Federal Court  Cour fédérale

Date: 20200407

Dockets: IMM-1842-19
IMM-1843-19

Citation: 2020 FC 498

Ottawa, Ontario, April 7, 2020

PRESENT: Mr. Justice Boswell

BETWEEN:

A.B.

Applicant

And

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, A.B., has brought two applications for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The applications concern two decisions by the same Senior Immigration Officer. In separate decisions each dated February 22, 2019, the Officer refused A.B.'s applications for a pre-removal risk assessment [PRRA] and for a permanent residence visa from within Canada on humanitarian and compassionate [H&C] grounds.

[2] A.B. asks the Court to quash each of the Officer's decisions and refer both matters back for redetermination by a different officer with any direction the Court considers appropriate. This request for relief requires the Court to determine whether it was reasonable for the Officer to refuse the applications.

I. Background

[3] A.B. left Rwanda in late September 2016 to attend a Rwandan cultural day in San Francisco. While in the United States, A.B.'s wife telephoned him to advise that government security agents had come to their home searching for him and told her that they would kill him when they found him. After this phone call, A.B. remained in the United States as a visitor until April 20, 2017, when he entered Canada seeking refugee protection.

[4] A.B. based his refugee claim on his imputed political opinion in Rwanda; he did not make a claim against Uganda. He did not share with his counsel that he was bisexual because he thought it was not relevant to his claim.

[5] The RPD found that A.B. is a citizen of Rwanda and, based on the documents A.B. presented, also a citizen of Uganda. The RPD decided to hear his claim only against Uganda. The RPD made no findings with respect to his claim against Rwanda. It dismissed A.B.'s claim in early July 2017. This Court denied A.B.'s application for leave and for judicial review of the RPD's decision in October 2017.

[6] A.B. submitted an H&C application in February 2018 and a PRRA application in December 2018. He revealed his sexual orientation for the first time to the lawyer who assisted him with his H&C application. He also revealed his relationship with a man in Canada and presented evidence of that relationship in both his H&C and PRRA applications.

II. The Decisions under Review

A. *H&C Decision*

[7] A.B. based his H&C application on his history of persecution in Rwanda, the persecution and risk he says he will face in Uganda, his bisexuality and HIV positive status, the best interests of his children in Rwanda and Uganda, his mental health, and his establishment in Canada.

[8] In refusing A.B.'s H&C application, the Officer assessed the hardships or discrimination that A.B. alleged he would experience in Rwanda and Uganda. The Officer found that, while A.B.'s HIV positive status and his support network in Canada were compelling factors, he would nonetheless be able to receive adequate treatment in Rwanda and he would also have family support there.

[9] Based on the cumulative assessment of the evidence presented, the Officer was not satisfied that A.B. would be unable to return to Rwanda or that the difficulties he may face in doing so justified an exemption from the usual requirement to apply for a permanent resident visa from outside Canada. The Officer concluded that the H&C considerations in A.B.'s circumstances did not justify an exemption under subsection 25(1) of the *IRPA*.

B. *PRRA Decision*

[10] A.B. based his PRRA application on his history of political persecution in Rwanda and the persecution he would face in Uganda and Rwanda because of his bisexuality and his HIV positive status. The Officer noted that A.B.'s refugee claim examined his allegations of risk only against Uganda and not against Rwanda; thus, the Officer examined all the evidence A.B. provided as new evidence in relation to his allegations of risk in Rwanda.

[11] The Officer noted that A.B. was a dual citizen of Rwanda and Uganda and concluded that did not face risk under sections 96 and 97 of the *IRPA* in Rwanda. Relying on this finding, the Officer found it unnecessary to analyze risk against Uganda.

III. The Evidence

[12] A.B. submitted substantially the same evidence for purposes of his H&C and PRRA applications.

A. *H&C and PRRA Decisions*

(1) State persecution in Rwanda

[13] In assessing A.B.'s claim of state persecution in Rwanda, the Officer considered A.B.'s affidavit, the corroborative evidence he provided, and documentary evidence that showed state authorities in Rwanda targeted and arbitrarily detained individuals perceived to be political opponents. The Officer was not satisfied that this evidence had sufficient probative value to

corroborate A.B.'s statements that he and his spouse were targeted by state authorities in Rwanda or that he would likely experience difficulties or mistreatment at the hands of Rwandan state authorities upon his return.

[14] The Officer considered the cumulative effect of the evidence, acknowledging that A.B. was not required to provide supporting evidence for every aspect of his statements. The Officer concluded that, in the absence of key pieces of evidence such as a report about his medical treatment in 2015 or affidavits from individuals who personally witnessed him being arrested or detained by state authorities, A.B. had provided insufficient probative evidence that he would be perceived as a political opponent and targeted by state authorities in Rwanda.

[15] The Officer noted A.B.'s submissions with respect to persecution by state authorities in Rwanda and his narrative about his business activities in Uganda. Although the Officer acknowledged documentary evidence that A.B. had registered a company in Uganda, the Officer found little supporting evidence linking his business activities to refugee camps in Uganda. The Officer also noted news articles A.B. submitted indicating that the Rwandan government targeted Rwandan exiles and refugees in Uganda, particularly those who fled for political reasons or were former members of the government or military. The Officer found little supporting evidence that business travellers between Uganda and Rwanda were viewed with suspicion and subjected to harassment by state authorities.

[16] As to A.B.'s submissions about his detention, subsequent release, and temporary stay at his friend's house, the Officer acknowledged the copy and translation of a summons from

Rwanda's National Police requiring A.B. to report to the Muhima police station. While the Officer accepted this as some evidence that A.B. had been summoned by state authorities, the Officer observed that the summons did not indicate why he was requested to appear at the police station. The Officer reduced the weight assigned to this document because A.B. had not supplied a certified copy of the original summons. The Officer remarked that, although the translation included a statement and a signature from an individual, A.B. had not provided a sworn affidavit from the translator and there was little evidence that the translator was a member of an organization of translators and interpreters in Canada. The Officer noticed that the summons was issued prior to the version of the law to which it referred.

[17] The Officer noted A.B.'s submissions that he had scaled back his business in Uganda, that he began a new business in Rwanda in November 2014, and that his wife took over operation of the business while he kept in the background to avoid issues with Rwandese security. The Officer acknowledged the copy of A.B.'s company's registration, noting that the document showed A.B. as managing director and included his national identification card number. In light of this, the Officer found it not reasonable to believe that state authorities would not have associated A.B. with his business; the Officer was not satisfied that A.B. had attempted to avoid being connected to his business.

[18] The Officer addressed A.B.'s submissions concerning the interrogation and torture he endured during his detention and considered a letter from Dr. Keefer who examined A.B.'s narrative in his basis of claim form and performed a medical assessment. The Officer cited an excerpt of the letter, in which the doctor stated that the majority of the injuries A.B. described

were the result of blunt force trauma and the resulting soft tissue injuries would have healed without permanent marks or scarring. With respect to A.B.'s left ear, the doctor noted that the scarring of A.B.'s left tympanic membrane and the conductive hearing loss were highly suggestive of a ruptured tympanic membrane.

[19] The Officer noted the doctor's observations about the scar on A.B.'s back and the scaring over the dorsal aspect of A.B.'s feet, which the doctor found consistent with non-accidental trauma such as torture because the scarring distribution was unusual for injuries resulting from daily living or accidents. The Officer noted that the doctor summarized the pattern of A.B.'s injuries as being consistent with the information he provided in his basis of claim form narrative. The Officer accepted this medical evidence as evidence from a reliable source.

[20] The Officer was not satisfied that the cumulative evidence A.B. supplied was sufficient to show state authorities tortured him and accused him of subversion. The Officer noted the absence of an affidavit from A.B.'s spouse, corroborating that she witnessed him being taken from their home, and supporting evidence such as medical reports indicating that he had received medical treatment in February 2015.

[21] The Officer found it not reasonable that A.B. would have been able to obtain a passport and travel through security checks at an airport in Rwanda if state authorities believed he was involved in subversive activities. The Officer noted that A.B. had not shown he had difficulties obtaining a passport from the Rwandan government or leaving by air from Rwanda. The Officer

also noted a U.S. Department of State report which contained evidence that state authorities had refused to issue passports or confiscated passports of political opponents and their families.

[22] The Officer considered a letter from an individual with whom A.B. had lived with in the United States from September 2016 to March 2017. This letter said that during his stay at her house, A.B.'s wife called him and told him that Rwandese security agents wanted him. The letter also said that A.B. had told her Rwandese security had kidnapped and tortured him and he feared for his life as he was wanted again.

[23] The Officer gave this letter some weight, yet determined that its probative value was lessened because there was little indication that this individual personally spoke with A.B.'s wife or that she had witnessed him receiving telephone calls from his spouse. The Officer noted that the letter did not mention that state authorities went to A.B.'s home, ransacked his house, or detained and tortured his wife on two occasions. The Officer also noted the absence of any affidavits from individuals who witnessed A.B.'s wife being taken by state authorities, such as the children's nanny or employees at the wife's place of employment.

[24] The Officer also considered a letter from A.B.'s niece, showing that he and his wife had been accused of supporting the opposition party since late 2012. The Officer concluded that there was little evidence that A.B.'s niece was living in Uganda or Rwanda when any of the events she described occurred. This letter stated that A.B.'s family home in Rwanda was invaded and searched by unknown men who assaulted his wife in front of the children. A.B.'s niece stated that she sent money to Rwanda for the children.

[25] The Officer reviewed A.B.'s supporting evidence, which included copies of his wife and children's passports with entry and exit stamps from Rwanda and Uganda, an email from A.B.'s nephew to his niece, and a medical report concerning his wife from a medical clinic in Uganda. The Officer noted the absence of any affidavits from A.B.'s wife, the individual in Uganda who received the money his niece sent to Uganda, or from the woman who provided his family a place to stay in Uganda.

[26] The Officer found that the RPD decision provided limited information about any hardships that would likely occur if A.B. were to return to Rwanda because the RPD had not assessed the evidence on Rwanda, focusing instead on the evidence concerning risk in Uganda.

(2) Sexual orientation

[27] The Officer considered A.B.'s submissions concerning his sexual orientation, specifically that: he self-identified as a bisexual man; he had kept his sexual orientation secret from his family; he had been in a serious and secret relationship with a man in Uganda from 2000 to 2008; his former same-sex partner in Uganda had been harassed, arrested, and forced into hiding after state authorities discovered his sexual orientation; he feared he would suffer the same consequences if his sexual orientation was discovered in Uganda; and he became involved in a romantic relationship with a man in Canada.

[28] The Officer found that A.B. had provided insufficient supporting evidence concerning his relationship with the man in Uganda. The Officer accepted that A.B. may be unable to present more evidence because individuals in same-sex relationships in Uganda would likely feel the

need to conceal their relationships. The Officer observed that A.B. did not present evidence of his fear concerning his sexual orientation during his RPD hearing.

[29] The Officer further observed that, while it was reasonable to believe A.B. would likely fear Ugandan authorities if they discovered his sexual orientation, he continued to work and travel in Uganda. The Officer considered A.B.'s statement that he failed to inform the lawyer who represented him at his refugee hearing about his sexual orientation because he thought this was irrelevant as his refugee claim was against his country of citizenship, Rwanda, and he had not been in a same-sex relationship in Rwanda. The Officer concluded it was unreasonable that A.B. would be unaware that his sexual orientation was a relevant factor for consideration in his refugee claim.

[30] The Officer considered supporting evidence, including letters from LGBTIQ+ organizations and letters from a man with whom A.B. has a continuing romantic relationship. The Officer compared the letters about A.B.'s relationship in his H&C and PRRA applications and noted that they were authored by the same individual. The Officer observed that both letters were identical in content; though the letter submitted with the PRRA application indicated that A.B. had been in this relationship for more than a year and that this individual was aware A.B. was married and had children.

[31] The Officer lessened the probative weight of these two letters because they were not sworn affidavits and there were no identification documents for the author of the letters. The Officer determined that neither A.B.'s submissions nor the letters included detailed information

about their relationship. The Officer concluded that, in absence of additional corroborative evidence of their relationship, such as letters from friends in Canada who were aware of the relationship, this evidence was insufficient to demonstrate that A.B. was likely in a relationship.

[32] In assessing the letters from LGBTIQ+ organizations, the Officer accepted that A.B. identified himself as bisexual to these organizations and had attended meetings. The Officer gave these letters some weight as evidence of his sexual orientation. The Officer noted though, that these letters did not mention A.B.'s same-sex relationship and, in absence of other corroborative evidence and a reasonable explanation for his failure to present his sexual orientation as a factor during his refugee claim, the Officer found A.B.'s involvement in these organizations was insufficient evidence of his sexual orientation.

[33] The Officer concluded that the evidence A.B. had adduced was insufficient to show he was bisexual, was in a same-sex relationship, would likely enter into same-sex relationships if he returned to Rwanda or Uganda, or that he would likely experience discrimination or difficulties if he were to leave Canada due to his sexual orientation.

(3) HIV positive status

[34] In the reasons for the PRRA decision, the Officer observed that a risk to life as defined by section 97 of the *IRPA* did not include assessment of risk caused by the inability of a country to provide adequate health or medical care. For purposes of the PRRA application, the Officer assessed whether A.B. would experience persecution with respect to access to medical care.

[35] The Officer considered A.B.'s submissions that adequate medical care for his health condition was unavailable in either Rwanda or Uganda because drugs were not readily available except in cities or at main hospitals and that, as an HIV positive individual, he would become an outcast in Uganda and Rwanda. As supporting evidence, A.B. provided a letter from his family doctor, a letter from the Black Coalition for Aids Prevention, and a letter from a support worker for Africans in Partnership Against Aids [APAA] who had provided counselling sessions to A.B.

[36] The letter from A.B.'s family doctor stated that disruptions to his treatment would lead to an increase in his HIV viral load, poor control of his HIV infection, and possibly to the development of AIDs and other opportunistic infections that arise when patients are immunocompromised. This letter also stated that A.B.'s treatment was unavailable in Rwanda and Uganda and, should he be deported to Rwanda or Uganda, his physical and mental health would deteriorate. The Officer found little evidence that A.B.'s family doctor had expertise regarding the healthcare system in Rwanda.

[37] The Officer considered the letter from the Black Coalition, which stated that A.B. would be unable to access effective healthcare and HIV treatment in Rwanda and the loss of his support system in Canada would have a significant impact on his health. The Officer found little evidence that the author of this letter had expertise about the healthcare system in Rwanda.

[38] The Officer also considered the APAA letter, which stated that A.B. feared the stigma, discrimination, rejection, and isolation he would face from society and his family members if

they found out he is HIV positive. This letter also stated that A.B.'s deportation would aggravate his overall physical, emotional and mental well-being.

[39] The Officer accepted that the stress of leaving Canada would cause A.B. some difficulties and gave this factor strong weight. The Officer noted though, that A.B.'s wife and children lived in Rwanda and they would likely provide him with emotional support. The Officer determined that, since A.B. had shown a willingness to volunteer in community organizations, it was reasonable that he would do so in Rwanda and develop a support network.

[40] The Officer also accepted that A.B. was HIV positive but determined that he had not provided evidence from relevant health authorities in Rwanda and Uganda confirming whether acceptable treatment was available in either country. In the Officer's view, there was insufficient evidence that A.B. could not continue to access adequate medication.

[41] The Officer consulted reports from the World Health Organization [WHO] and from the U.S. Department of State indicating that access to care services for HIV have been improving and that the number of available medical facilities providing antiretroviral therapy have increased in Uganda. The Officer determined that treatment for HIV was available in Rwanda.

[42] The Officer stated that A.B. would likely return to Rwanda because he is a citizen of Rwanda, his family lives in Rwanda, he operated a business in Rwanda, and his country of removal for his PRRA application was Rwanda. The Officer acknowledged that, although

individuals with HIV/AIDS in Rwanda experienced some discrimination, the level of discrimination would be insufficient to prevent A.B. access to adequate treatment.

B. *H&C*

(1) Ugandan Citizenship

[43] The Officer noted A.B.'s statement that although he was born in Uganda, he was not a Ugandan citizen because his parents were both born in Rwanda, and under Ugandan law he could not became a citizen by birth unless his parents were Ugandan citizens at the time of his birth. A.B. stated that his parents were Rwandan refugees living in Uganda, but they never acquired Ugandan citizenship. The Officer acknowledged the submission by A.B.'s representative that A.B.'s parents possibly used fraudulent documents indicating they were Ugandan citizens to be able to send him to Uganda to receive a better education free from discrimination.

[44] The Officer reviewed certified true copies of A.B.'s Rwandan passport, his Rwandan identity card, and a copy of his birth certificate from Uganda, showing that his parents were Ugandan citizens. The Officer referenced the RPD decision, which said that, under Ugandan citizenship laws, A.B. was also a citizen of Uganda. The Officer found A.B. had supplied little supporting evidence to counteract the information listed on his birth certificate and concluded that A.B. was a citizen of both Rwanda and Uganda.

(2) State persecution in Uganda

[45] The Officer considered the RPD's remark that when A.B. was asked if he feared Ugandan authorities, he could only cite his fear of Rwandan authorities and their collaboration with Ugandan authorities. The Officer also considered news articles showing that Rwandan refugees and political exiles in Uganda had been kidnapped and that Rwandan authorities were suspected of being responsible for disappearances and killings. The Officer concluded A.B. would not be perceived as a political opponent and targeted by Rwandan authorities.

(3) Sexual orientation

[46] The Officer found conditions for LGBTIQ+ individuals in Rwanda were not as severe as those in Uganda, where homosexuality was criminalized. The Officer referenced a U.S. Department of State report which stated that, while LGBTIQ+ individuals experienced discrimination in Rwanda, government officials had expressed support for the protection of their rights.

(4) HIV positive status

[47] The Officer considered WHO and U.S. Department of State country condition reports about the availability of antiretroviral therapy. These reports stated that although the law prohibited discrimination against persons with HIV/AIDS, in reality discrimination was common, inhibiting individuals from seeking treatment. The Officer concluded that, while there was little evidence that antiretroviral treatment was unavailable in Uganda, A.B. would likely

experience challenges in accessing medical treatment because there was widespread and pervasive discrimination in Uganda against HIV positive individuals.

(5) A.B.'s mental health

[48] The Officer considered a letter from Dr. Pitiakoudis, a psychologist, which stated that A.B. suffered from posttraumatic stress disorder [PTSD] as a result of being detained and tortured by Rwandan law enforcement officials. This letter also stated that, if A.B. was forced to return to Rwanda his symptoms could be exacerbated, and his psychological well-being would deteriorate and cause significant distress and harm. The Officer accepted that A.B. met the criteria for PTSD.

[49] The Officer was not satisfied that A.B. was receiving treatment for his PTSD symptoms. The Officer observed that the psychological report was written after only one visit with A.B. and it did not recommend a treatment plan; nor did it indicate that A.B. would receive follow-up treatment. The Officer found it was unclear whether it was more likely than not that A.B.'s PTSD symptoms would deteriorate if he returned to Rwanda. The Officer noted that A.B. had supplied little evidence that he would be unable to access counselling services in Rwanda if required.

[50] The Officer accepted that A.B. would likely experience some stress and anxiety about returning to Rwanda as would most individuals who face the risk of deportation. The Officer observed that, while A.B. had developed a strong support network in Canada, he also had strong family ties to Rwanda. The Officer noted that A.B. was resilient and willing to seek support

when needed. The Officer considered that A.B. was familiar with life in Rwanda as he had a family, friends and owned a business there. In the Officer's view, these factors might help mitigate some of the psychological difficulties he would experience on return to Rwanda.

(6) Establishment, etc.

[51] The Officer noted that A.B. had been living in Canada for approximately one year and nine months. He supplied letters of support showing that, during this time, he had been a member of several community organizations. The Officer further noted that, although he was initially supported by the Ontario Disability Support Program, he began working as a janitor in early January 2018. The Officer gave strong weight to his community involvement and support network in Canada and some weight to his establishment in Canada. The Officer found little evidence of strong family ties in Canada.

[52] The Officer accepted that leaving his network in Canada would likely cause some difficulties for A.B, particularly with his health condition. The Officer noted though, that A.B. had been born in Uganda, completed post-secondary education, started a business in Uganda, and one of his children and his three siblings lived in Uganda. The Officer further noted that A.B. also had lived for years in Rwanda where he had his own business and strong family ties. The Officer concluded that A.B. would receive help from a strong support network if he were to return to Rwanda where his wife and children remained. The Officer gave strong weight to A.B.'s family ties in Rwanda and Uganda.

[53] The Officer noted that A.B. was in a romantic relationship with a man in Canada. The Officer found A.B. had supplied insufficient evidence of this relationship. In the Officer's view, A.B. would not experience difficulties in leaving Canada due to this factor.

[54] The Officer also noted that A.B. has a niece in Canada who had provided a letter of support. The Officer found there was insufficient detailed information about the extent of their relationship. The Officer determined that A.B. would not experience difficulties in leaving Canada due to this factor.

[55] The Officer remarked that A.B. had provided evidence that his wife and two children lived in Rwanda, and that he also had two children from previous relationships, one of whom lived in Uganda. The Officer determined that, despite A.B.'s submissions that he wished to be physically reunited with his wife and children in Canada, the reunion could also occur in Rwanda. Although A.B. said that his family in Rwanda struggled financially and state authorities threatened them, the Officer found insufficient evidence to support these statements.

[56] The Officer next proceeded to assess the best interests of A.B.'s three minor children, two of whom lived in Rwanda with their mother, while the other child lived in Uganda. According to A.B., it was in the best interests of his minor age children that he stayed in Canada.

[57] The Officer noted A.B.'s claim that the two children who lived in Rwanda witnessed him and his wife being threatened and arrested and had seen the impacts of being tortured by state authorities. The Officer found there was insufficient evidence that the events A.B. alleged in fact

occurred and assigned little weight to his statement that the two children living in Rwanda were in danger because he and his wife were targeted by state authorities. The Officer further found there was little evidence that these two children were not receiving loving care and adequate financial support from their mother. The Officer accepted that the best interests of these two children were to be reunited with their father. There was, in the Officer's view, insufficient evidence that A.B. would be unable to return to Rwanda and provide them with loving care and support.

[58] As to A.B.'s minor daughter who lived with her mother in Uganda, the Officer found little evidence that she was unwell and that it was in her best interests that her father remained in Canada. The Officer further found A.B. had provided few details about the extent of his involvement with his daughter in Uganda. The Officer concluded that it would likely be in her best interests to be able to communicate with her father, have him visit her, and receive financial support from him.

C. *PRRA*

(1) State persecution in Rwanda

[59] The Officer noted that A.B. had previous passports and that a friend had assisted him in obtaining a United States visa. The Officer questioned why he had not attempted to leave Rwanda at an earlier date.

[60] The Officer remarked that A.B. had lived in the United States prior to entering Canada and drew a negative inference from his failure to seek protection in the United States. Noting that this fact alone was not determinative of a PRRA application, the Officer found A.B.'s failure not to seek protection in the United States indicated a lack of subjective fear. The Officer considered a news article indicating that people arriving at the Mexican border seeking asylum have been turned away by immigration officials in the United States; the Officer found little indication that this situation applied to A.B. as he was already living in the United States.

(2) Sexual orientation

[61] The Officer examined a country condition report concerning Rwanda and, while accepting that some discrimination against LGBTIQ+ individuals persisted, the Officer determined that it did not rise to the level of persecution. The Officer found little evidence that bisexual men experience persecution in Rwanda.

IV. Standard of Review

[62] The Supreme Court of Canada recently recalibrated the framework for determining the applicable standard of review for administrative decisions on the merits.

[63] The starting point is the presumption that a standard of reasonableness applies in all cases and a reviewing court should derogate from this presumption only where required by a clear indication of legislative intent, or when the rule of law requires the standard of correctness to be applied (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10,

16 and 17 [*Vavilov*]; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 27). Neither circumstance is present in this case to justify a departure from the presumption of reasonableness review.

[64] Reasonableness review is concerned with both the decision-making process and its outcome. It tasks the Court with reviewing an administrative decision not only for the existence of internally coherent reasoning and the presence of justification, transparency and intelligibility. It also tasks the Court with determining whether the decision is justified in relation to the relevant factual and legal constraints that bear on the decision maker (*Vavilov* at paras 85, 86 and 99; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[65] If 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; nor is it the function of the reviewing court to reweigh the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61; *Vavilov* at para 125).

[66] The applicable standard of review for an officer's decision whether to hold an oral hearing for an H&C decision is a matter of procedural fairness (*Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at paras 20 and 30 [*Baker*]). The duty of fairness recognizes that meaningful participation can occur in different ways and in different situations (*Baker* at para 33). While an oral hearing is not a general requirement for H&C decisions (*Baker* at para 34), fundamental justice requires that an oral hearing be held when an

H&C decision is based on an adverse creditability finding (*Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at para 59 [*Singh*]).

[67] The standard that applies to an officer's decision not to hold an oral hearing requires the Court to determine if the process followed by the officer achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115; *Vavilov* para 77).

[68] The analytical framework is not so much one of correctness or reasonableness but, rather, one of fairness and fundamental justice. An issue of procedural fairness "requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation" (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74).

[69] The applicable standard of review for an officer's decision whether to hold an oral hearing in the context of a PRRA application continues to be a product of the Court's characterization of the issue. Some decisions apply a correctness standard of review because the issue is characterized as a matter of procedural fairness. Others apply a reasonableness standard of review because the issue is viewed as a question of mixed law and fact involving interpretation of paragraph 113(b) of the *IRPA* and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] (*Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 paras 10 to 13; *Huang v Canada (Citizenship and Immigration)*,

2018 FC 940 at para 12 [*Huang*]). In my view, whether an oral hearing is required in a PRRA determination raises a question of procedural fairness.

V. The Parties' Submissions – H&C Decision

A. *A.B.'s Submissions*

[70] A.B. says the Officer unreasonably assessed the evidence, particularly the medical evidence in support of his claim of torture and abuse at the hands of Rwandan authorities. According to A.B., the Officer assessed each piece of evidence individually and found it lacking, despite the Officer's statement that the evidence had been reviewed cumulatively.

[71] A.B. states that the Officer did not reveal why he or she accepted Dr. Keefer's finding that his pattern of injuries were consistent with the information provided in his basis of claim narrative, but did not believe his version of how he suffered the injuries. A.B. further states that the Officer accepted that he met the criteria for PTSD, but seemingly gave this diagnosis little weight because the Officer was not satisfied that he was receiving treatment for PTSD symptoms.

[72] In A.B.'s view, the Officer made erroneous credibility findings about his sexual orientation and the dangers he would face if he were to return to either Uganda or Rwanda. A.B. contends that the Officer made an unfounded plausibility finding about his departure from Rwanda. According to A.B., these findings should have been addressed in an oral hearing.

[73] A.B.'s notes that sworn testimony enjoys a presumption of truth and the Officer failed to provide justified, transparent, and intelligible reasons as to why he or she did not believe his affidavit evidence. Rather, A.B. says, the Officer focused on the absence of additional corroborative evidence but did not properly assess the corroborative evidence that was present.

[74] A.B. further notes that, while the Officer accepted the summonses as some evidence that he had the attention of Rwandan authorities, the Officer reduced the probative weight of them because they were not translated by a certified translator or accompanied by an affidavit. A.B. accepts that, while it would have been better if the summonses had been translated through a certified translator or accompanied by an affidavit, they were translated according to the Rules of the Refugee Protection Division.

[75] A.B. argues that the Officer did not consider his explanation and evidence about the reasons he decided to move his business operations away from Uganda, namely, to avoid crossing the border and continued suspicion by Rwandan authorities. According to A.B., the Officer did not deal in substance with his explanation. A.B. says the Officer made a plausibility finding that he did not try to avoid being connected to his business because the Rwandan company registration form listed him as managing director. In A.B.'s view, since Rwandan authorities were suspicious of his activities in Uganda, it was reasonable for him to believe that if he reduced his operations in Uganda, any suspicion of his activities there would cease.

[76] A.B. says the Officer unreasonably drew a negative inference from his failure to disclose his sexual orientation during the RPD hearing. A.B. explains that, when he was informed his

claim would be only against Uganda, his lawyer asked for the hearing to be reconvened to allow him to make a claim against Uganda, but this request was refused. According to A.B., it is not unreasonable that he would not have spontaneously admitted to his sexual orientation when it was something that he had kept secret for years.

[77] In A.B.'s view, the Officer unreasonably rejected the letters submitted by his same-sex partner in Canada. A.B. says the Officer did not explain why the content of these letters was not accepted or why the author of the letters was not contacted. A.B. also says it was unreasonable for the Officer to give little weight to the contents of the letters that demonstrated his continued participation in the LGBTQ+ community in Toronto and to focus on what was not in the letters, namely, corroboration of his relationship with his partner in Canada.

[78] A.B. submits that the Officer made a negative plausibility finding on his departure from Rwanda to the United States. The Officer relied on a U.S. Department of State report for the finding that state authorities have refused to issue passports or have confiscated passports of political opponents and their families. A.B. says the same report stated that the government generally respected the right to foreign travel. In A.B.'s view, there was insufficient information in the record on which to base a plausibility finding and that this issue ought to have been addressed in an oral hearing.

[79] According to A.B., the numerous credibility and veiled credibility findings made by the Officer violated his ability to meaningfully present his case. A.B. says the Officer made a negative credibility finding of the central issue in his claim that Rwandan authorities tortured

him and his wife due to imputed political opinion. A.B. further says Dr. Keefer's medical report corroborated the nature of the torture and injuries he endured. While the Officer accepted this report, the Officer did not believe that the events took place. This central assessment, according to A.B., required an oral hearing, particularly since this was the first time the evidence on Rwanda was considered.

B. *The Respondent's Submissions*

[80] In the respondent's view, the Officer indicated why he or she agreed with Dr. Keefer's observations about certain wounds but did not believe A.B.'s story. The respondent says that, while the Officer observed that the various scars Dr. Keefer noted did not controvert the story, the observations did not suggest who or what caused the injuries or for what reasons.

[81] According to the respondent, the Officer could look at the context of the PTSD diagnosis. The respondent says there is no blanket ban on looking at the circumstances surrounding a diagnosis, such as history and treatment, to weigh that diagnosis as evidence of hardship. The respondent states it was open to the Officer to reduce the weight of the diagnosis as evidence suggesting hardship.

[82] According to the respondent, the Officer did not make credibility findings on A.B.'s sworn statement; rather, the Officer's decision was based on the insufficiency of evidence to corroborate A.B.'s narrative in his affidavit. The respondent says the internal inconsistency in one of the summonses left it open to the Officer to give them little weight regardless of the translation issues the Officer identified.

[83] As to A.B.'s argument that the Officer failed to address his decision not to disclose his sexual orientation to the RPD, the respondent points out that the Officer provided a lengthy explanation in the reasons. According to the respondent, the Officer's logical assessment was clearly laid out in the reasons.

[84] The respondent says the Officer accepted the letters from A.B.'s alleged same-sex partner in Canada and from Toronto LGBTQ+ organizations. The respondent says that the Officer gave them little weight because they did not say that A.B. was homosexual and that his current same sex relationship was sexual.

[85] In the respondent's view, the Officer did not ignore the U.S. Department of State report stating that the Rwandan authorities generally respected the right to travel. The respondent says it was not unreasonable for the Officer to question why the authorities would allow A.B. to leave the country, considering that he alleged to have been singled out for persecution at the border. The respondent states that, while A.B. characterizes this finding as one of plausibility, this is of no importance because the finding is tied to the facts in his personal circumstances. The Officer did not make a presumption that state authorities are always rational actors.

[86] As to A.B.'s argument that the Officer made credibility findings that ought to have been raised at an oral hearing, in the respondent's view the only credibility finding discernible in the Officer's reasons is about one of the several excuses A.B. made for why he did not claim his sexual orientation as grounds for fear in his refugee claim. According to the respondent, this is not a major point because the other excuses had problems and were overshadowed by the more

fundamental problem of a lack of objective proof that LGBTQ+ and HIV positive people were subjected to hardship in Rwanda.

VI. Analysis – H&C Decision

[87] Subsection 25(1) of the *IRPA* gives the Minister the discretion to exempt foreign nationals from the ordinary requirements under the *IRPA* if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 10 [*Kanthasamy*]). The underlying purpose of the humanitarian and compassionate relief application process is equitable (*Kanthasamy* at para 31).

[88] An H&C assessment requires an officer to consider the humanitarian and equitable purpose of subsection 25(1) of the *IRPA* and give weight to all relevant H&C considerations in a particular case (*Kanthasamy* at para 33). An officer reviewing an H&C application is not to apply an unduly narrow approach to the assessment of the circumstances raised in the application (*Kanthasamy* at para 45).

(1) Was the Officer's decision to dismiss the H&C application reasonable?

[89] In my view, the Officer adopted an unduly narrow approach to the assessment of the circumstances A.B. raised in his application. The Officer approached the medical evidence in a piecemeal fashion, individually assessing each piece of evidence, despite the Officer's statement that the evidence had been reviewed cumulatively. The Officer's reasons are structured into a

pattern which required corroborating evidence to substantiate each medical report, rather than focusing on the corroborative evidence that the reports themselves provide. The Supreme Court specifically rejected this approach in *Kanthasamy* (at paras 45 and 47).

[90] The Officer's conclusion cannot flow from the analysis in the reasons. This lack of internal coherence is particularly evident in the Officer's understanding of Dr. Keefer's medical report. The Officer accepted that his medical assessment was reliable and accepted the content of the medical report; namely, that A.B.'s injuries were consistent with the narrative he provided in his basis of claim form, particularly the pattern of injuries to his feet. Yet, the Officer was not satisfied that this piece of evidence was sufficient to show that A.B. was likely tortured by state authorities who accused him of subversion.

[91] The Officer's reasons do not demonstrate why he or she disbelieved A.B.'s sworn evidence which detailed how he suffered the injuries. Having accepted Dr. Keefer's report, it is unclear why the Officer would have required A.B. to adduce further corroborative evidence such as an affidavit from his wife who had witnessed him being taken from his home or a medical report indicating that he had received medical treatment for his injuries.

[92] Although the Officer accepted that A.B. met the criteria for PTSD, the Officer impugned this diagnosis by stating that Dr. Pitiakoudis' letter was written after only one visit with A.B. and did not indicate whether he would be receiving treatment for PTSD symptoms or recommend a treatment plan. The Officer did not explain why the letter's silence concerning follow-up

treatment had a bearing on his or her decision to afford this evidence little weight. The Officer's approach to Dr. Pitiakoudis' evidence lacks justification and runs afoul of *Kanthasamy* (para 47).

[93] The Officer's findings are contradictive and unjustifiable. The Officer's approach to the medical evidence alone constitutes an error that goes to the heart of the decision and affected the overall balance of the decision (*Williams v Minister of Immigration, Refugees and Citizenship*, 2018 FC 241 at para 26).

(2) Did the Officer's decision not to convoke an oral hearing violate procedural fairness?

[94] An oral hearing is not a general requirement for H&C decisions (*Baker* at para 34). Fundamental justice, however, requires that an oral hearing be held when an H&C decision is based on an adverse credibility finding (*Singh* at para 59; *Duka v Canada (Citizenship and Immigration)*, 2010 FC 1071 at para 13 [*Duka*]).

[95] Determining whether veiled credibility findings are present in a decision requires going beyond the actual words used by an officer; it is necessary to determine the basis for the decision even if the officer expressly declares he or she is not making a finding on credibility. The Court must first determine whether a credibility finding was made, explicitly or implicitly. If so, the Court must determine if the issue of credibility was central to or determinative of the decision (*Majali v Canada (MCI)*, 2017 FC 275 at paras 30 and 31).

[96] In my view, the Officer made findings with respect to A.B.'s credibility that were central to his application, in particular given the Officer's assessment of Dr. Pitiakoudis' report and that of Dr. Keefer. I agree with A.B. that the Officer simply disbelieved his version of events. I also agree with A.B. that the Officer's reasons do not show why the Officer disbelieved his sworn evidence, which detailed how he suffered the injuries.

[97] The Officer made veiled credibility findings about A.B.'s sexual identity, particularly with respect to his reasons for not disclosing his sexual orientation as grounds for fear in his refugee claim. This was a central issue in A.B.'s H&C application. It was unreasonable for the Officer to draw a negative inference from A.B.'s failure to disclose his sexual orientation during the RPD hearing (*Duka* at para 22; *Leonce v Canada (Citizenship and Immigration)*, 2011 FC 831 at para 10).

[98] The Officer's credibility findings should have been addressed in an oral hearing.

VII. The Parties' Submissions – PRRA Decision

A. *A.B.'s Submissions*

[99] A.B. submits that the Officer unreasonably assessed the evidence in his PRRA application, particularly with respect to Dr. Keefer's evidence of his torture and abuse at the hands of Rwandan authorities. A.B. contends the Officer ignored evidence of widespread stigma and discrimination of bisexual people and people living with HIV in Rwanda and Uganda.

[100] A.B. claims the Officer made unreasonable credibility and plausibility findings not founded on the evidence. According to A.B., the Officer did not consider his explanations, disregarded the context in which he made decisions, and made unfounded plausibility findings about his departure from Rwanda.

[101] A.B. contends that the Officer made unreasonable findings on his subjective fear because the Officer inferred that his continued travel between Rwanda and Uganda signified a lack of subjective fear. A.B. notes that this Court has warned against presumptions of rational action by state officials, particularly when making plausibility findings about enforcement action at a border.

[102] A.B. further contends that the Officer simply disbelieved his version of events and this credibility finding should have been addressed in an oral hearing. Because the Officer did not provide an explanation as to why section 167 of the *Regulations* did not apply, A.B. says the Officer violated his right to procedural fairness.

B. *The Respondent's Submissions*

[103] The respondent says the Officer's assessment of the medical evidence was reasonable. According to the respondent, it was reasonable for the Officer to find Dr. Keefer's medical report did not answer the critical questions of who and what caused the scars on A.B.'s body and why. The respondent agrees with A.B. that one cannot expect a doctor to know how or why an injury occurred, and says this supports the inevitable evidentiary inference that the doctor's report is not corroboration of how or why the injuries occurred.

[104] As to A.B.'s argument that his sworn evidence should have been presumed to be true, the respondent says this runs counter to basic evidentiary law and there is no statutory presumption in the context of a PRRA that sworn evidence is presumed to be true.

[105] In the respondent's view, the Officer did not make credibility findings on the central elements of A.B.'s story. According to the respondent, the only credibility finding discernible in the Officer's reasons was about one of the several excuses A.B. made for why he did not claim his sexual orientation as grounds for fear in his refugee claim. The respondent says this was not a major point since the other excuses had problems and were overshadowed by the more fundamental problem of a lack of objective proof that LGBTQ+ and HIV positive people were subjected to hardship in Rwanda.

[106] As to A.B.'s alleged persecution at the hands of Rwandan authorities, the respondent contends that the Officer did not make credibility findings on A.B.'s sworn evidence. In the respondent's view, the Officer's decision was based on the insufficiency of evidence to corroborate A.B.'s narrative in his affidavit.

VIII. Analysis – PRRA Decision

(1) Was the Officer's decision to dismiss the PRRA application reasonable?

[107] The purpose of a PRRA application is to assess whether the applicant is in need of protection in Canada because removal to his or her country of nationality would subject them to

a danger of torture, a risk to life, or to a risk of cruel and unusual treatment or punishment (*Rasiah v Canada (Minister of Citizenship and Immigration)* 2005 FC 583 at para 15).

[108] The Federal Court of Appeal noted in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, that:

> [11] Assuming there are no issues of criminality or national security, an application under subsection 112(1) is allowed if, at the time of the application, the applicant meets the definition of "Convention refugee" in section 96 of the IRPA or the definition of "person in need of protection" in section 97 of the IRPA (paragraph 113(c) of the IRPA). The result of a successful PRRA application is to confer refugee protection on the applicant (subsection 114(1) of the IRPA).

[109] In the reasons for the PRRA decision (as in the H&C decision), the Officer unreasonably assessed Dr. Keefer's medical evidence. The Officer's reasons for the negative PRRA decision do not show why the Officer disbelieved A.B.'s sworn evidence which detailed how he suffered the injuries. Having accepted Dr. Keefer's report as reliable, it is unclear why the Officer would have required A.B. to adduce further corroborative evidence such as an affidavit from his wife who had witnessed him being taken from his home or a medical report indicating that he received medical treatment for his injuries.

[110] The Officer made unreasonable plausibility findings not founded on the evidence with respect to persecution of A.B. by Rwandan state officials and his departure from Rwanda. The Officer concluded that A.B.'s persecution narrative was implausible because he did not face difficulties obtaining a new passport from the Rwandan government when he travelled to the

United States, nor did he experience difficulties going through security checks at the airport in Rwanda.

[111] This Court has held that a tribunal may make adverse credibility findings based on the implausibility of an applicant's story so long as the inferences drawn can be reasonably said to exist. Plausibility findings should only be made in the clearest of cases and should not be based on a solely Canadian perspective of what is plausible (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7).

[112] In my view, the Officer made unreasonable plausibility findings concerning the Rwandan authorities' behavior. The Officer assumed that the persons A.B. alleged persecuted him were not acting independently and that law enforcement in Rwanda is a coordinated body of government. This evidence was not available to the Officer. This was an unsupported plausibility finding.

(2) Did the Officer's decision not to convoke an oral hearing violate procedural fairness?

[113] While most PRRA applications are dealt with in writing, an oral hearing may sometimes be convoked under paragraph 113(b) of the *IRPA* (*A.B. v Canada (Citizenship and Immigration)*, 2019 FC 165 at para 9). Section 167 of the *Regulations* provides that in determining whether a hearing is required, three factors are considered: whether the evidence (i) raises a serious issue of an applicant's credibility; (ii) is central to the decision; and (iii) if accepted, would justify allowing the PRRA application (*Huang* at para 14). Where the credibility of an applicant could

lead to a negative PRRA decision, section 167 becomes operative (*Tekie v Canada (Minister of Citizenship and Immigration)*, 2005 FC 27 at para 16).

[114] In *Gao v Canada (Citizenship and Immigration)*, 2014 FC 59 [*Gao*], the Court remarked that:

> [32] … in some cases it is difficult to draw a distinction between a finding of insufficient evidence and a finding that the applicant was not believed i.e. was not credible. The choice of words used, whether referring to credibility or to insufficiency of the evidence is not solely determinative of whether the findings were one or the other or both. However, it can not be assumed that in cases where an Officer finds that the evidence does not establish the applicant's claim, that the Officer has not believed the applicant.

[115] A PRRA officer does not make an adverse credibility finding every time he or she concludes that the evidence adduced by an applicant is insufficient to meet the applicant's evidentiary burden of proof (*Herman v Canada (Minister of Citizenship and Immigration)*, 2010 FC 629 at para 17 [*Herman*]). There is a difference between the burden of proof, standard of proof, and the quality of the evidence necessary to meet the standard of proof (*Carillo v Canada (Minister of Citizenship and Immigration*), 2008 FCA 94 at para 16). A PRRA officer can make a negative credibility finding or simply disbelieve the evidence presented by the applicant. This approach is different from not being persuaded that an applicant has met his or her burden of proof on a balance of probabilities, without ever having considered whether the evidence is credible (*Herman*, at para 17).

[116] The jurisprudence establishes that whether an applicant has met his or her legal burden depends on the weight an officer attaches to the evidence. The officer may approach this task by

first assessing credibility, and if found not to be credible, the officer may attach no weight to the evidence. But the officer may either weigh the evidence that he or she has found to be credible or may move directly to weighing the evidence without making any credibility findings (*Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at paras 26 and 27 [*Ferguson*]; *Gao* at paras 35 and 36). As Justice Zinn noted in *Ferguson*:

> [26] If the trier of fact finds that the evidence is credible, then an assessment must be made as to the weight that is to be given to it. It is not only evidence that has passed the test of reliability that may be assessed for weight. It is open to the trier of fact, in considering the evidence, to move immediately to an assessment of weight or probative value without considering whether it is credible. Invariably this occurs when the trier of fact is of the view that the answer to the first question is irrelevant because the evidence is to be given little or no weight, even if it is found to be reliable evidence. For example, evidence of third parties who have no means of independently verifying the facts to which they testify is likely to be ascribed little weight, whether it is credible or not.
>
> [27] Evidence tendered by a witness with a personal interest in the matter may also be examined for its weight before considering its credibility because typically this sort of evidence requires corroboration if it is to have probative value. If there is no corroboration, then it may be unnecessary to assess its credibility as its weight will not meet the legal burden of proving the fact on the balance of probabilities. When the trier of fact assesses the evidence in this manner he or she is not making a determination based on the credibility of the person providing the evidence; rather, the trier of fact is simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered. That, in my view, is the assessment the officer made in this case.

[117] As noted above, the Officer accepted the content of Dr. Keefer's medical report which indicated that A.B.'s injuries were consistent with the narrative he provided in his basis of claim form. The Officer was not satisfied though, that this evidence was enough to show A.B. had been likely tortured by state authorities who accused him of subversion. I agree with A.B. that the

Officer's reasons in the PRRA decision do not show why the Officer disbelieved A.B.'s affidavit evidence which detailed how he suffered the injuries.

[118] In my view, the Officer made credibility findings that were central to A.B.'s PRRA application. The Officer's credibility findings should have been addressed in an oral hearing.

IX. Conclusion

[119] The Officer's decisions with respect to the H&C and the PRRA applications do not fit comfortably with the principles of justification, transparency, and intelligibility. Therefore, each application for judicial review is allowed.

[120] The Officer adopted an unduly narrow approach to the assessment of the circumstances A.B. raised in his applications. The Officer's approach to the medical evidence is an error that goes to the heart of the decisions and affected the overall balance of the decisions.

[121] The Officer made unreasonable assessments of evidence concerning Dr. Keefer's medical evidence of A.B.'s torture and abuse in both the H&C and PPRA decisions. The Officer made unreasonable plausibility findings not founded on the evidence with respect to persecution by Rwandan state officials and A.B.'s departure from Rwanda. The Officer made credibility findings that should have been addressed in an oral hearing under section 167 of the *Regulations*.

[122] Neither party proposed a question for certification.

JUDGMENT in IMM 1842-19 and IMM 1843-19

THIS COURT'S JUDGMENT is that: the applications for judicial review are allowed; the matters are returned for redetermination by a different officer in accordance with the reasons for this judgment; a copy of this judgment shall be placed in each of court file IMM-1842-19 and IMM-1843-19; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1842-19 AND IMM-1843-19
STYLE OF CAUSE:	A.B. v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 20, 2020
REASONS FOR JUDGMENT AND JUDGMENT:	BOSWELL J.
DATED:	APRIL 7, 2020

APPEARANCES:

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