

Federal Court



Cour fédérale

**Date: 20230622**

**Docket: IMM-2293-22**

**Citation: 2023 FC 880**

**Ottawa, Ontario, June 22, 2023**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**MICHELLE TENDAI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] This is an application for judicial review of a Refugee Appeal Division [RAD] decision dated February 10, 2022 [the Decision], confirming the decision of the Refugee Protection Division [RPD], that the Applicant is neither a Convention refugee nor a person in need of protection.

## II. **Background**

[2] The Applicant is a citizen of Zimbabwe who fears persecution on the basis of her sexual orientation as a bisexual woman.

[3] The Applicant claimed that in 2016, she began working on cruise ships where she engaged in a number of same sex relationships with female colleagues.

[4] In March 2018, she returned to Zimbabwe and discovered that videos and photographs of her and another female had been leaked to social media and that the story was then published in a local newspaper.

[5] Subsequently, in May 2018, the Applicant's father, a pastor, allegedly forced her to undergo an exorcism. She was also put on trial in her community, found guilty of homosexuality, and sentenced to death.

[6] When the Applicant tried to escape, she was caught by a group of government officials who forcibly confined and sexually assaulted her. She claims that one of the individuals who had taken part in the attack ultimately helped her escape.

[7] The Applicant first went to a church and received assistance from a reverend who helped her leave the country. The Applicant arranged a placement on a cruise line and left Zimbabwe for the United States (US) on May 23, 2018.

[8] The Applicant travelled from the US to Canada on August 19, 2018 and initiated a claim for refugee protection.

[9] The RPD hearing was held September 15, 2021. Her claim was rejected October 5, 2021.

[10] The Applicant appealed the RPD decision to the RAD.

### III. **Decision under Review**

[11] In support of her claim before the RPD, the Applicant submitted two newspaper articles to corroborate the public exposure of her sexual orientation in Zimbabwe. One was the original, full copy of the February 9, 2018 print edition of the “Zimbabwe H-Metro” newspaper. The other was a print screen from an online article, dated October 10, 2018, which is still accessible online on the Chronicle’ website. The online article specifically refers to the earlier H-Metro article.

[12] The RPD found that the H-Metro newspaper was overall authentic but the pages with the article relating to the Applicant were fraudulent. It was only through the negative RPD decision that the Applicant first became aware that the RPD had concerns about the authenticity of the article.

[13] The Applicant argued on appeal that the RPD erred in failing to notify the Applicant that the authenticity of the newspaper was in doubt and giving her an opportunity to address it.

[14] The RAD agreed.

[15] However, the RAD found that the Applicant's credibility had been "entirely impugned" by the evidence she disclosed.

[16] The RAD concluded that the Applicant was not a trustworthy witness and that she failed to establish her allegations of sexual orientation and gender identity and expression.

[17] Based on the above, the RAD found that the RPD did not err in its decision that the Applicant is neither a Convention refugee nor a person in need of protection and dismissed her appeal.

#### IV. **Issues and Standard of Review**

[18] The Applicant submits that the Decision is both procedurally unfair and unreasonable, asserting that:

- a) The RAD erred by failing to ascertain the authenticity of The Chronicle article.
- b) The RAD erred in refusing to admit new evidence and,
- c) The RAD erred by failing to provide the Applicant with notice of new issues.

[19] The first two issues are reviewable on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 10 [Vavilov].

[20] The focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. A court applying the reasonableness standard does not ask what decision it would have made in the place of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable: *Vavilov* at para 83.

[21] To set a decision aside, a reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision: *Vavilov* at para 100.

[22] The third issue concerns procedural fairness. When reviewing the procedural fairness of a decision, the Court determines whether the procedure used by the decision maker was fair, having regard to all of the circumstances including the nature of the substantive rights involved and the consequences for the individual affected. While technically no standard of review applies, the Court's review exercise is akin to correctness: *Hussey v Bell Mobility Inc*, 2022 FCA 95, at para 24; *Gordillo v Canada (Attorney General)*, 2022 FCA 23, at para 63. Ultimately, the question is whether the Applicant knew the case to be met and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, at para 56.

[23] Having found that the RAD erred in its treatment of the Applicant's evidence is determinative, I will only deal with the first issue.

V. **Analysis**

[24] The Applicant submitted two articles from Zimbabwe newspapers in support of her claim before the RPD. These articles were tendered to corroborate her claim that her sexual orientation had been publicly disclosed.

[25] The first article was contained in a February 9, 2018 print edition of the "H-Metro" newspaper, which she claims was the first to publish the story about the Applicant's same-sex activity. The full newspaper was submitted to the Board, including the article titled "ZAOGA Pastor's daughter in lesbian sex storm".

[26] The second article, dated October 10, 2018 in "The Chronicle" was provided via screenshots of the online article located on the newspaper's website. This article is entitled "Tendai family in yet another scandal".

[27] The RPD rejected the H-Metro article as fraudulent due to several "anomalies" relating to font variations, and spacing variations, as well as the placement of the word "Steelmate", an advertiser, in the header of the article located on page 12 of the paper.

[28] On appeal, the Applicant challenged the RPD's findings about spacing and font changes. She also argued that the RPD completely disregarded the second October 10, 2018 Chronicle

article. The Applicant submitted to the RAD that the Chronicle article corroborates the Applicant's allegations and the authenticity of the H-Metro article as it contains an explicit reference to it. The Applicant highlighted for the RAD that the article to present day remains accessible online.

[29] The Chronicle article reports that the Applicant was "notorious" because of leaked pictures of her with her "lesbian lover", Merilyn Derby Nyamadzawo, as well as a leaked five-minute video of the two together "in a romp", and that government officials are searching for her.

[30] The RAD assessed the Chronicle article and made the following findings:

[37] I find that, particularly as online information is susceptible to alternation [*sic*] and manufacture, that the October 10, 2018 online *Chronicle* article does not overcome the anomalies and deficiencies that led me to my finding that the H-Metro article is not genuine. Moreover, the credibility of the content of the *Chronicle* article depends on the credibility of the H-Metro document, which I have found to be not genuine. Simply referring to one document in another document does not make its contents more credible.

[31] The Applicant's submission is that the RAD's finding is unreasonable because it concluded, without justification, that "online information is susceptible to alternation [*sic*] and manufacture [*sic*]". The Applicant asserts that the RAD cites no evidence to support its finding, and contrary to this Court's jurisprudence, failed to explain why the document was rejected based on the document itself and not the prevalence of fraudulent documents citing, *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 28, *Ogbebor v Canada (Citizenship*

*and Immigration*), 2021 FC 994 at para 21, *Oladekoye v Canada (Citizenship and Immigration)*, 2022 FC 449 at paras 22-28.

[32] The Applicant also asserts that the RAD was under an obligation to make some effort to ascertain the authenticity of documents that appear to be genuine. The Applicant relies on *Hohol v Canada (Citizenship and Immigration)*, 2017 FC 870 at paragraph 22 where Justice Manson held:

[22] ... a finding that one or more documents are fraudulent does not necessarily mean that all documents are fraudulent, even in a situation where fraudulent documents are readily available. The RPD must make some effort to ascertain the authenticity of documents that appear to be genuine.

[33] Ultimately, the Applicant states, the RAD failed to grapple with the key issue being the fact that there exists an article on the website of one of Zimbabwe's national newspapers, alleging the Applicant is a lesbian. I agree.

[34] The Respondent in their materials defends the reasonableness of the RAD's Decision, pointing to the many credibility concerns with the Applicant's testimony and evidence. However, the Respondent failed to address the issue of the Chronicle article, which is one of the primary challenges asserted in this judicial review.

[35] I agree with the Applicant that the RAD's analysis with respect to the Chronicle article lacks justification and transparency and demonstrates a failure to meaningfully grapple with the evidence.



[36] Dismissing one key piece of evidence simply because online content is susceptible to alteration, without more, is unreasonable. As noted by the Applicant, it also runs afoul of this Court's jurisprudence.

[37] I agree with the Applicant that the RAD's treatment of the Chronicle article is analogous to the line of cases where this Court has cautioned against dismissing evidence as fraudulent without first probing the document itself.

[38] In *Ogbebor*, Madam Justice McVeigh stated as follows:

[29] If there were specific reasons, why the document should have been rejected—based on the document itself—then the decision-maker was required to explain it in the reasons. The reasons do not indicate anything at all about the document which renders it suspect other than that it comes from Nigeria and the Applicant has credibility issues. In my view, it is completely on point with the above jurisprudence to find this to be unreasonable.

[39] The existence of the Chronicle article was explicitly raised by the Applicant in her submissions to the RAD as evidence that corroborates the core allegation of her claim, which is that she fears persecution based on her sexual orientation. Dismissing this critical piece of evidence as fraudulent solely because online content is susceptible to alteration, without more, will inevitably be unreasonable. It is also highly speculative in this instance. The RAD does not cite any source for the prevalence of altered or manufactured content online in Zimbabwe, thus depriving the Applicant from understanding the basis for the conclusion drawn.

[40] I note the Applicant's submission that the Chronicle is not a blog, or a tabloid, but a national newspaper in Zimbabwe and the evidence is that this article remains live and accessible

to present day. Further, there is little doubt that this finding was critical to the RAD's ultimate conclusion that the Applicant's sexual identity "was not exposed in the Zimbabwean media". As this Court cannot know whether the RAD would have come to the same conclusion absent this error, the Decision cannot stand.

[41] In sum, the RAD's dismissal of the Chronicle article is a critical finding lacking in both transparency and justification, and in my view, compromises the reasonableness of the Decision as a whole.

[42] Having determined that the RAD's assessment of the Applicant's evidence was unreasonable, it is unnecessary to deal with the remaining issues.

## VI. **Conclusion**

[43] The RAD's Decision lacked both transparency and justification. Therefore, it is unreasonable. I therefore grant the Applicant's application for judicial review.

[44] The parties proposed no serious question of general importance for certification. I agree that none arises on these facts.

**JUDGMENT IN IMM-2293-22**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is allowed and the matter will be returned for redetermination by a different member of the RAD.
2. There is no serious question of general importance to certify.

"E. Susan Elliott"

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Judge

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

**DOCKET:** IMM-2293-22

**STYLE OF CAUSE:** MICHELLE TENDAI v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY WAY OF VIDEOCONFERENCE

**DATE OF HEARING:** FEBRUARY 23, 2023

**JUDGMENT AND REASONS:** ELLIOTT J.

**DATED:** JUNE 22, 2023

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