Immigration and
Refugee Board of Canada

Refugee Appeal Division

Commission de l'immigration
et du statut de réfugié du Canada

Section d'appel des réfugiés

RAD File No. / N° de dossier de la SAR : MB3-04744

Private Proceeding / Huis clos

Reasons and decision – Motifs et décision

Person who is the subject of the appeal	XXXX XXXX XXXX	**Personne en cause**
Appeal considered / heard at	Montréal, Quebec	**Appel instruit à**
Date of decision	February 24, 2014	**Date de la décision**
Panel	M[e] Alain Bissonnette	**Tribunal**
Counsel for the person who is the subject of the appeal	M[e] Chantal Ianniciello	**Conseil de la personne en cause**
Designated representative	N/A	**Représentant désigné**
Counsel for the Minister	Farah Merali	**Conseil du ministre**

Canada

REASONS AND DECISION

I. INTRODUCTION

[1] **XXXX XXXX XXXX**, the appellant, a citizen of Nigeria, is appealing against the decision of the Refugee Protection Division (RPD), alleging that the RPD rendered a decision based on errors in its assessment of his credibility and his sexual orientation.

[2] The Minister of Public Safety Canada (the Minister) intervened in this appeal, submitting that the RPD properly assessed the appellant's credibility.

II. DETERMINATION OF THE APPEAL

[3] Pursuant to subsection 111(1) of the *Immigration and Refugee Protection Act* (IRPA), the Refugee Appeal Division (RAD) allows the appeal, sets aside the RPD's determination and refers the matter to a differently constituted panel for re-determination of the case taking into account the following directions:

[4] The RPD will have to analyze whether the appellant is in fact homosexual, taking into account all of the evidence, including the letter from the organization AGIR. If it concludes that, despite this evidence, he is not homosexual, it will not have to take its analysis any further. If it concludes that he is homosexual, it will have to determine whether, as a homosexual, he is a member of a particular social group—homosexuals—who, in Nigeria, face or do not face persecution simply by reason of their sexual orientation. If the appellant establishes that he is homosexual but does not establish that homosexuals are oppressed simply because of their sexual orientation, the RPD will then have to determine whether he personally has a well-founded fear of persecution if he returned to live in Nigeria.

III. BACKGROUND

A. Basis of the claim

[5] In the Basis of Claim Form (BOC Form), which he amended and signed on August 6, 2013, the appellant stated that he is a citizen of Nigeria, born on XXXX XXXX, 19XXXX XXXX and

that his mother and two sisters were living in Lagos, Nigeria, at that time.[1]

[6] In his amended BOC Form, the appellant stated that, if he returned to his country, he would fear being subjected to prejudice, mistreatment and threats because he is homosexual. He also stated that, in the past, he was beaten and disowned by his father because of his identity as a homosexual, was punished under Sharia for his behaviour, which was considered shameful, and, in XXXX 2012, his partner was killed.[2]

[7] In his amended BOC Form, the appellant stated that he left his country on XXXX XXXX XXXX 2013, no sooner, no later, because after his partner's death in XXXX 2012, he lived in different places and then received help from someone who provided him with accommodations and then helped him leave his country.[3]

B. RPD decision

[8] The hearing before the RPD was held on May 27 and October 8, 2013. In its decision dated October 30, 2013,[4] the RPD rejected the claim for refugee protection filed by the appellant, then referred to as the claimant. In light of the implausibilities and contradictions that riddled his testimony, the RPD found that he was not credible overall and with respect to his sexual identity.[5]

C. Grounds of appeal and remedy sought

[9] In his memorandum, the appellant submits that the RPD's principal credibility findings are patently unreasonable because they are not based on elements that are relevant or significant within the meaning of the case law.[6] The appellant is requesting that the RAD allow the appeal, set aside the determination of the RPD and render a positive decision.[7]

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1 Amended Basis of Claim Form (BOC Form), pages 22, 29 and 32 of the RPD record.

2 *Idem*, pages 27 and 28 of the RPD record.

3 *Idem*, page 28 of the RPD record.

4 RPD decision, pages 3 to 8 of the RPD record, particularly at paragraphs 6 and 17.

5 *Idem*, page 12 of the RPD record.

6 Appellant's memorandum, paragraph 50, page 21 of the appeal record.

7 *Idem*, page 22 of the appeal record.

[10] The Minister submits that it is the responsibility of the RPD to assess a refugee protection claimant's credibility; that, in the present case, after weighing all of the documentary evidence, the appellant's particular situation and the quality of his testimony, the RPD found that he was not credible, including with respect to his sexual identity; and that, in his opinion, the RPD properly assessed the appellant's credibility. The Minister is requesting that the RAD dismiss the appeal and confirm the RPD's determination.[8]

IV. NO NEW EVIDENCE PRESENTED ON APPEAL

[11] In his written statement, the appellant stated that he was not submitting any evidence under subsection 110(4) of the IRPA.[9]

[12] The Minister also submitted no new evidence.[10]

V. HEARING BEFORE THE RAD

A. The appellant requested a hearing

[13] The RAD Rules provide that the record of the person who is the subject of the appeal must include, among other documents, a written statement indicating whether the appellant is requesting that a hearing be held under subsection 110(6) of the IRPA, and a memorandum that includes full and detailed submissions regarding why the RAD should hold such a hearing, if the appellant is requesting that a hearing be held.[11]

[14] In his memorandum, the appellant requested that a hearing be held in his appeal.[12]

[15] The Minister submits that nothing in what the appellant has submitted justifies the holding of a hearing and requests that the RAD refuse to hold a hearing.[13]

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8 Minister's memorandum, January 20, 2014, 5 pages, pages 2 to 5.

9 Appellant's statement, paragraph 11, page 8 of the appeal record.

10 Minister's memorandum, January 20, 2014, 5 pages, page 5.

11 RAD Rules, SOR/2012-257, subrule 3(3).

12 Appellant's memorandum, page 22 of the appeal record.

13 Minister's memorandum, January 20, 2014, 5 pages, page 4.

[16] It should be noted that, pursuant to subsection 110(3) of the IRPA, the RAD generally proceeds without a hearing, on the basis of the record of the RPD proceedings:

110. (3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.	110. (3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.

B. Subsection 110(6) test

[17] Pursuant to subsection 110(6) of the IRPA, when evidence presented on appeal is found to be admissible, it should be determined whether it raises a serious issue with respect to the credibility of the person who is the subject of the appeal, whether it is central to the decision with respect to the refugee protection claim and whether it justifies allowing or rejecting the refugee protection claim. If the answer is yes, the RAD may then hold a hearing.

110. (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3) (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal; (b) that is central to the decision with respect to the refugee protection claim; and (c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	110. (6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois : a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause; b) sont essentiels pour la prise de la décision relative à la demande d'asile; c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

C. No RAD hearing should be held

[18] For a hearing to be held before the RAD, evidence presented as part of the appeal process must have first been found to be admissible. In this appeal, the appellant did not present any new evidence pursuant to subsection 110(4) of the IRPA; consequently, no evidence could be found admissible in his appeal.

[19] For these reasons, I find that no hearing can be held in the context of these appeal proceedings.

VI. WHAT DEFERENCE AND WHAT STANDARDS OF REVIEW SHOULD BE APPLIED IN THE APPEAL PROCEEDINGS BEFORE THE RAD?

[20] In the following paragraphs, I will analyze the particular context of the RPD and the RAD, and what I consider can be inferred from a few legal decisions that deal with these issues.

A. The particular context of the RPD and the RAD

[21] The RAD is not a court of law, and it does not review RPD decisions, but rather determines appeals in an administrative and non-judicial context. The RPD and RAD are two separate divisions of the same Immigration and Refugee Board.[14] Sections 162 to 169 of the IRPA identify the provisions that apply to them both. Each division "has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction."[15] Each member has the powers and authority of a commissioner and may do any other thing they consider necessary to provide a full and proper hearing.[16] Hearings are held in the absence of the public, although each may conduct a proceeding in public, or take any other measure that it considers necessary to ensure the appropriate access to

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14 Section 151 of the IRPA: "The Immigration and Refugee Board consists of the Refugee Protection Division, the Refugee Appeal Division, the Immigration Division and the Immigration Appeal Division."

15 Section 162 of the IRPA.

16 Section 165 of the IRPA.

the proceedings.[17] Sections 169.1 to 170.2 of the IRPA identify the provisions specific to the RPD, while sections 171 to 171.1 identify the provisions specific to the RAD.

[22] The RPD and the RAD, in their respective roles, are required to deal with whether to grant refugee status and protection to claimants. They are therefore part of the Canadian refugee protection system under the IRPA that governs them both and that, among other things, has the objective of establishing fair and effective procedures that will maintain the integrity of this system, while upholding respect for the human rights and fundamental freedoms of all human beings.[18]

[23] The primary role of the RPD is to hold hearings to determine whether refugee protection claimants are "Convention refugees" or "persons in need of protection." Because it disposes of the refugee protection claim at a hearing, the RPD therefore has the opportunity to see and question the refugee protection claimants, which gives it a significant advantage with respect to findings of fact and the assessment of the refugee protection claimants' credibility.

[24] Pursuant to subsection 110(1) of the IRPA, a person or the Minister may appeal—on a question of law, of fact or of mixed law and fact—to the RAD against a decision of the RPD to allow or reject the person's claim for refugee protection. Pursuant to subsection 110(3) of the IRPA, the RAD generally proceeds without a hearing, on the basis of the RPD record. For a hearing to be held before the RAD, there must be new evidence that has been found to be admissible. The RAD must also consider that this evidence raises a serious issue with respect to the credibility of the person who is the subject of the appeal, is central to the decision with respect to the refugee protection claim and would justify either allowing or rejecting the refugee protection claim.[19] Consequently, there are significant differences between the RPD and the RAD.

B. Right to appeal and deference to RPD decisions

[25] I would now like to refer to the concepts developed by the Alberta Court of Appeal in two decisions that do not directly relate to the IRPA governing the RPD and the RAD and that,

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17 Section 166 of the IRPA.

18 Paragraph 3(2)(*e*) of the IRPA.

19 Subsection 110(6) of the IRPA.

consequently, do not serve as precedents that must be followed in this context. However, I am of the opinion that they can be used to provide a number of lessons not only regarding the issue of whether the appeal to the RAD is an appeal *de novo*, but also regarding what standards of review should be applied in this appeal.

[26] When analyzing the respective roles of two administrative tribunals and deciding which standard of review the Law Enforcement Review Board should apply in determining an appeal against a decision made by the officer tasked with hearing a complaint about a police officer's behaviour, the Alberta Court of Appeal noted that the mere presence of a right to appeal—including appeals within an administrative structure—in no way means that no deference to the first-level decision-maker is called for.[20]

[27] In its decision, the Court of Appeal referred to the example of the relationship established between a trial judge and an appeal judge:

> The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.[21]

[28] In thus citing the Supreme Court of Canada, the Court of Appeal emphasized the importance of promoting the autonomy of the proceeding and its integrity, adding that the same principle applies within administrative structures:

> The same principle applies to the hearings before the presiding officers. If the Board was to continue to routinely rehear all matters on a *de novo* basis, and to extend no deference whatsoever to the decisions of the presiding officers, that would only undermine the apparent integrity of those hearings. As previously stated, that is inconsistent with the

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20 *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, paragraphs 55 and 56:

> [55] …While *H.L.* was decided on the *Housen* principles, and *Khosa* was decided on the *Dunsmuir/Pushpanathan* principles, both cases clearly reject the argument that the mere presence of a right of appeal signals that no deference is called for. There is no principle basis on which to make an exception for appeals within an administrative structure, such as the one that is in issue in this appeal.
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> [56] The mere presence of a right of appeal from the presiding officer to the Board does not warrant a correctness standard of review.

21 *Housen v. Nikolaisen*, 2002 SCC 33; [2002] 2 S.C.R. 235, paragraph 17, as cited by the Alberta Court of Appeal in *Newton* at paragraph 81.

> hybrid scheme of the *Act*. As the appellant noted, that approach undermines those hearings to the point that they become almost academic, and call into question the need of the interested parties to even participate in them. The hearing would be reduced to a type of preliminary inquiry.[22]

[29] Having examined the respective roles of the decision-makers, their particular expertise and the general economy of the proceedings, the Alberta Court of Appeal identified which standards of review the Law Enforcement Review Board should apply to the decision rendered by the decision-maker of first instance:

> [82] In conclusion, the decision of the Board to conduct a *de novo* hearing, and to assume that it owed no deference to the findings of the presiding officer was in error. The role of the Board is primarily to sit on appeal from the presiding officer. The Board is not a tribunal of first instance, and cannot simply ignore the proceedings before the presiding officer, and the conclusions reached by him. The focus of the appeal to the Board should be on its dual mandate of civilian oversight, and the correction of unreasonable results.
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> [83] There is no general power to hold a *de novo* hearing in every case, and no requirement that a *de novo* hearing be held unless the parties consent to proceeding otherwise. Where a sufficient reason is shown or the issues on appeal warrant it, the Board has the power to admit fresh evidence. When sufficient cause is shown the Board can even rehear key evidence presented to the presiding officer.
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> [84] The Board has a legitimate role to play in providing civilian oversight to the system of police discipline where oversight issues arise. The Board is not bound by the inferences and conclusions of the presiding officer, but it should be able to offer some articulable reason based in law, fact or policy when it interferes with a decision under appeal. The Board should proceed primarily from the record created by the hearing before the presiding officer. It should extend deference to the decision of the presiding officer on questions of fact, credibility, and technical policing issues. If the decision of the presiding officer was reasonable, the Board should not substitute its own view just because it might have come to a different conclusion. Where the appeal raises issues of acceptability of particular police conduct, or the integrity of the discipline process, the Board's mandate is more robust.[23]

[30] In a more recent decision by the same Alberta Court of Appeal, the Honourable Justice Slatter indicated that the *Newton* standard of review may well vary depending on the issue at hand. Referring to the Métis Settlements Appeal Tribunal, Justice Slatter pointed out that the administrative tribunal plays a number of roles, including promoting consistency in the interpretation and application of the statutory regime to all Métis throughout Alberta. In the future,

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22 *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, paragraph 81.

23 *Idem*, paragraphs 82 to 84.

if an appeal were to raise issues of this type, according to Justice Slatter, the Appeal Tribunal owes less deference to a decision made at the local level.[24]

[31] In some interesting decisions of the Court of Appeal of Québec, this same issue of standards of review to be used by an appellate body that is part of an administrative tribunal was analyzed, but in a legislative context that differs from ours. I note from these two decisions that it is essential that [translation] "the applicable legislation be reviewed carefully to determine the limits of the intervention framework that each decision-maker, at each decision-making level, has been assigned by Parliament."[25] I also note that, contrary to the statutory scheme analyzed in this case, which provides that the appellate body hearing the appeal can uphold, amend or reverse any decision brought before it,[26] in the context of the IRPA, which governs the RPD and the RAD, as I understand it, the RAD can set aside only RPD decisions that are wrong.[27] Finally, I am sensitive to the argument that an appeal before an appellate body that is part of an administrative tribunal must not be treated like a kind of judicial review.[28] However, I also note that even an appeal like this has intrinsic limits and that this may not be the time for a new process.[29]

[32] When all is said and done, I am of the opinion that, except for strict issues of law that may include, in particular, the interpretation of the IRPA, which governs the RPD and the RAD, and except for issues of natural justice, it is appropriate for us, as members of the RAD, to extend deference to RPD decisions, which is different but comparable to that which courts of law are

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[24] *Kikino Métis Settlement v. Métis Settlements Appeal Tribunal*, 2013 ABCA 151, paragraph 12: "This *Newton* standard of review may well vary depending on the issue at hand. The Appeal Tribunal is charged with preserving and enhancing Métis culture and identity and furthering the attainment of self-governance by Métis settlements under the laws of Alberta: *Métis Settlements Act*, RSA 2000, c. M-14, s. 0.1. It undoubtedly plays other roles, including, for example, promoting consistency in the interpretation and application of the statutory regime throughout Alberta. To the extent that an appeal raises issues of this type, the Appeal Tribunal owes less deference to the settlement council. The settlement council, on the other hand, is charged with the local management of the Métis settlement, and with having regards to local interests and issues. On those issues, as well as on its basic findings of fact, more deference is due."

[25] *Laliberté v. Huneault*, 2006 QCCA 929, paragraph 16.

[26] *Idem*, paragraph 18.

Parizeau v. Barreau du Québec, 2011 QCCA 1498, paragraph 76.

[27] Paragraph 111(2)(*a*) of the IRPA.

[28] *Parizeau v. Barreau du Québec*, 2011 QCCA 1498, paragraphs 75 to 78.

[29] *Idem*, paragraph 79.

required to extend to decision-makers of first instance when the issue is a question of fact or a question of mixed law and fact. Therefore, in my opinion, an appeal heard by the RAD does not constitute an appeal *de novo*.

[33] That said, the Federal Court should soon clarify for us the issue of what standards of review should apply in the case of appeals of RPD decisions heard by the RAD. When this happens, we will no longer have to make these kinds of references to our current context or to decisions made in cases concerning legislation that differs from the legislation governing the relationship between the RPD and the RAD. However, for the moment, I am of the opinion that it is necessary to do as I have done in the paragraphs above, well aware of the fact that this situation is temporary and that the analysis of the standard of review does not have to be done in all cases.[30]

C. Standard of review to be applied in this case

[34] In his memorandum, the appellant submits that the RPD's principal credibility findings are patently unreasonable because they are not based on elements that are relevant or significant within the meaning of the case law. Without specifying which standard of review should be applied, the appellant submits, however, that the RPD's conclusions are patently unreasonable.[31]

[35] The Minister submits that the assessment of the credibility of a claimant before the RPD is subject to the standard of review of reasonableness, and that the RAD should therefore refrain from intervening on this issue and show considerable deference.[32]

[36] Using the Federal Court case law as a guide, I am of the opinion that the assessment of the appellant's credibility is a question of fact and that the standard of review in this appeal is indeed reasonableness.[33] The RPD's identity findings are also to be reviewed on the standard of

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30 *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R 190, paragraph 62. *Canada (Human Rights Commission v. Canada (Attorney General)*, 2011 SCC 53; [2011] 3 S.C.R. 471, paragraph 16.

Cetinkaya v. Canada (Minister of Citizenship and Immigration), No. IMM-3362-11, Russell, January 4, 2012; 2012 FC 8, paragraph 16.

31 Appelant's memorandum, paragraph 50, page 21 of the appeal record.

32 Minister's memorandum, January 20, 2014, 5 pages, page 2.

33 *Parthipan Balasubramaniam v. Canada (Minister of Citizenship and Immigration)*, No. IMM-4243-12, Scott, June 21, 2013; 2013 FC 698, at paragraph 23.

reasonableness.[34] When a decision is reviewed based on the reasonableness standard, the analysis must be concerned with justification, transparency and intelligibility within the decision-making process, as well as with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[35]

[37] In my opinion, what I need to analyze first of all is whether the RPD's decision on the appellant's sexual orientation or identity as a homosexual is reasonable. If it is not, it will be neither necessary nor useful for me to analyze the other arguments raised by the appellant or those raised by the Minister.

VI. ANALYSIS OF THE MERITS OF THE APPEAL

Does the RPD's decision on the matter of the appellant's identity as a homosexual fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law?

[38] I have concluded that the RPD's finding with regard to the appellant's identity as a homosexual does not fall within a range of acceptable outcomes which are defensible in respect of the facts and law. Here is why.

[39] In his memorandum, the appellant submits that the RPD's principal credibility findings are patently unreasonable because they are not based on elements that are relevant or significant within the meaning of the case law.[36]

[40] More specifically, the appellant's lawyer criticizes the RPD for concluding that the appellant could not have had sexual contact in the middle of the classroom, given that it is not a specialist in human sexuality, and submits that it is plausible that the appellant was involved in

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34 *Mustafa Ibrahim Elhassan v. Canada (Minister of Citizenship and Immigration)*, No. IMM-9787-12, de Montigny, December 12, 2013; 2013 FC 1247, at paragraph 16, citing the earlier decision in *Liu v. Canada (Minister of Citizenship and Immigration)*, No. IMM-4964-11, Gleason, March 30, 2012; 2012 FC 377, at paragraph 8.

35 *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R 190, at paragraph 47. *Gabor Miroslav v. Canada (Minister of Citizenship and Immigration)*, No. IMM-3466-09, Russell, April 12, 2010; 2010 FC 383, at paragraph 22. *Bethany Lanae Smith v. Canada (Minister of Citizenship and Immigration)*, No. IMM-5699-11, Mosley, November 2, 2012; 2012 FC 1283, at paragraph 19.

36 Appellant's memorandum, paragraph 50, page 21 of the appeal record.

touching in a classroom. She added that although this event might not have seemed credible in the RPD's eyes, it was essential that it remain neutral in order to carry out its analysis with an open mind in order to determine whether the appellant is homosexual.[37]

[41] The appellant's lawyer also criticizes the RPD for having deemed the incident in which the appellant was attacked during a carnival as not credible because there seemed to be a discrepancy of a year between the dates he provided and the date that appeared in the documents adduced as evidence. She submits that, although the date problem could raise doubts, this finding alone could not lead the RPD to conclude that the entire document was fraudulent.[38]

[42] The appellant's lawyer also criticizes the RPD for being overly focussed on the details and for not analyzing the file as a whole, particularly, by giving more weight to what an immigration officer wrote than to what the appellant testified at the hearing in relation to how long ago he met his friend XXXX (2 years ago or 10 years ago).[39]

[43] The appellant's lawyer also maintains that the appellant may have made some mistakes in relation to certain dates in his story, but that these mistakes must not be used simply to trip up someone who is under stress and in a situation where he is vulnerable and has to divulge details of his private life before someone who does not seem to believe him. She added that the RPD must not focus on the peripheral aspects of the case and that it must be particularly cautious before concluding that facts presented by a refugee protection claimant are implausible.[40]

[44] Finally, the appellant's lawyer criticizes the RPD for failing to give a great deal of weight to the letter, which was filed as evidence, from the organization AGIR because this letter not only establishes the appellant's presence at the gay pride parade, but it also helps establish his sexual orientation.[41]

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37 *Idem*, paragraphs 9 to 16, pages 14 and 15 of the appeal record.

38 *Idem*, paragraphs 17 to 28, pages 15 and 16 of the appeal record.

39 *Idem*, paragraphs 29 to 33, pages 16 and 17 of the appeal record.

40 *Idem*, paragraphs 34 to 41, pages 17, 18 and 19 of the appeal record.

41 *Idem*, paragraphs 42 to 49, pages 19, 20 and 21 of the appeal record.

[45] The Minister submits that it is the responsibility of the RPD to assess a refugee protection claimant's credibility; that, in the present case, after weighing all of the documentary evidence, the appellant's particular situation and the quality of his testimony, the RPD found that he was not credible, including with respect to his sexual identity; and that, in his opinion, the RPD properly assessed the appellant's credibility.[42]

[46] In its reasons for decision, the RPD found that the appellant, then referred to as the claimant, was not credible overall or with respect to his sexual identity.[43]

[47] First, the RPD indicated that the appellant's testimony was full of implausibilities and contradictions with respect to some events he had allegedly experienced, including his first homosexual encounter in a classroom with another student, which the RPD found to be implausible.[44] But there is more:

> [8] …When asked the name of the classmate with whom he allegedly had an approximately two-year relationship, the claimant answered that he did not remember. The panel does not find it credible that the claimant cannot remember the name of his first partner, someone with whom he allegedly had such an intimate relationship and whom he described as his best friend.[45]

[48] Then, the RPD identified a contradiction between the appellant's testimony and the information in two documents filed as evidence about an incident in which he was allegedly attacked by a homophobic group. During his testimony, the appellant stated that the attack happened in XXXX 2005. According to the documents adduced as evidence, it happened in XXXX 2006. The RPD gave the appellant an opportunity to explain, but it did not find his explanations satisfactory because, in its opinion, they did not reasonably explain how the same error could have been made on two different documents submitted as evidence.[46] It therefore found

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42 Minister's memorandum, January 20, 2014, 5 pages, pages 3 and 4.

43 RPD decision, paragraph 17, page 7 of the RPD record.

44 *Idem*, paragraphs 6 and 7, pages 4 and 5 of the RPD record.

45 *Idem*, paragraph 8, page 5 of the RPD record.

46 *Idem*, paragraph 9, page 5 of the RPD record.

that the appellant's credibility was undermined with respect to the occurrence of this incident and his homosexuality.[47]

[49] The RPD then identified other contradictions, including the one relating to the appellant's allegation that his father threw him out about a year and a half after the XXXX 2005 attack, when, according to the appellant's own earlier statements, his father died on XXXX XXXX XXXX 2006—two months after the assault. The RPD found that this contradiction was fatal to the appellant's credibility with respect to his story and his sexual orientation.[48]

[50] The RPD analyzed the letter from the organization AGIR, which was adduced as evidence (P-17), as well as the photographs submitted by the appellant, but attached little probative value to them, "given that the claimant's testimony was not credible and that anyone, including heterosexuals, can be part of the organization and take part in the [gay pride] parade."[49]

[51] My role in this appeal is not to reassess the evidence,[50] nor to proceed with a microscopic analysis of the RPD's decision, but rather to determine whether, analyzed as a whole, this decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[51] The RPD's findings regarding credibility and the assessment of evidence are entitled to great deference.[52]

[52] At the outset, I want to emphasize that the sexual orientation or gender identity of someone who is claiming refugee protection is an important matter that must be treated with sensitivity and

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47 *Idem*, paragraph 10, page 6 of the RPD record.

48 *Idem*, paragraph 13, page 6 of the RPD record.

49 *Idem*, paragraph 15, page 7 of the RPD record.

50 *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12; [2009] 1 S.C.R. 339, paragraph 59: "Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome."

51 *Pawanbir Singh v. Canada (Minister of Citizenship and Immigration)*, No. IMM-12505-12, Shore, July 23, 2013; 2013 FC 807, at paragraph 29.

52 *Ahmadsai v. Canada (Minister of Citizenship and Immigration)*, No. IMM-893-13, Shore, October 10, 2013; 2013 FC 1025, at paragraph 23.

diligence, given that it is a fundamental part of human identity and that discrimination on account of a person's sexual orientation is prohibited by law.[53]

[53] In this case, in my opinion, the first issue the RPD had to decide on was whether the appellant had established his sexual orientation or identity as a homosexual, given that, according to a recent Federal Court decision, when a claimant fails to establish his identity as a homosexual, the RPD is not obligated to consider the application further in relation to fear of persecution as a homosexual.[54] However, that statement can be qualified by adding that the RPD should also examine whether the claimant has a well-founded fear of persecution because of his perceived sexual orientation as a homosexual.

[54] Now, as regards the appellant's identity as a homosexual, in the reasons for its decision, the RPD concluded that he was not homosexual because, on the one hand, it found implausibilities and contradictions in his testimony that undermined his credibility, including in relation to his sexual orientation, and because, on the other hand, it attached little probative value to the letter from the organization AGIR.

[55] According to the case law, whether corroborative evidence can be reasonably demanded depends on the facts of each case.[55] It is, however, recognized that such evidence is required as soon as the RPD has doubts as to the credibility of the claimant's allegations, particularly if it finds contradictions or inconsistencies in the person's testimony.[56]

[56] It is worth mentioning that, in this case, the appellant stated clearly in his BOC Form that he fears persecution because of his identity as a homosexual if he has to return to Nigeria. It is well-settled law that such sworn and uncontradicted evidence creates a presumption of its

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53 United Nations High Commissioner for Refugees (UNHCR), *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, Geneva, November 2008, 21 pages, paragraphs 8, 9 and 11.

54 *Kazondunge v. Canada (Minister of Citizenship and Immigration)*, No. IMM-2212-12, Near, November 9, 2012; 2012 FC 1310, at paragraph 17.

55 *Popyilla Dayebga v. Canada (Minister of Citizenship and Immigration)*, No. IMM-3588-12, O'Keefe, August 1, 2013; 2013 FC 842, at paragraph 30, citing an earlier decision of the Court: *Lopera v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 653, [2011] FCJ No. 828, at paragraph 31.

56 *Hernandez v. Canada (Minister of Citizenship and Immigration)*, No. IMM-3517-09, Martineau, February 18, 2010; 2010 FC 179, at paragraph 26.

truthfulness.[57] Thus, a lack of corroborating evidence of one's sexual orientation in and of itself, absent negative, rational credibility or plausibility findings related to that issue, would not be enough to rebut this presumption of truthfulness.[58] But in this case, there is more, because the appellant provided corroborating evidence as to his sexual orientation—the letter from the organization AGIR, which specifically states that the appellant is someone who wishes to live as a gay man in peace.[59] In my opinion, the appellant's lawyer is correct that the purpose of this letter is not simply to establish the appellant's presence at the gay pride parade, but also to help establish his sexual orientation. I am also of the opinion that she is right to argue that it is certainly not in the interest of this organization to provide guidance and support to people who are not part of their homosexual community.[60]

[57] That said, it is indeed up to the RPD to arrive at a conclusion as to whether an individual who claims to be homosexual is credible, but it cannot arrive at such a conclusion without looking at all of the evidence. Based on my understanding of the RPD's reasons for decision in this case, it did not clearly indicate that the letter from AGIR did in fact corroborate the appellant's identity as a homosexual.

[58] That the RPD furthermore concluded that there were problems with the allegations of persecution in the past, problems that led it to find that the appellant was not a credible witness, cannot, in my opinion, be used to contradict the fact that the appellant is homosexual and that he therefore has a well-founded fear of future persecution if he had to return to Nigeria. In that regard, it is worth mentioning that it is possible that the appellant was not a credible witness in relation to his allegations of persecution in the past without compromising the truthfulness of his allegation that he is homosexual. It is worth adding that someone who is claiming refugee protection might not have experienced harm in the past sufficient to amount to persecution, notably because the

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57 *Houshan v. Canada (Minister of Citizenship and Immigration)*, No. IMM-4619-09, O'Keefe, June 15, 2010; 2010 FC 650, at paragraph 20, citing the well-known decision in *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.).

58 *Idem*, our emphasis.

59 The letter is reproduced at pages 258 and 259 of the RPD record. The second last paragraph contains the following: "He is a very gentle and positive human being, and someone who wishes to life as a gay man in peace."

60 Appellant's memorandum, paragraphs 43 to 46, page 19 of the appeal record.

individual hid their sexual orientation or because the authorities were not aware of this orientation. That said, the well-foundedness of the refugee protection claim can be based on the assessment of the consequences the person would have to face in the future upon returning to his or her country.[61]

[59] Consequently, I am of the opinion that the RPD's conclusion that the appellant did not establish his identity as a homosexual constitutes an error and that it falls outside the range of acceptable outcomes which are defensible in respect of the facts and law.

[60] In the documentary evidence that is part of the RPD's record, the situation of homosexuals in Nigeria is described as, at the very least, cause for concern.[62] In his BOC Form, the appellant stated that he is homosexual, and he provided evidence to corroborate that statement. In my opinion, the RPD did not consider the fact that the letter from the organization AGIR indeed corroborated the appellant's identity as a homosexual. As a result, I am of the opinion that the RPD should have pursued its analysis beyond the appellant's strictly personal situation and examined whether he is a member of a particular social group—homosexuals—who, in Nigeria, face persecution simply by reason of their sexual orientation. On that matter, the jurisprudence indicates that the existence of persecution under section 96 of the IRPA can be established through an analysis of the treatment of persons in a situation similar to that of the claimant, regardless of whether, in the past, the claimant was personally subjected to persecution:

> In the context of claims derived from situations of generalized oppression, the issue is not whether the claimant is more at risk than anyone else in his country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm for which the state is accountable, and if that risk is grounded in their civil or political status, then he is properly considered to be a Convention refugee….[63]
>
> Unlike section 97 of the IRPA [the Act], there is no requirement under section 96 of the IRPA [the Act] that the applicant show that his fear of persecution is

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61 United Nations High Commissioner for Refugees (UNHCR), *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, Geneva, November 2008, 21 pages, paragraphs 23 and 24.

62 See the documentary evidence on this subject, which is reproduced at pages 181 to 249 of the RPD record.

63 *Osama Fi v. Canada (Minister of Citizenship and Immigration)*, No. IMM-2091-06, Martineau, September 19, 2006; 2006 FC 1125, at paragraph 14, Justice Martineau citing a decision of the Federal Court of Appeal in *Salibian v. Canada (Minister of Employment and Immigration*, [1990] 3 F.C. 250, page 259 (F.C.A.) and a decision of the Federal Court in *Ali v. Canada (Minister of Citizenship and Immigration)*, (1999), 235 N.R. 316.

> "personalized" if he can otherwise demonstrate that it is "felt by a group with which he is associated, or, even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition [of a Convention refugee]".[64]

[61] In my opinion, the RAD's failure to carry out such an analysis constitutes an error that places its decision outside the range of possible outcomes in respect of the facts and law.

[62] That said, can the RAD, on its own, conclude that in Nigeria today, homosexuals face persecution as a particular social group, simply based on a reading of the documentary evidence on the record without at least hearing the appellant's arguments as expressed by his lawyer and those of the Minister? In my opinion, no. Therefore, in the circumstances, I am of the opinion that it is preferable for me to refer the matter to the RPD for re-determination by a differently constituted panel.

[63] It must also be mentioned that if the RPD concludes that in Nigeria, homosexuals, as a particular social group, do not face persecution, it must then examine the appellant's claim for refugee protection, taking into account the credibility of his allegations with respect to his personal situation. In that regard, in the context of this appeal, although I concluded that the RPD made errors that I find to be unreasonable and that its decision falls outside the range of possible outcomes in respect of the facts and law, this does not mean that I can substitute the RPD's determination with the determination that should have been rendered. In this case, although the recording of the hearing concerning the appellant's claim for refugee protection is part of the record before me, the fact remains that I still cannot substitute my own determination for the one rendered by the RPD without hearing the evidence presented before it. Furthermore, based on my understanding of the case law, the credibility of the person who is the subject of an appeal can only be analyzed on the basis of an oral hearing, and findings should only be made by a decision-maker who has participated in that hearing and who has heard all of the evidence.[65]

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64 *Idem*, paragraph 16, Justice Martineau's emphasis.

65 *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, in the reasons written by Madam Justice Wilson, at pages 213 and 214: "…even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are

VII. REMEDIES

[64] For these reasons, I set aside the determination of the RPD and refer the matter to a differently constituted panel for re-determination of the case taking into account the following directions under subsection 111(1) of the IRPA:

[65] The RPD will have to analyze whether the appellant is in fact homosexual, taking into account all of the evidence, including the letter from the organization AGIR. If it concludes that, despite this evidence, he is not homosexual, it will not have to take its analysis any further. If it concludes that he is homosexual, it will have to determine whether, as a homosexual, he is a member of a particular social group—homosexuals—who, in Nigeria, face or do not face persecution simply by reason of their sexual orientation. If the appellant establishes that he is homosexual but does not establish that homosexuals are oppressed simply because of their sexual orientation, the RPD will then have to determine whether he personally has a well-founded fear of persecution if he returned to live in Nigeria.

[66] The appeal is allowed.

Alain Bissonnette

M^e^ Alain Bissonnette

February 24, 2014

Date

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extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person [citations omitted]. I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions."

Killen v. Minister of Transport, No. T-2410-97, Gibson, June 8, 1999; 1999 CanLII 8354 (FC), at paragraph 14: "I find that the only option available to the Tribunal in the circumstances was to evaluate the testimony given before the member of the Tribunal on the basis of the transcript of that testimony. In doing so, it is indeed unfortunate that it adopted the language of 'credibility' with respect to the testimony of Mrs. Matheson. It was simply not in a position to determine credibility. That being said, I am satisfied that it was open to the Tribunal to evaluate the evidence on the basis of the transcript and in so doing to give greater weight to the specific and detailed testimony of Mrs. Matheson as against the necessarily more generalized testimony of the applicant and his student pilot."

IRB translation
Original language: French