend [Lillie] to stay in her apartment while she was out of town. Lillie allegedly discovered Ms. Oria-Arebun's journal

which included not only descriptions of romantic relationships with her former girlfriend [Anita] and friend [Diana] but also their names. Lillie allegedly shared this information with Ms. Oria-Arebun's then current boyfriend and the police. This led to Anita's arrest. Ms. Oria-Arebun was not arrested at the same time because she was not at home. Anita was released shortly after, and promptly fled to Turkey on a UK visa.

[3] Ms. Oria-Arebun further alleges that in November 2015, after running into Lillie and her friends in public, they jumped and beat her badly. When others attempted to intervene, Lillie told them Ms. Oria-Arebun was bisexual and had been harassing her for months. Ms. Oria-Arebun asserts she then was mobbed, stripped, beaten, and almost set on fire by the crowd. She yelled for help to a nearby police officer, but he responded that she must have done something to deserve it and wanted nothing to do with their problems. Ms. Oria-Arebun explains she passed out during the attack and woke up in a hospital. Seeing a police officer in the hallway, Ms. Oria-Arebun left the hospital as quickly as she could to go into hiding. She went first to a friend's house [Nedu, possibly a derivative of "Chinedu"] and the next day to her relatives in Abuja and then on to Kaduna. She told no one in her family about her sexuality, and only told her sister [Patricia] of the attack.

[4] Eventually, Ms. Oria-Arebun and her sister Patricia left for Atlanta, Georgia in the United States of America [USA or US] on January 15, 2016. There she stayed with a friend [Melissa] from her arrival until June 2016. After informing Melissa she wanted to remain in the USA permanently and legally, Melissa introduced Ms. Oria-Arebun to "Gary", who in turn introduced her to "James". Ms. Oria-Arebun alleges she paid James $5,000.00 (and Gary and Melissa

$500.00 each as a finder's fee) to enter into a marriage of convenience in order to secure status in the USA. They married on March 21, 2016, just prior to the expiry of her visitor visa.

[5] In June 2016, Ms. Oria-Arebun moved to Connecticut, USA to live with another friend after Melissa asked her to start paying rent or move out. She explains she worked illegally during this period, and that despite her continued requests, James never filed the spousal sponsorship paperwork and continued to demand more money from her.

[6] Ms. Oria-Arebun entered Canada via an informal border crossing where she made her claim for protection on October 27, 2017. Rejecting her claim because she lacked credibility on key elements, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] found the Applicant is not a Convention refugee or person in need of protection as defined in sections 96 and 97(1) of the Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]. Ms. Oria-Arebun appealed the RPD's October 4, 2018 decision to the Refugee Appeal Division [RAD]. On February 6, 2019, the RAD confirmed the RPD's negative determination, pursuant to pursuant to IRPA s 111(1)(a), and dismissed her appeal.

[7] The determinative issue on this application for judicial review is the RAD's assessment of Ms. Oria-Arebun's credibility. For the reasons that follow, I grant the application.

II. Impugned Decision

[8] The RAD confirmed the determinative issue on appeal was whether the RPD erred in its credibility assessment. Ms. Oria-Arebun filed new evidence but did not request an oral hearing

and so none was held. The RAD acknowledged its role was to undertake an independent assessment of all of the evidence to reach its own determination; it saw no reason to show deference to any of the RPD's findings. The RAD stated that, in conducting an independent assessment, it considered the psychological report from Dr. Agarwal (which on its face appears to be a psychiatric assessment), and considered and applied the Chairperson's Guideline 9: *Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression*, and the Chairperson's Guideline 4: *Women Refugee Claimants Fearing Gender-Related Persecution* during its analysis.

A. *Admissibility of New Evidence*

[9] The RAD declined to admit any of the new evidence Ms. Oria-Arebun provided.

(i) *Original Nigerian bar documents, original support letter from Yvonne, and a printout of information regarding the Applicant's university*

[10] Relying on Rule 42 of the *Refugee Protection Division Rules*, SOR/2012-256 [RPDR], which requires an appellant to provide original documentation no later than at the beginning of the hearing, the RAD concluded these documents were available or ought to have been available during her hearing. Since Ms. Oria-Arebun did not establish they were not available or that she reasonably could not have been expected to present them, the RAD declined to accept them: IRPA s 110(4).

[11] The RAD further declined to admit a printout with information on Igbinedion University, finding it neither relevant nor material as both the RPD and the RAD accepted the university was in Benin City, Nigeria: IRPA s 110(4).

(ii) *Snapshots of text messages between Ms. Oria-Arebun and Yvonne, and between Ms. Oria-Arebun and Anita*

[12] The RAD concluded these texts were available prior to the RPD hearing, and characterized their submission before the RAD as attempting "to repair a deficient record" by supplementing and strengthening the support letters. The RAD stated "if [Ms. Oria-Arebun] wished to provide the RPD with evidence around how she obtained a support letter from Anita, she ought to have presented that evidence in advance of her hearing, or she should have at least requested additional time to produce such evidence."

[13] The RAD recognized that producing a witness is not required. Nonetheless, it found Ms. Oria-Arebun should have called Yvonne as a witness if she wished to prove her case on a balance of probabilities, as this relationship was one of the strongest pieces of evidence available for her claim. The RAD noted it was unclear who actually sent the text messages dated September 25-30, 2018 as the author was identified as "Assurance" and not Yvonne.

(iii) *Photographs of, and text messages between, Ms. Oria-Arebun and Yvonne*

[14] The RAD concurred with the RPD that text messages and photos of Yvonne and Ms. Oria-Arebun were inadmissible, as Ms. Oria-Arebun should have provided them during her hearing rather than later to repair a deficient record: IRPA s 110(4).

(iv) *Nurse Practitioner's Letter*

[15] Ms. Oria-Arebun sought to submit a nurse practitioner's letter explaining she suffered a pattern of hair loss along her anterior scalp line and scratch marks on her upper arms and legs as proof she was mobbed as alleged. The RAD declined to admit this letter, concluding it was not sufficiently probative as she could have obtained the scars for an entirely different reason at an entirely different point of time: Rule 29 of the *Refugee Appeal Division Rules*, SOR/2012-257 [RADR].

B. *Credibility*

[16] The RAD found credibility concerns regarding Ms. Oria-Arebun's residential and educational history in Nigeria, her misrepresentations to Canadian and USA immigration officers - including the omission of her fraudulent marriage to James - and her failure to claim asylum in the USA, outweighed her corroborating evidence. On this basis, the RAD concluded Ms. Oria-Arebun was not a Convention refugee or a person in need of protection.

[17] In confirming the RPD's conclusion, the RAD nonetheless disagreed with several of the RPD's credibility findings. For example, the RAD noted the RPD's assessment of Ms. Oria-Arebun's trauma from childhood sexual abuse was erroneous, as it amounted to a selective reading of her evidence; and the RAD disagreed that her marriage to James was genuine. The RAD found, however, that discrepancies concerning her residential and educational history, and thus her relationship with Anita, were determinative issues the RPD correctly assessed. These discrepancies were mainly between her Schedule A form, which she filled out the day she

arrived in Canada, and her Basis of Claim [BOC], which she submitted with the assistance of counsel one year later. Despite Ms. Oria-Arebun's explanation that she never finished her studies and therefore did not see the utility in including the University of Benin on her Schedule A, the RAD found it was unreasonable to omit it as this is where she alleged she first met Anita and where their relationship developed. The RAD noted she completed Schedule A prior to drafting the BOC, and that she submitted no other evidence related to the University of Benin. The RAD also rejected Ms. Oria-Arebun's explanation that she lived in Kaduna while attending school in Benin City, as the two were 10 hours apart. For the RAD, these inconsistencies cast doubt on her relationship and intimacy with Anita, whether they attended university together, and whether/when Ms. Oria-Arebun left the university. The RAD concluded Ms. Oria-Arebun's psychological state, as evidenced by Dr. Agarwal's report, did not account adequately for these discrepancies.

[18] Regarding her marriage of convenience to James, Ms. Oria-Arebun explained she mentioned the marriage in her BOC at the urging of her lawyer, and had failed to disclose this earlier because she did not consider it a real marriage and was therefore unsure of where to list it on the Schedule A form. The RAD noted, however, that during the RPD hearing, Ms. Oria-Arebun had explained she did not disclose it at first because she was scared and confused and did not want to risk being sent back, and later because she did not consider herself truly married. As noted by the RPD, her narrative describes this as an innocent omission, as she did not know whether or how to disclose the information. The RAD rejected her explanations, finding it implausible that a lawyer in Nigeria did not know she was legally married when she entered Canada and expressed concern that the various explanations were inconsistent and evolved over

time. The RAD found Ms. Oria-Arebun's "willingness to mislead immigration officials … damaging to her credibility."

[19] The RAD drew further negative inferences from Ms. Oria-Arebun's failure to claim asylum in the USA. It rejected the RPD's conclusion that the marriage was genuine and noted Ms. Oria-Arebun paid $5,000.00 for a marriage of convenience, paid a commission fee to a broker for the introduction, remained in the USA without status and worked illegally "pending her scheme to gain permanent residence through fraud". The RAD noted the "psychological" report concluded that Ms. Oria-Arebun was afraid to disclose her situation to other Nigerians and that her survival responses caused her to make spur-of-the-moment decisions without heed to the long-term consequences. Nonetheless, the RAD rejected Ms. Oria-Arebun's explanation that she did not know she could claim asylum. The RAD found Ms. Oria-Arebun spent 21 months in the USA in that situation, and concluded it was reasonable for her - a lawyer, with high levels of education, English fluency, and funds - to make inquiries about the legitimate options available to her. Based on this delay, the RAD concluded "the more likely explanation is that the circumstances that led [Ms. Oria-Arebun] to leave Nigeria were not based on grounds that entitled her to refugee protection."

[20] The RAD also concluded Ms. Oria-Arebun's marriage of convenience was *prima facie* grounds to doubt her credibility, stating that even if these actions were understandable when she first arrived, she persisted in her attempt to defraud the US immigration system for more than a year. The RAD found that because Ms. Oria-Arebun "has already engaged in a fraudulent immigration scheme in the United States for one purpose, [it did] not see why she should now be

considered to be a credible witness in her representations before Canadian immigration authorities. Whatever her reasons for leaving Nigeria, she appears to be willing to misrepresent herself in order to remain here."

[21] Finally, the RAD considered Ms. Oria-Arebun's corroborative evidence, namely letters from and photographs with Yvonne, and support letters from Anita, Patricia, and Chinedu. Contrary to the RPD's findings, the RAD found the similarities in style and format of the letters were not so great as to conclude they were written by the same person.

[22] The RAD agreed, however, with the RPD's conclusion to assign little weight to Yvonne's letter, citing Ms. Oria-Arebun's overall lack of credibility and failure to make arrangements for Yvonne to act as a witness as justification for doing so. The RAD found "[g]iven the challenges that many people of diverse sexual orientations face in providing credible evidence of their sexuality, it was all the more important for [Ms. Oria-Arebun] to advance strong evidence of a current same-sex relationship in Canada." The RAD also assigned little weight to the photographic evidence, finding the photographs did not depict romantic or intimate relationships with women or otherwise prove her sexuality.

[23] The RAD summarized the letters from Anita, Patricia, and Chinedu, and noted each letter was accompanied by a photocopy of the author's identification. It gave only moderate weight to the letters from Anita and Chinedu, noting these letters were original copies with envelopes showing where they came from, but that none of the authors was called to testify. The RAD

awarded Patricia's letter little weight, noting that, despite being notarized, it was not an original and that Patricia also was not available to testify.

[24] After considering the entirety of the evidence, including the psychological/psychiatric evidence and corroborating evidence, the RAD concluded Ms. Oria-Arebun failed to establish credibly her allegations on a balance of probabilities. The RAD found significant questions remain concerning Ms. Oria-Arebun's personal history, including where she lived and whether she attended the University of Benin. This led the RAD to believe Ms. Oria-Arebun never attended the University of Benin nor did she meet Anita there, which consequently undermined her allegations regarding her relationship with Anita and the resulting violence. The RAD further concluded Ms. Oria-Arebun's fraudulent marriage for immigration purposes in the USA, her failure to make an asylum claim in the USA, and the omission of her marriage to Canadian immigration officials were all indicative of a lack of credibility. As such, the RAD, like the RPD, believed it was unnecessary to make specific findings with respect to the mob attack.

III. Issues

[25] The overarching issue is whether the RAD's decision was reasonable. More specifically:

A. Did the RAD err in refusing to admit new evidence under IRPA s 110(4);

B. Did the RAD err in its treatment of corroborative evidence;

C. Did the RAD err in failing to address the most serious incident of persecution (the near death mob beating); and

D. Did the RAD err in its assessment of the fraudulent marriage?

IV. Standard of Review

[26] The RAD is a specialized administrative body applying its home statute to questions of fact and mixed fact and law. The parties agreed, as do I, that the applicable standard of review for all of the issues in this case is reasonableness: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*] at para 35; *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] at paras 29, 74; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 27. Under the reasonableness standard, this Court will "defer to any reasonable interpretation adopted by an administrative decision maker, even if other reasonable interpretations may exist": *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 40; *Canada (Attorney General) v Heffel Gallery Limited*, 2019 FCA 82 at para 48; *Delios v Canada (Attorney General)*, 2015 FCA 117 at paras 27-28.

[27] For this Court to intervene, it must be satisfied that, in respect of the RAD's decision, assessed in the context of the entire record, there did not exist "justification, transparency and intelligibility within the decision making process," and the decision was not "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47. Not all elements of the evidence need be referred to explicitly. Before seeking to subvert the decision maker's decision, the Court first must seek to supplement it: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*NL Nurses*] at para 12. If the decision maker's reasons, read in context with the evidence, allow the Court to understand why the decision maker made its decision, it will be justifiable, transparent, and intelligible: *NL Nurses*, above at paras 16-18.

V. Relevant Provisions

[28] Part 2 of the IRPA governs Canada's refugee regime. Canada confers refugee protection upon individuals who are found to be Convention refugees or persons in need of protection: IRPA ss 95-97.

Immigration and Refugee Protection Act (S.C. 2001, c. 27)	**Loi sur l'immigration et la protection des réfugiés (L.C. 2001, ch. 27)**
95 (1) Refugee protection is conferred on a person when	**95 (1)** L'asile est la protection conférée à toute personne dès lors que, selon le cas :
(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;	**a)** sur constat qu'elle est, à la suite d'une demande de visa, un réfugié au sens de la Convention ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d'un permis de séjour délivré en vue de sa protection;
(b) the Board determines the person to be a Convention refugee or a person in need of protection; or	**b)** la Commission lui reconnaît la qualité de réfugié au sens de la Convention ou celle de personne à protéger;
(c) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.	**c)** le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).
(2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).	**(2)** Est appelée personne protégée la personne à qui l'asile est conféré et dont la demande n'est pas ensuite réputée rejetée au titre des paragraphes 108(3), 109(3) ou 114(4).
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du

religion, nationality, membership in a particular social group or political opinion,

fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

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) 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.

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.

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

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

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

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 themself 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

(iii) la menace ou le risque ne

incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	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.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	**(2)** A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

[29] At first instance, the RPD is the authorized decision maker in respect of a refugee claim: IRPA s 107(1).

107 (1) The Refugee Protection Division shall accept a claim for refugee protection if it determines that the claimant is a Convention refugee or person in need of protection, and shall otherwise reject the claim.	**107 (1)** La Section de la protection des réfugiés accepte ou rejette la demande d'asile selon que le demandeur a ou non la qualité de réfugié ou de personne à protéger.

[30] Applicants before the RPD are required to provide original documents: RPDR Rule 42.

Refugee Protection Division Rules (SOR/2012-256)	**Règles de la Section de la protection des réfugiés (DORS/2012-256)**
42 (1) A party who has provided a copy of a document to the Division must provide the original document to the Division	**42 (1)** La partie transmet à la Section l'original de tout document dont elle lui a transmis copie :
(a) without delay, on the written request of the Division;	**a)** sans délai, sur demande écrite de la Section;

or	
(b) if the Division does not make a request, no later than at the beginning of the proceeding at which the document will be used.	**b)** sinon, au plus tard au début de la procédure au cours de laquelle le document sera utilisé.

[31] Applicants who are not otherwise precluded from doing so may appeal their negative RPD decisions to the RAD: IRPA s 110(1).

110 (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.	**110 (1)** Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.

[32] On appeal to the RAD, applicants may present only evidence that arose after the rejection of their claim, that was not reasonably available at the time of their claim, or that they could not reasonably have been expected in the circumstances to have presented: IRPA s 110(4).

(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.	**(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.

[33] In deciding whether to admit this new evidence, the RAD will consider several factors: RADR at Rules 29(1) and (4); IRPA s 171(a.3):

Refugee Appeal Division Rules (SOR/2012-257)	**Règles de la Section d'appel des réfugiés (DORS/2012-257)**
29 (1) A person who is the subject of an appeal who does not provide a document or written submissions with the appellant's record, respondent's record or reply record must not use the document or provide the written submissions in the appeal unless allowed to do so by the Division.	**29 (1)** La personne en cause qui ne transmet pas un document ou des observations écrites avec le dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique ne peut utiliser ce document ou transmettre ces observations écrites dans l'appel à moins d'une autorisation de la Section.
…	…
(4) In deciding whether to allow an application, the Division must consider any relevant factors, including	**(4)** Pour décider si elle accueille ou non la demande, la Section prend en considération tout élément pertinent, notamment :
(a) the document's relevance and probative value;	**a)** la pertinence et la valeur probante du document;
(b) any new evidence the document brings to the appeal; and	**b)** toute nouvelle preuve que le document apporte à l'appel;
(c) whether the person who is the subject of the appeal, with reasonable effort, could have provided the document or written submissions with the appellant's record, respondent's record or reply record.	**c)** la possibilité qu'aurait eue la personne en cause, en faisant des efforts raisonnables, de transmettre le document ou les observations écrites avec le dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique.
171 In the case of a proceeding of the Refugee Appeal Division,	**171** S'agissant de la Section d'appel des réfugiés :
…	…
(a.3) the Division may receive and base a decision on evidence that is adduced in the	**a.3)** elle peut recevoir les éléments de preuve qu'elle juge crédibles ou dignes de foi en

proceedings and considered credible or trustworthy in the circumstances;	l'occurrence et fonder sur eux sa décision;

[34] The RAD and may confirm or substitute the RPD decision, or refer the matter back for re-determination: IRPA s 111(1).

111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:	**111 (1)** La Section d'appel des réfugiés confirme la décision 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.
(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.	

VI. Analysis

[35] As a preliminary matter, Ms. Oria-Arebun submitted an affidavit in support of her application. A judicial review, however, generally is restricted to the material on the record before the administrative decision maker, unless an exception applies: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at paras 19-20; *Bernard v Canada Revenue*

Agency, 2015 FCA 263 at para 17. Exceptions may exist where the material: (i) assists the court to understand the general background which in turn may assist its understanding of the relevant issues, (ii) is relevant to an issue of procedural fairness or natural justice, or (iii) highlights a complete absence of evidence before the decision maker when making a particular finding: *Access Copyright*, above at para 20. As the submitted affidavit does not fall within any of these exceptions, it therefore is inadmissible.

A. *Did the RAD err in refusing to admit new evidence under IRPA s 110(4)?*

[36] Ms. Oria-Arebun submits the RAD should have been more flexible with admitting evidence, and should have admitted the documents described below: *Jeyakumar v Canada (Citizenship and Immigration)*, 2017 FC 241; *Singh*, above.

a. The original letter from Yvonne and texts confirming her non-attendance at the hearing: she argues these were necessary to rebut the RPD's credibility conclusions. She asserts "[t]he RAD focuses on the availability of the evidence as opposed to the reasonableness of expecting it to have been presented to the RPD";

b. Her original law degree: she could not have reasonably known her copy of the law degree would be doubted given the other extensive documentation she submitted corroborating her attendance; and

c. The nurse practitioner's letter: she argues the RAD, by finding the scars may have resulted for different reasons, made an improper negative credibility finding to justify its exclusion. She submits the appropriate approach was to assess whether the letter had probative value to demonstrate her injuries, and only after admitting it

consider what weight to afford it given the RAD's credibility findings: *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 [*Magonza*] at paras 21-29.

[37] The Minister, pointing to IRPA ss 110(4) and 171, submits the RAD need only consider credible or trustworthy evidence. The Minister argues the *Raza Factors*, originally decided in the context of Pre-Removal Risk Assessments, provide guidance to determine when to admit new evidence in any proceeding: *Singh*, above at paras 44, 74; *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paras 13-16. A negative finding in respect of any of these factors means the evidence need not be considered. The *Raza Factors* are set out below:

> 1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence?
>
> 2. Relevance: Is the evidence capable of proving or disproving a fact that is relevant to the claim for protection?
>
> 3. Newness: Is the evidence capable of:
>
> a. Proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
>
> b. Proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
>
> c. Contradicting a finding of fact by the RPD (including a credibility finding)?
>
> 4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD?
>
> 5. Express Statutory Conditions:
>
> a. If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that (i) the evidence was not reasonably available for presentation at the RPD hearing, or (ii) could not have been expected reasonably in the circumstances to have presented the evidence at the RPD hearing?

> b. If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new, or not material).

[38] The Minister asserts the RAD reasonably excluded Ms. Oria-Arebun's new evidence. As the photos and texts predated the September 27, 2018 RPD hearing, the RAD reasonably concluded they were not new: *Singh*, above at para 54. Further, the texts dated September 25-30, 2018 identified "Assurance" as the author, not Yvonne, and as such it was even more reasonable to exclude them.

[39] The Minister submits that as Yvonne was Ms. Oria-Arebun's current girlfriend, she was vital to establishing Ms. Oria-Arebun's identity as a bisexual. As such, it was reasonable for the RAD to draw a negative inference from Ms. Oria-Arebum's failure to provide her as a witness or otherwise reasonably explain her absence.

[40] The Minister submits Ms. Oria-Arebun had an obligation to produce original documents no later than at the beginning of her hearing: RPDR at Rule 42. As she failed to do so without reasonable explanation, the RAD correctly excluded the original copies of her law degree. Further, the Minister maintains the certificate is neither relevant nor material to the claim.

[41] With respect to the RAD's conclusion regarding the probative value of the nurse practitioner's letter, the Minister explains the RAD "sensibly found it difficult to determine if the pattern of hair loss and scratches resulted from the mob attack described…" and that on a balance of probabilities, it was open to the RAD to exclude this evidence: *RADR* at Rule 29.

[42] I find on the whole the RAD's treatment of Ms. Oria-Arebun's new evidence was reasonable. The RAD conducted an independent analysis on the credibility of the original evidence before it, ascertained the RPD erred in respect of the supporting letters in particular, and admitted them without having to consider the "new" evidence of photographs and texts. The RAD nonetheless considered whether the proposed new evidence should be admitted to supplement Ms. Oria-Arebun's original record, and concluded reasonably it should not as the texts and photographs were not new: IRPA s 110(4). Ms. Oria-Arebun could have provided this evidence or explanations as to her witness' absences at the hearing, or requested additional time to arrange for witness testimony, but failed to do so. While the RAD has flexibility to relax admissibility rules given its role as a safety net for the RPD, it was not obligated to do so: *Huruglica*, above at para 97; *Singh*, above at para 64.

[43] The RAD's approach to Ms. Oria-Arebun's original documentation - the letter from her current girlfriend Yvonne and the Nigerian law degree - was reasonable for the same reason. As the RAD noted, applicants are obliged to provide original documents or provide an explanation as to why they are not available: RPDR at Rule 42. It was reasonable for the RAD to reject her explanation that she initially believed the copy of the law degree she provided was original.

[44] The RAD refused to admit the nurse practitioner's letter given its perceived limited probative value. In doing so, the RAD referred to Rule 29(4) of the RADR, which requires it to consider, among other things, the document's relevance and probative value. The RAD concluded "[i]t is difficult to determine from the existence of a pattern of hair loss and a number of scars that [Ms. Oria-Arebun] was, in fact, attacked in the manner she describes in her Basis of

Claim (BOC) Form. The scars may have resulted for entirely different reasons, at entirely different points in time." While not necessarily incorrect, these statements are more consistent with an assessment of weight or sufficiency of evidence, rather than probative value.

[45] As the Court noted in *Magonza*: "[i]n many cases, we do not have direct evidence of the ultimate facts that trigger the application of a legal rule. Instead, we need to rely on inferences from known facts. Probative value is the measure of the strength of those inferences": *Magonza*, above at para 21. In other words, probative value refers to the capacity of the evidence to establish the fact which it was offered to prove: *Ibid*. Further, "[a]s long as a piece of evidence has some probative value, it is relevant. Relevance is often a component of tests for the admissibility of evidence": *Magonza*, above at para 23.

[46] On its face, the nurse practitioner's letter is not inconsistent with Ms. Oria-Arebun's alleged most serious incident of persecution, the near death mob beating. When considered together with the psychiatric assessment and Ms. Oria-Arebun's direct evidence, it can be said to have some probative value and, therefore, should have been admitted. Because it is not determinative, however, of whether such beating occurred, the nurse practitioner having been consulted several years after the incident allegedly occurred, it properly could have been assigned little, if any weight or found to be insufficient to prove the fact of the beating.

[47] Contrary to Ms. Oria-Arebun's assertion that the RAD's finding concerning the nurse practitioner's letter was an impermissible negative credibility finding, "a decision maker can also find evidence to be insufficient without any need to assess its credibility": *Ahmed v Canada*

(Citizenship and Immigration), 2018 FC 1207 at para 31. In other words, the result may have been the same had the RAD admitted the nurse practitioner's letter and then assigned it little weight or found it insufficient to establish the facts for which it was submitted. Though the RAD erred in not admitting this new evidence, I find this error alone does not warrant the Court's intervention.

[48] On a related note, for similar reasons I find the RAD was not required to accept Dr. Agarwal's conclusion that Ms. Oria-Arebun's PTSD stemmed from the alleged mob attack, given the underlying event or events resulting in this condition were not within Dr. Agarwal's personal knowledge. The RAD does seem to accept that Ms. Oria-Arebun suffers from PTSD, but reasonably concludes it could have occurred from another incident.

B. *Did the RAD err in its treatment of corroborative evidence?*

[49] Ms. Oria-Arebun submits the RAD erred in assigning the letters from friends and family moderate to little weight, given the importance of their content: *Downer v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 45; *Paxi v Canada (Citizenship and Immigration)*, 2016 FC 905; *Magonza*, above. She further submits it is unreasonable to diminish the weight of these letters because she did not produce witnesses, stating there was no guarantee Yvonne would have been allowed to testify and that in any event, she was not required to produce witnesses: *Shahaj v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1044 [*Shahaj*] at para 9. She submits the RAD should have considered the contents of these letters prior to assigning them low weight simply because the authors' credibility was untested, and notes nothing prevented the RAD from holding a hearing and issuing summons to testify by phone if they were concerned of

the authors' credibility. She also submits it was unreasonable for the RAD to assign little weight to Patricia's letter due to it being a copy, as it was notarized.

[50] With respect to the weight afforded the letters, the Minister distinguishes *Shahaj* by noting the RPD in that case made cumulative credibility errors which negatively impacted its assessment of the evidence overall: *Shahaj*, above at para 12. The Minister points to *Jumriany*, where this Court found the Board reasonably rejected a claimant's explanation regarding a false statement that impugned their credibility: *Jumriany v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ no 683 [*Jumriany*] at paras 5-6.

[51] In my view, the RAD treated Ms. Oria-Arebun's corroborative evidence unreasonably. The Minister asserted that so long as Ms. Oria-Arebun's credibility clearly was impugned, it was open for the RAD to assign her corroborative evidence little weight. This is not what the RAD did, however. Instead, the RAD lowered the weight of Ms. Oria-Arebun's corroborative letters because their authors were not available to testify:

> [94] Viewing these pieces of evidence in isolation from the other credibility issues, I would place moderate weight on the letters from Anita and Chinedu. The letters are detailed and consistent with the Appellant's story. Original copies were presented to the RPD, along with envelopes to show where they came from. However, the credibility of each of these authors' evidence remains untested, as neither was called as a witness by teleconference.
>
> [95] The letter from Patricia, however, is given little weight. This is the only support letter that appears to have been notarized. However, the Appellant inexplicably failed to present an original copy of this notarized letter to the RPD. Again, like the other authors, Patricia was not available to be cross-examined in regard to her letter. For these reasons, the letter is given little weight.

[52] I agree with Ms. Oria-Arebun that doing so was improper, given their attendance was not required: *Shahaj*, above at para 9, see also *Canada (Minister of Citizenship and Immigration) v Navarrete*, 2006 FC 691 at paras 24-25. As noted by the Federal Court of Appeal, "[i]t is not for the Refugee Division to impose on itself or claimants evidentiary fetters of which Parliament has freed them": *Fajardo v Canada (Minister of Employment & Immigration)*, [1993] FCJ No 915, 157 NR 392.

C. *Did the RAD err in failing to address the most serious incident of persecution (the near death mob beating)?*

[53] Ms. Oria-Arebun submits the RAD erred generally in its overall approach to her credibility assessment, in particular by failing to assess her credibility in relation to her near death experience by mob in Nigeria. By failing to consider her testimony or question her on this main incident, she argues the RAD relinquished its opportunity to make a negative credibility finding on her claim, as her narrative retains the presumption of truthfulness: *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302; *Feboke v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 855 [*Feboke*] at paras 3-4; *Sothinathan v Canada (Citizenship and Immigration)*, 2015 FC 154 at paras 24-26. The RAD cannot make a negative credibility finding for failing to provide corroborative evidence, and errs in doing so: *Dayebga v Canada (Citizenship and Immigration)*, 2013 FC 842 at paras 27-28.

[54] The Minister asserts the RAD is not obligated to admit evidence it does not consider credible or trustworthy: IRPA s 171; *Siad v Canada (Secretary of State)*, [1996] FCJ No 1575, [1997] 1 FC 608 at para 23 (FCA). The Minister submits the RAD properly assessed the crux of

Ms. Oria-Arebun's claim in its review of her corroborative evidence (in particular, Patricia's letter) and in light of her overall un-credible testimony. Further, the Minister maintains "scars are not proof of an attack" and that it was not unreasonable for the RAD to doubt the claimant's explanation of these events. The Minister submits Ms. Oria-Arebun simply did not establish, on a balance of probabilities, the alleged attack, and as such the RAD's reasons were clear, cogent, and comprehensive: *Medina v Canada (Minister of Employment and Immigration)*, [1990] FCJ No 926 (FCA); *Boulis v Canada (Minister of Manpower and Immigration)*, [1974] SCR 875; *Ayanru v Canada (Citizenship and Immigration)*, 2013 FC 1017 at paras 4-8; *NL Nurses*, above at paras 14-22; *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65 at para 3; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 51-53.

[55] Except in cases where the RPD enjoys a true advantage assessing credibility, the RAD owes no deference to the RPD's credibility assessment: *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at paras 102-104. The RAD, like the RPD, however, is under "a duty to give its reasons for casting doubt upon the appellant's credibility in clear and unmistakable terms" when conducting its own credibility assessment: *Hilo v Canada (Minister of Employment & Immigration)* (1991), 130 NR 236 (FCA) at para 6; *Zaytoun v Canada (Citizenship and Immigration)*, 2014 FC 939 at para 7. With this in mind, I agree the RAD determinatively erred by failing to assess Ms. Oria-Arebun's credibility in relation to her alleged attack by a mob. Her testimony on this point is central to her claim of persecution, as this is when she first experienced violence as a result of her bisexuality and led to her filing her protection claim. Given the importance of this information, and that the RPD made no finding on this point, the RAD was required to assess her credibility in relation to the alleged attack: *Rasiah*

v Canada (Citizenship and Immigration), 2019 FC 408 [*Rasiah*] at paras 22-23, 26; *Ndudzo v Canada (Citizenship and Immigration)*, 2007 FC 261 at para 11.

[56] Seeking to distinguish *Rasiah*, the Minister submits the RAD adequately considered the mob attack but dismissed it due to a lack of credible evidence. I do not agree. In commenting on Ms. Oria-Arebun's overall credibility, the RAD made only passing reference to the attack under the rubric "ensuing events" (emphasis added):

> [99] ... **It is clear that she would go to great lengths to secure immigration status abroad, including by committing fraud. I find that the Appellant's failure to claim in the United States is also indicative that her decision to leave Nigeria was not precipitated by persecution relating to refugee protection grounds.**
>
> [100] **These credibility issues are sufficient for me to doubt the credibility of the Appellant's allegations, including her sexual orientation, her dispute with Lillie, and the ensuing events.** The Appellant argues that the RPD failed to actually address the main incident of persecution in the Appellant's narrative and to specifically make findings on it. **Although it is true that the RPD does not make any specific findings on that incident, it is obvious from the RPD's reasons that the RPD did not find the Appellant or her story to be credible. I agree with the RPD in this regard.**

[57] It is clear that neither the RPD nor the RAD evaluated Mr. Oria-Arebun's testimony with respect to the alleged mob attack because they believed other credibility concerns in her testimony rendered her whole testimony unbelievable. The problem with this approach, as Ms. Oria-Arebun points out, is that it presumes that if an applicant lies on one aspect of their claim, another aspect of their claim also rooted in their testimony cannot be true, even if the two are not connected: *Guney v Canada (Citizenship and Immigration)*, 2008 FC 1134 at para 17; *Feboke*, above at para 4. Regardless of whether the RAD disbelieved Ms. Oria-Arebun's

testimony about her relationship with Anita, it was required to assess her credibility with respect to the mob attack - a central pillar of her claim - before coming to an overall conclusion.

[58] I do not accept the RAD's conclusion that Ms. Oria-Arebun's relationship with Anita was so inextricably tied to the alleged mob incident that in impugning her credibility on that aspect, the RAD discharged its obligation to assess the mob attack altogether. Even if the RAD found she was untruthful with respect to her actual sexuality or her relationship with Anita, the facts as described may have been sufficient for the RAD to find she was at risk of persecution because of [mis]perceived [by third parties] sexual orientation. Whether the RAD would have done so is now speculative, as it failed to conduct this analysis altogether and hence, committed a reviewable error. As stated in *Rasiah*, above at para 27:

> "… It is not the reviewing court's role to re-weigh the evidence. It is, however, the reviewing court's duty to determine whether the decision is justified, transparent and intelligible. In the complete absence of any analysis of the pivotal incident in the applicant's narrative, the decision lacks justification, transparency and intelligibility. It is unreasonable and must be set aside."

D. *Did the RAD err in its assessment of the fraudulent marriage?*

[59] It is clear from the RAD's decision that her omission of the marriage from the Schedule A form in and of itself was not the reason for doubting Ms. Oria-Arebun's credibility, but rather it was that her explanations about the failure to disclose it were inconsistent and evolving. Further, the RAD reasonably assessed and rejected Ms. Oria-Arebun's explanation for not seeking asylum status in the USA. While the RAD recognized Dr. Agarwal's conclusion that Ms. Oria-Arebun may have entered her marriage of convenience because of her psychological state, it justified its final negative credibility conclusion by noting her persistence in attempting

to follow through with this “scheme” for 21 months. Nonetheless, this reasonable assessment cannot in itself justify the RPD’s ultimate conclusion, given it does not remedy that the RPD never assessed her credibility in relation to a central aspect of her claim.

VII. Conclusion

[60] I grant the application for judicial review. As the RAD failed to conduct a credibility assessment on a central aspect of Ms. Oria-Arebun’s claim and unreasonably imposed unnecessary evidentiary requirements on her corroborative evidence, the matter is to be sent back to a differently-constituted RAD for redetermination.

[61] Neither party proposed a serious question of general importance for certification.

JUDGMENT in IMM-1464-19

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted.

2. The February 6, 2019 decision of the RAD is set aside and the matter is remitted to a differently-constituted RAD for redetermination.

3. There is no question for certification.

"Janet M. Fuhrer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1464-19
STYLE OF CAUSE:	TONIA ESE ORIA-AREBUN v THE MINISTER OF CITIZNESHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 16, 2019
JUDGMENT AND REASONS:	FUHRER J.
DATED:	NOVEMBER 19, 2019

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