

Federal Court



Cour fédérale

Date: 20200423

Docket: IMM-5010-19

Citation: 2020 FC 550

Ottawa, Ontario, April 23, 2020

PRESENT: Mr. Justice James W. O'Reilly

BETWEEN:

PATIENCE NGOZI ONWUANAGBULE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In 2017, Ms Patience Onwuanagbule sought refugee protection in Canada alleging that she faced persecution in her home country of Nigeria because of her sexual orientation. A panel of the Refugee Protection Division (RPD) dismissed her claim due to a lack of credible evidence. Ms Onwuanagbule appealed the RPD's decision to the Refugee Appeal Division (RAD). The RAD dismissed her appeal, concluding that the RPD's credibility findings and its treatment of

the evidence were correct. The RAD also rejected Ms Onwuanagbule's contention that the RPD had failed to assess her risk under s 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] (see Annex).

[2] Ms Onwuanagbule seeks judicial review of the RAD's decision. She maintains that the RAD treated her unfairly by making adverse credibility findings against her without providing her a chance to respond to them. In addition, she argues that the RAD unreasonably discounted evidence that supported her claim. Finally, Ms Onwuanagbule submits that the RAD, like the RPD, failed to consider her claim under s 97 of IRPA. She asks me to quash the RAD's decision and order another panel to reconsider her appeal.

[3] I agree with Ms Onwuanagbule that the RAD treated her unfairly by failing to provide her an opportunity to address the RAD's credibility concerns. That is a sufficient basis for overturning the RAD's decision. I need not deal with the other grounds she raised. I will, therefore, allow the application for judicial review.

[4] The sole issue is whether the RAD treat Ms Onwuanagbule unfairly.

II. The RAD's Decision

[5] The RAD found that the RPD had not erred in its credibility findings. In particular, it found that the RPD had given Ms Onwuanagbule an opportunity to address areas where it had credibility concerns.

[6] In addition, the RAD concurred with the RPD's findings in respect of the following pieces of evidence. The RPD had given little weight to photos of Ms Onwuanagbule with her partner since they did not corroborate the existence of a same-sex relationship. The RPD also gave little weight to a letter and attendance sheet provided by the Metropolitan Community Church (MCC), a pro-LGBTQ congregation. Again, the RPD found that this evidence did not support an inference about Ms Onwuanagbule's sexual orientation.

[7] Further, the RPD discounted the probative value of two affidavits filed by Ms Onwuanagbule. The first affidavit, from a family friend, listed Ms Onwuanagbule's allegations about persecution in Nigeria. The second affidavit, from Ms Onwuanagbule's mother, described when she found out about her daughter's sexuality.

[8] The RAD was satisfied that the RPD had conducted a s 97 analysis given its conclusion that Ms Onwuanagbule had failed to establish that she would face a risk to her life, or a risk of cruel and unusual treatment or punishment, or a risk of torture, if she returned to Nigeria.

III. Did the RAD treat Ms Onwuanagbule unfairly?

[9] Ms Onwuanagbule argues that the RAD made an independent credibility finding in respect of her affidavits and did not provide her an opportunity to respond to its concerns. She submits that fairness required the RAD to express its concerns about the affidavits and question her about them.

[10] The RAD observed that the mother's statement was unclear about who had informed her about Ms Onwuanagbule's sexual orientation. The RAD also noted that neither affidavit contained "first-hand knowledge of [Ms Onwuanagbule's] claims". On those grounds, the RAD gave the affidavits no weight.

[11] In my view, the RAD treated Ms Onwuanagbule unfairly. While it was clear from the RPD's decision that the evidentiary value of the affidavits she submitted was in question, the RPD focussed on an issue not dealt with by the RAD. The RPD doubted the genuineness of the affidavits on the basis that, in Nigeria, providing written evidence about a person's sexual orientation could put that person, and the deponents themselves, in danger. The RPD also noted that affidavits are frequently forged in Nigeria.

[12] The RAD gave the affidavits no weight for a completely different reason – they provided no first-hand knowledge about Ms Onwuanagbule's claim. The RAD specifically stated that it did not have to review the country condition evidence on which the RPD had relied because the affidavits merited no weight in any case.

[13] In my view, this resulted in an unfairness to Ms Onwuanagbule. Her appeal, in part, was directed at the RPD's alleged error in discounting the affidavits based on the country condition evidence. Being unaware of them, she had not made submissions on the issues that troubled the RAD and that resulted, in part, in the dismissal of her appeal. The RAD dismissed her appeal without hearing any submissions from her on the key issues. In general, the RAD is not permitted to decide issues that were not raised by the parties in argument, since this deprives the

affected party of the right to respond: *Tan v Canada (Minister of Citizenship and Immigration)*, 2016 FC 876 at para 40.

[14] Accordingly, I must allow the application for judicial review and order another panel of the RAD to reconsider Ms Onwuanagbule's appeal.

IV. Conclusion and Disposition

[15] By not providing Ms Onwuanagbule an opportunity to address perceived shortcomings in the affidavits she filed in support of her claim, the RAD treated her unfairly. I must, therefore, allow this application for judicial review. Neither party proposed a question of general importance to be certified, and none is stated.

JUDGMENT IN IMM-5010-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The matter is remitted to other panel of the RAD for reconsideration.
3. There is no question for certification.

"James W. O'Reilly"

Judge

Annex

Immigration and Refugee Protection Act, SC 2001, c 27

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

Person in need of protection

Personne à protéger

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 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

(iii) la menace ou le risque ne résulte pas de

lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5010-19

STYLE OF CAUSE: PATIENCE NGOZI ONWUANAGBULE v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 24, 2020

JUDGMENT AND REASONS O'REILLY J.

DATED: APRIL 23, 2020

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