Federal Court Cour fédérale

Date: 20201015

Docket: IMM-6050-19

Citation: 2020 FC 971

Ottawa, Ontario, October 15, 2020

PRESENT: Madam Justice Pallotta

BETWEEN:

KOLAWOLE MONSUR AKINTOLA
ABIOLA SHAKIRAT AKINTOLA
FAHAM IYIOLA AKINTOLA
FRUQON FIMINIYI AKINTOLA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Kolawole Monsur Akintola, his wife Abiola Shakirat Akintola, and two of their minor children apply for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. They are citizens of Nigeria who allege a fear of

persecution on the basis that Mr. Akintola is a bisexual man whose sexual orientation was exposed in 2017. The applicants' attempts to seek help from a family elder worsened the situation, as the elder insisted that Ms. Akintola and the children submit to terrifying rituals. The applicants fled Nigeria for the U.S. and then travelled to Canada and sought refugee protection under sections 96 and 97 of the *IRPA*.

[2] The Refugee Protection Division (RPD) rejected Mr. Akintola's refugee claim on the basis that his evidence lacked credibility, outlining "a series of cascading implausibilities and credibility concerns that undermine all the claims". The RPD found that Mr. Akintola had not demonstrated that he is a bisexual man, and concluded that he would not face a serious possibility of persecution if he returned to Nigeria. Since the other applicants' refugee claims flowed from Mr. Akintola's claim, the RPD refused them as well.

[3] The Refugee Appeal Division (RAD) dismissed the applicants' appeal. While the RAD overturned three of the RPD's credibility findings, credibility nonetheless remained the determinative issue. The RAD found that a number of key elements of Mr. Akintola's claim were not credible, including his alleged bisexuality.

[4] The applicants argue that the RAD's decision was unreasonable. They submit that the RAD erred in assessing the applicants' credibility and erred in assessing the documentary evidence filed in support of their claims for refugee protection. They also submit that the RAD failed to conduct a *sur place* analysis to determine if circumstances that arose after the applicants' departure from Nigeria would give rise to a well-founded fear of persecution or harm.

[5] For the reasons below, I must dismiss this application for judicial review. The RAD's credibility findings and assessment of the documentary evidence were not unreasonable. Furthermore, given the RAD's finding that Mr. Akintola was not bisexual, it had no obligation to conduct a *sur place* analysis.

II. **Issues and Standard of Review**

[6] The issues on this application for judicial review are:

A. Did the RAD err in assessing the applicants' credibility?

B. Did the RAD err in assessing the documentary evidence filed in support of the applicants' claims for refugee protection?

C. Did the RAD err in failing to conduct a *sur place* analysis of the applicants' claims for refugee protection?

[7] In accordance with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], reasonableness is the standard of review applicable to all the issues. Reasonableness is a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. A reviewing court must determine whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

III. **Analysis**

A. *Did the RAD err in assessing the applicants' credibility?*

[8] The RPD outlined seven bases supporting its negative credibility determination. The applicants label these as six implausibility findings and one finding of an evidentiary discrepancy. On appeal, the RAD overturned three of the RPD's implausibility findings. The applicants challenge the remaining four findings on judicial review: one implausibility finding that the RAD upheld and three findings that the RAD considered to be uncontested. The applicants also challenge the reasonableness of the RAD's overall conclusion on credibility, particularly since the RAD overturned three of the seven bases that supported the RPD's negative credibility determination.

(1) **Implausibility finding**

[9] The applicants submit that the RAD erred in upholding the RPD's finding that Mr. Akintola's account of how his sexual orientation was exposed was implausible. Mr. Akintola alleged that on a Friday night toward the end of July 2017, he was discovered with his lover on a remote beach in Lagos by a customer of the printing company where he worked. The next day, Mr. Akintola spoke to the customer who assured him that the secret was safe; however, before the end of the week, the customer visited Mr. Akintola's office to pressure him to print documents meant to defraud the government. Mr. Akintola refused and the customer stormed out of the office. Fearing what the customer would do, Mr. Akintola stopped going into work and he was fired later that month.

[10] The RAD stated there was a "vanishingly small" chance that a work client would happen upon Mr. Akintola and his lover on a remote beach when they were deliberately avoiding discovery. The applicants submit that the RAD failed to appreciate an important distinction between an event that is improbable, and one that is implausible and leads the tribunal to call credibility into question. They argue that the low probability of a chance encounter does not justify a finding that such an encounter is implausible. Furthermore, the applicants contend the RAD failed to appreciate the distinction between the likelihood that a particular person (Mr. Akintola) would experience a chance encounter and the likelihood that chance encounters happen. The probability of the latter is not "vanishingly small". They argue that the failure to appreciate this distinction introduces a selection bias because bisexual individuals in Nigeria must hide their sexual orientation, and it is the unlucky ones—those who defy the odds by being discovered—who are forced to flee and make a claim for refugee protection.

[11] The applicants argue that this Court's jurisprudence sets a high bar for implausibility findings that lead to a determination that a witness is being untruthful—the witness' version of events must be "outside the realm of what could reasonably be expected": *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7 [*Valtchev*]. According to the applicants, even if the decision in *K.K. v Canada (Citizenship and Immigration)*, 2014 FC 78 can be interpreted as setting a lower bar than in *Valtchev*, the RAD's reasons for impugning the applicants' credibility did not reach it.

[12] The RAD (and the RPD) is under a duty to justify its credibility findings with specific and clear reference to the evidence: *Maldonado v Canada (Minister of Employment and Immigration)* (1979), [1980] 2 FC 302 (CA) at para 16 [*Maldonado*]. This duty is particularly

important when a claimant's credibility is affected by implausibility findings, which are inherently subjective assessments, and largely dependant on the tribunal's perceptions of what constitutes rational behaviour: *Leung v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 774 at para 15. As Justice Gleason stated in *Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2012 FC 1155 at paragraphs 9-11, credibility findings that rest on plausibility 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:

> An allegation may thus be found to be implausible when it does not make sense in light of the evidence before the Board or when (to borrow the language of Justice Muldoon in *Valtchev*) it is "outside the realm of what reasonably could be expected". In addition, this Court has held that the Board should provide "a reliable and verifiable evidentiary base against which the plausibility of the Applicants' evidence might be judged", otherwise a plausibility determination may be nothing more than "unfounded speculation".
>
> [Citations omitted.]

[13] Here, the RAD's plausibility determination was not unfounded speculation. As the respondent correctly notes, the RAD did not find the circumstances exposing Mr. Akintola's bisexuality to be implausible simply because the likelihood of a chance encounter is low. Rather, the RAD found that the chance discovery, by a work client, of two men deliberately avoiding detection on a remote beach was implausible. The alleged facts laid out in Mr. Akintola's affidavit were that he and his partner were kissing inside a vehicle "parked in a very secluded part of the beach that was usually abandoned". The RAD specifically considered the test as set out in *Valtchev* and found, on a balance of probabilities, that Mr. Akintola's account was outside the realm of what could reasonably be expected. Furthermore, the RAD noted that

the RPD "found there to be reason to doubt the veracity of the [applicants'] allegations" based on multiple credibility concerns and findings, and in such circumstances, the presumption of truthfulness ceased to exist: see *Maldonado*. Thus, the RAD considered whether the account of the beach encounter was plausible in the context of other evidence and findings, including uncontested findings (discussed under the second subheading, below). Finally, the RAD did not reach its conclusion on the applicants' credibility based solely on the implausibility of the beach encounter that Mr. Akintola described. Rather, the RAD evaluated the findings and weighed the evidence cumulatively (discussed under the third subheading, below).

[14] The RAD is entitled to make findings based on implausibility, common sense, and rationality, and it is entitled to reject evidence that is inconsistent with the probabilities affecting the case as a whole: *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 26; see also *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA). The applicants have not established that the RAD's implausibility finding was unreasonable.

(2) **Uncontested findings of the RPD**

[15] According to the applicants' Basis of Claim form, the applicants decided to take a family vacation after Mr. Akintola lost his job. They applied for U.S. visas, which were issued on September 11, 2017. On September 30, 2017, Mr. Akintola received a telephone call from his wife while he was out shopping for the upcoming vacation. The customer from the printing company was at the applicants' home accompanied by police, looking for him. Ms. Akintola wanted to know if their allegations about Mr. Akintola and another man was true. A crowd of

neighbours gathered to support the police and called for Mr. Akintola's arrest. About an hour later, Ms. Akintola telephoned her husband again and told him not to come home, as the crowd had not dispersed. She gathered some clothes and the applicants fled to Mr. Akintola's hometown of Abeokuta to seek the assistance of a family elder. However, when Mr. Akintola confessed to his bisexuality, the family decreed that the applicants would have to undergo ritual cleansing—Ms. Akintola was to be circumcised and the two children were to be chained and forbidden from eating or drinking for 7 days. The family elder stated that the rituals had to be performed before the end of October. The applicants remained in hiding in Abeokuta until the morning of October 11, 2017, when they left the family home for the Lagos airport. They arrived in the U.S. on October 12, 2017 and crossed into Canada on October 18, 2017, where they sought refugee protection.

[16] Two of the RPD's implausibility findings and one finding of an evidentiary discrepancy regarding the events above were findings that the RAD considered to be uncontested, namely:

> (c) it was implausible that the family elder, who was insistent that the rituals be performed, would give the applicants a month to do so, and therefore a chance to escape;
>
> (d) it was implausible that the applicants were not stopped at the Lagos airport when their personal documentation was checked by officials;
>
> (f) Ms. Akintola's port of entry ("POE") documents indicate that she worked in Lagos until the family left for the U.S., which was inconsistent with the claim that the family was hiding in Abeokuta.

[17] The applicants submit that they are entitled to challenge the above findings on judicial review. First, they argue that the RAD incorrectly characterized the findings as "uncontested" because their RAD appeal was effectively a challenge to all of the RPD's findings, and further,

the evidentiary discrepancy (f) was specifically challenged by Mr. Akintola's affidavit explaining that Ms. Akintola had made a mistake in her POE documents. Second, the applicants argue that they are entitled to challenge the RPD's findings because the RAD provided no basis for agreeing with them, and yet relied on them to reach its conclusion on credibility.

[18] If they are entitled to challenge the RPD's findings in this proceeding, the applicants submit that the findings are unsound. The applicants argue that the RPD's implausibility findings were based on improper assumptions that lack an evidentiary basis, and do not meet the test set out in *Valtchev*. The applicants argue that the RPD's finding of an evidentiary discrepancy was wrong because the POE forms asked for Ms. Akintola's employment history, not the date she stopped working. Ms. Akintola provided only a general, "month/year" history—2016-02 to 2017-10, makeup artist, Lagos-Nigeria—and it was unreasonable for the RPD to treat her answer as evidence that Ms. Akintola was in Lagos in October 2017, rather than hiding in Abeokuta in October 2017, as Mr. Akintola had testified.

[19] Having reviewed the applicants' notice of appeal and memorandum of argument that were before the RAD, I find that the RAD addressed every issue that the applicants raised. The RAD correctly noted that the applicants had made a number of general arguments (for example, that the RPD ignored the *Maldonado* principle, failed to consider the matter holistically, and was distracted by perceived minor credibility issues) without providing any basis for the arguments or identifying where the errors could be found in the RPD's reasons, as required by Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257 [*RAD Rules*]. In the absence of any guidance from the applicants and despite its review of the record, the RAD was "unable to see that any of the general arguments are supported" and as such, did not address them. The RAD

also noted that since the applicants "did not take issue with the RPD's findings labelled c), d) and f) above, I will not analyse these findings herein. I note, however, that I have reviewed them and I am in agreement with them."

[20] With respect to the statements in Mr. Akintola's affidavit about his wife's mistake, the affidavit did not raise the RPD's finding of a discrepancy as a ground of appeal in accordance with the *RAD Rules*. In any event, I fail to see how Mr. Akintola's affidavit assists the applicants. His affidavit states that Ms. Akintola "made a mistake in the documents at the Canadian border when she said she had been working in Lagos right up until we fled from Nigeria to the USA," and that she stopped working in late September 2017, when the applicants fled from Lagos to Abeokuta to hide with Mr. Akintola's family members. Thus, Mr. Akintola's testimony effectively confirms the discrepancy, and refutes the applicants' argument that it was unreasonable for the RPD to treat Ms. Akintola's answer on the POE form as evidence that Ms. Akintola was in Lagos in October.

[21] The RAD's brief summary of the uncontested findings followed by a general statement that it concurs with those findings does not permit the applicants to raise, for the first time on judicial review, alleged errors of the RPD that were unchallenged on appeal: *Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102 at paras 30-39 (see also *Dibia v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1076 at para 14; *Khan v Canada (Citizenship and Immigration)*, 2016 FC 855 at para 37). The RAD is not required to provide reasons for unchallenged findings, and there was no error in the RAD's approach.

(3) **Cumulative assessment**

[22] Finally, the applicants submit that even if the adverse credibility findings were properly given some weight, they provide insufficient cumulative weight to justify the RAD's conclusion that the applicants were not credible. They submit that the RAD failed to analyze the "overall impact" of overturning three of the seven negative findings that supported the RPD's negative credibility determination, and that it was unreasonable for the RAD to uphold the RPD's determination in light of this "overall impact".

[23] I disagree. The RAD stated that its conclusion on credibility was based on the entirety of the evidence:

> When I weigh the findings of the RPD with which I agree—including the findings of the RPD that are uncontested—and the supporting documentation, I conclude that [Mr. Akintola], as well as the other [applicants], are, overall, lacking in credibility. I find on a balance of probabilities that [Mr. Akintola] is not bisexual; that he was not discovered kissing a man in his car; that he has not been perceived as a bisexual by police, his community or his family elder; and that he and his family have not been threatened with rituals. Consequently, I find that there is not a serious possibility that they will face persecution or a likelihood that they will face harm as described under subsection 97(1) upon their return to Nigeria.

[24] Having reviewed the RAD's decision and the evidentiary record that was before it, I find that the RAD reached its conclusion on credibility based on the entirety of the evidence, as it stated above. The RAD disregarded the RPD's findings that it overturned, and reasonably weighed the remaining findings together with the supporting documentation to conclude that Mr. Akintola and the other applicants were lacking in credibility. Thus, the "overall impact" of

overturning three of the RPD's implausibility findings was specifically addressed in the RAD's reasons. A reviewing court should refrain from reweighing and reassessing the evidence considered by the decision maker: *Vavilov* at para 125. The applicants have not established that the RAD's assessment of the evidence was unreasonable.

[25] In conclusion, I find that the RAD did not err in assessing the applicants' credibility. The RAD's assessment of the applicants' credibility was reasonable.

B. *Did the RAD err in assessing the documentary evidence filed in support of the applicants' claims?*

[26] In their written submissions, the applicants challenged the RAD's assessment of three documents: a psychotherapy assessment, a letter from Mr. Akintola's sister, and an orientation record from a two-hour course that Mr. Akintola attended at The 519, a Canadian non-profit organization supporting LGBTQ communities. During the hearing, the applicants confined their arguments to the letter from Mr. Akintola's sister and a document not mentioned in the written submissions—a letter from Mr. Akintola's neighbour. While the applicants did not express concerns with the RAD's treatment of the psychotherapy report and the orientation record in their oral arguments, I have nevertheless addressed their written submissions below.

(1) **Letter from Mr. Akintola's sister**

[27] The RPD assigned no weight to a letter from Mr. Akintola's sister that incorrectly stated the police went to the applicants' home on September 29, 2017, rather than on September 30, 2017. Before the RAD, the applicants sought to admit a December 15, 2017 email exchange

between Mr. Akintola and his sister, which explained that the letter contained a typographical error and that she intended to write September 30, 2017. The applicants argued that the email was new evidence unavailable when Mr. Akintola made his refugee claim, as "it only arose because of the [RPD's] skepticism of his story". The RAD refused to admit the email exchange as new evidence on appeal because the exchange occurred several months before the RPD hearing and Mr. Akintola's email to his sister pointing out her error suggested that he was aware it could negatively affect the reliability of her evidence. As such, the RAD found the applicants had not met the requirements for admissibility set out in s. 110(4) of the *IRPA*. The RAD disregarded the sister's explanation, and agreed with the RPD's finding that the letter should be given no weight based on the incorrect date.

[28] On this application for judicial review, the applicants argue that the difference in dates was minor and that the RAD examined the evidence microscopically, contrary to *Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168 (Fed CA). The applicants also submit the date discrepancy was never put to them during the RPD hearing. I am not persuaded by these arguments. I note that the applicants did not raise the RPD's failure to put the discrepancy to them as an issue on appeal. Nevertheless, Mr. Akintola was well aware of the error, and it was significant enough for Mr. Akintola to write to his sister about it. The applicants have not demonstrated that the RAD's agreement that the sister's letter should be given no weight was unreasonable.

(2) **Letter from Mr. Akintola's neighbour**

[29] As noted above, the applicants did not address the neighbour's letter in their written submissions. More importantly, as the respondent correctly points out, the applicants did not raise any error regarding the neighbour's letter as a ground of appeal before the RAD. The RAD's reasons do not mention the letter and the applicants' oral submissions focused on the RPD's reasons.

[30] The applicants submit that the RPD erred in assigning no weight to the neighbour's affidavit on the basis of: (i) the RPD's incorrect assumption that the letter is an affidavit; (ii) the RPD's reliance on information in the National Documentation Package for Nigeria ("NDP") that it is not standard practice in Nigeria for a commissioner of oaths to swear an affidavit regarding an individual's gender and sexual orientation due to high levels of homophobia; and (iii) the RPD's reliance on NDP information that fraudulent documents are readily available in Nigeria.

[31] I agree with the applicants that the RPD assumed that the letter was a sworn affidavit when it was not. However, it is more troubling that the RPD afforded no weight to what it believed to be sworn evidence solely because the NDP describes barriers to obtaining sworn evidence about sexual orientation in Nigeria. The RPD provided no reason for assigning no weight to the document other than its incorrect assumption that the document was sworn and its illogical expectation that the document should have been unsworn. Similarly, the RPD offers no reason for suspecting the document to be fraudulent. It would be perverse to require refugee claimants to file unsworn testimony, even where sworn testimony is available, in order to avoid a

negative inference or a finding of fraud. In my view, the RPD's finding that "no weight can be placed on this document" was not justified or reasonable.

[32] That said, the applicants did not point to any error in the RAD's decision. The RAD was not required to address the RPD's treatment of the neighbour's letter because the applicants did not raise it as a ground of appeal. The RAD's reasons provide no basis for me to conclude that it made the same mistaken assumption as the RPD, or that it afforded no weight to the neighbour's letter on the same unreasonable basis. The RAD certainly did not accept all of the RPD's findings without proper consideration—in fact, it overturned three of the four implausibility findings that were contested on appeal. Therefore, the applicants have not established that the RAD's treatment of the neighbour's letter was unreasonable.

(3) **Psychotherapy report**

[33] The applicants allege that the RAD erred in finding that a psychotherapy report from Ms. Natalie Riback was of "very little value". The applicants submit that the RAD: (1) did not respect Ms. Riback's professional credentials; (2) gave insufficient weight to her findings on Mr. Akintola's mental health; and (3) improperly found that Ms. Riback put herself in the role of an advocate for the applicants, rather than a neutral health care professional.

[34] I disagree with the applicants' submissions. The RAD acknowledged Ms. Riback's credentials as a psychotherapist, but found that her report repeated many of the claims made by Mr. Akintola. Although the report noted that Mr. Akintola had short-term memory loss, the credibility issues arising from his testimony did not arise from memory issues, but rather the

plausibility of the events in question. Therefore, the RAD reasonably found that, even if it accepted the diagnosis of post-traumatic stress disorder, this would have little bearing on the plausibility of Mr. Akintola's testimony. Furthermore, the RAD provided specific examples of advocacy in the report. In my view, the RAD's treatment of the psychotherapy report is consistent with the jurisprudence: *Verma v Canada (Citizenship and Immigration)*, 2016 FC 404 at paras 28, 34-35; *Egbesola v Canada (Citizenship and Immigration)*, 2016 FC 204 at paras 13-15; *Molefe v Canada (Citizenship and Immigration)*, 2015 FC 317 at paras 31-33. I am not persuaded that the RAD's finding regarding Ms. Riback's report was unreasonable.

(4) **Orientation record from The 519**

[35] The applicants submit that the RAD erred in finding that Mr. Akintola's attendance at an orientation session at The 519 provided low evidentiary value to prove that he is bisexual.

[36] The RAD gave some weight to the orientation record from The 519. In my view, the RAD made no error in doing so. The RAD accepted that Mr. Akintola participated in the course and that his participation indicated his desire to be recognized as a bisexual. However, the RAD reasonably explained that attending a two-hour course could not establish Mr. Akintola's bisexuality in the face of reasons to doubt his truthfulness.

C. *Did the RAD err in failing to conduct a* sur place *analysis of the applicants' claims for refugee protection?*

[37] According to their written submissions, the applicants assert that the RAD never made a finding that Mr. Akintola is not bisexual and thus accepted his sexual identity. They argue that

the RAD is required to examine a *sur place* claim if evidence of activities in Canada that may have significant consequences in the refugee claimant's home country "emerged perceptibly" from the record: *Mohajery v Canada (Citizenship and Immigration)*, 2007 FC 185 at paras 31-32. Here, the issue that the applicants contend should have been examined was whether Mr. Akintola could live as an openly bisexual man in Nigeria.

[38] Contrary to the applicants' submissions, the RAD did make a specific finding that Mr. Akintola is not bisexual. The applicants conceded in oral argument that their *sur place* argument is premised on this Court finding that the RAD's credibility determination was unreasonable, and I have found that it was not. There was no basis to support a *sur place* claim, and the RAD did not err by failing to conduct a *sur place* analysis.

IV. **Conclusion**

[39] For the reasons above, I find that the RAD's decision was reasonable. Therefore, this application for judicial review is dismissed.

[40] Neither party raised a question for certification, and none arises.

JUDGMENT in IMM-6050-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6050-19
STYLE OF CAUSE:	KOLAWOLE MONSUR AKINTOLA, ABIOLA SHAKIRAT AKINTOLA, FAHAM IYIOLA AKINTOLA, FRUQON FIMINIYI AKINTOLA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 22, 2020
JUDGMENT AND REASONS:	PALLOTTA J.
DATED:	OCTOBER 15, 2020

APPEARANCES:

Adam Wawrzkiewicz	FOR THE APPLICANTS
Kevin Spykerman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT