Federal Court Cour fédérale

Date: 20230824

Docket: IMM-9335-22

Citation: 2023 FC 1139

Ottawa, Ontario, August 24, 2023

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

KEIRAN CURTIS ST. BRICE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for a judicial review of a pre-removal risk assessment [PRRA] that was refused on August 19, 2022, wherein the Senior Immigration Officer [the Officer] determined that the Applicant was not at risk upon his return to St. Lucia.

[2] The Applicant is a 31 year-old single male from St. Lucia who is bisexual and cognitively impaired. The Applicant fears a risk of persecution because of his sexual orientation.

[3] The PRRA Officer accepted that the Applicant is a bisexual man with cognitive impairments. Nevertheless, the PRRA application was refused on the basis that the Applicant would receive state protection in St. Lucia, a country where same-sex activities are criminalized and stigmatized.

[4] For the reasons below, this application for judicial review is allowed.

II. Background Facts

[5] The Applicant and his twin brother were born on November 22, 1991, from an interfamily sexual abuse that occurred when his mother was fifteen years old. She attempted to terminate the pregnancy by drinking a toxic drink intended to induce an abortion, but she was not successful.

[6] Growing up in St. Lucia with undiagnosed cognitive impairments and as a boy who is attracted to other boys, the Applicant was often socially ostracized, verbally abused, and physically assaulted.

[7] Around the age of 15, he was formally “outed” when he was caught engaging in sexual activity with a male partner. The Applicant moved to different parts of St. Lucia to attempt to

hide his sexual orientation; however, because of the small geographical location and population size of St. Lucia, the word quickly spread around that he was attracted to other men.

[8] This resulted in increasing threats, including armed men attending twice at his home who threatened his life.

[9] The first time that he was threatened by armed men, the Applicant sought help from the police in Dennery, St. Lucia while he was staying in hiding with his aunt. However, he was told by the police that they did not help "people like him."

[10] He then came back to his family because his aunt's sons and neighbours found out about his bisexuality. He told the police about the issue and thought the police would realize how serious and out of control the situation was, but the police still had no interest in assisting him.

[11] On March 20, 2011, men with guns returned to his home. The Applicant later went to a police station with his mother and stepfather but again did not receive any assistance.

[12] Realizing that he could no longer live safely in St. Lucia, the Applicant decided to leave the country.

[13] On or about March 24, 2011, the Applicant entered Canada and submitted a claim for refugee protection. This claim was rejected by the Refugee Protection Division [RPD] on August 10, 2012, for credibility-related issues and because the Applicant had not demonstrated

that state protection was not accessible to him. At this stage, the RPD did not have access to the medical evidence that was before the PRRA Officer. Moreover, the ground of the particular social group of persons with disabilities was not before the RPD because his cognitive impairments were only diagnosed in mid-2022.

[14] On February 6, 2012, the Federal Court denied the Applicant's application for leave of the RPD's decision and on November 21, 2019, the Applicant filed a first PRRA application, which was denied on September 16, 2020.

[15] This refusal was set aside on consent and remitted to a new Officer. The redetermination decision was rendered on August 19, 2022, and that decision forms the basis of this application for judicial review.

III. PRRA Decision

[16] On August 19, 2022, the Applicant's PRRA application was rejected. The Officer determined that the Applicant would not be at risk of persecution, subject to a danger of torture, or face a risk to his life or a risk of cruel and unusual treatment or punishment if returned to St. Lucia.

[17] In support of this PRRA application, counsel for the Applicant submitted that there is new evidence indicating a lower level of intellectual functioning, therefore giving rise to a second nexus to the Convention: the particular social group of persons with disabilities.

[18] For the redetermination of that decision, the Applicant submitted new evidence including a psychiatric assessment dated January 15, 2022, and another undated psychological assessment report.

[19] According to this new evidence, the Applicant has an IQ of 68 and "is functioning intellectually in the Intellectually Deficient range as compared to others his age (2nd percentile)" with overall academic skills "equivalent to a typical 4th grade student."

[20] In light of this new evidence regarding the Applicant's intellectual disability, the PRRA Officer accepted the Applicant's argument that no weight should be attributed to the old credibility findings made by the RPD.

[21] Nevertheless, the Officer still gave considerable weight to the risk and state protection findings made by the RPD, which indicated that "adequate state protection in St. Lucia would be reasonably forthcoming for the claimant should he be in need of such protection". The RPD had found that the evidence submitted at the time did not demonstrate the state's inability to protect the LGBTQ+ community.

[22] In analyzing the evidence submitted in the PRRA application, the Officer came to a similar conclusion.

[23] The Officer found that even if homosexuality is a criminal offence under section 133 of St. Lucia's Criminal Code [CC133], the evidence submitted did not demonstrate that the

presumption of state protection was rebutted because of CC133. The Officer noted that the "submitted country condition documentation, corroborated by independent research is unanimous in stating that CC133 is not enforced by St. Lucian authorities or law enforcement, and that no arrests in the country have occurred under same."

[24] The Officer further found that "while documentary evidence does indicate a certain resistance to remove CC133 from the Criminal Code, there are no indications that authorities are looking to expand such provisions or to enforce the existing provisions".

[25] The Officer also noted that St. Lucian employment law and its *Domestic Violence Act* provide anti-discrimination protection to people with same-sex orientation, and that therefore, the existence of an unenforced discriminatory law (CC133) is insufficient to demonstrate persecutory intent of such individuals by the state.

[26] Further, regarding the Applicant's claim that because he is also disabled, the homophobic criminal statute will be enforced toward him, the Officer found this assertion to be speculative, as not supported by the evidence. The Officer noted that the Applicant had not demonstrated that the intersectional identity of cognitive impairment in conjunction with sexual orientation would result in future enforcement.

[27] With regards to state protection, the Officer found that country condition documentation indicates that St. Lucia is a multiparty parliamentary democracy where the Royal Saint Lucia Police Force is responsible for law enforcement and maintenance of order within the country.

[28] Relying on the case of *Canada (Citizenship and Immigration) v Kadenko*, 1996 CanLII 3981 (FCA) [*Kadenko*] and on the evidence of family members and medical professionals, the Officer held that the Applicant needed to demonstrate more than mere interactions with his country's authorities to demonstrate a lack of state protection. The Officer found the evidence submitted by the Applicant to be vague, lacking in detail and not supported by corroborating evidence. For instance, the Officer held that no reasons were provided as to why the Officer refused to assist him. The Officer further noted that consideration had been given to the evidence regarding the Applicant's intellectual disability and interactions with Canadian law enforcement but had found that these assessments did not indicate his intellectual disabilities or past experiences were an impediment to his ability to communicate with either Canadian or St. Lucian law enforcement. The submission from his mother neither indicated that the Applicant's condition was a factor in his failure to obtain protection.

[29] The Officer afforded no weight to the Applicant's brother's letter stating that he was beaten because of his brother's (the Applicant) sexual orientation. The Officer held that this letter was not indicative that St. Lucian law enforcement would be unwilling to assist the Applicant should protection be sought.

[30] The Officer also found that even though the Applicant's mother received threats targeting the Applicant, the evidence submitted did not demonstrate an inability of the state to protect its citizens from the indicated criminal acts. While the country condition documentation indicates that CC133 is not enforced, evidence does not indicate that the other sections of the Criminal Code are not enforced by St. Lucian law enforcement. Further, no evidence demonstrates that

these family members sought protection from St. Lucian law enforcement nor provide a reasonable explanation as to why they did not do so.

[31] Based on the medical assessments submitted as additional evidence in this PRRA redetermination, the Officer found that it was reasonable to conclude that the Applicant's intellectual disabilities had manifested while he was in St. Lucia. Nevertheless, the Officer held that the submitted evidence did not demonstrate that the effects of his intellectual condition resulted in discrimination or persecution while the Applicant was in St. Lucia.

[32] The Officer also found that there was no evidence that country conditions regarding the treatment of people with disabilities have deteriorated since the Applicant's departure from the country.

[33] While the risks related to the Applicant's condition were acknowledged and considered by the Officer, he determined that in and of themselves those intellectual issues did not constitute a forward-looking risk bringing the Applicant within the definition of a person in need of protection under 97 of the *Immigration and Refugees Protection Act*, SC 2001, c. 27 [IRPA], nor would he be denied treatment or care based on an enumerated Convention ground under 96 of the IRPA.

[34] Overall, the Officer concluded that the submitted evidence was insufficient to rebut the presumption that adequate protection would be available to those who identify as LGBTQ+ or to

show that people situated at the intersection of sexual orientation and mental disability have trouble accessing such protection.

[35] The Officer also held that the Applicant had not provided sufficient evidence of a personalized forward-looking risk for him in St. Lucia. There is also less than a mere possibility that the Applicant faces persecution as described in section 96 of the IRPA.

IV. Issues and Standard of Review

[36] Having considered the parties' written and oral submissions, the evidence of the record and the applicable jurisprudence, this matter raises the following determinative issues:

1. Did the PRAA Officer breach the Applicant's right to procedural fairness?
2. Is the PRRA Officer's decision finding that the Applicant has not rebutted the presumption of state protection reasonable?

[37] On the issue of procedural fairness, the Applicant submits that the PRAA Officer relied on independent research not disclosed to the parties. The standard of review applicable on that issue is subject to a "reviewing exercise… 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Aboudlal v Canada (Citizenship and Immigration),* 2023 FC 689 at para 32 citing *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPRC*] at para 54; *Ganeswaran v Canada (Citizenship and Immigration),* 2022 FC 1797 at paras 21-28; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship),* 2020 FCA 196 at para 35).

[38] The use of “undisclosed independent research” by the Officer affects the Applicant’s right to know the case to meet and have a full and fair opportunity to respond (*CPRC* at paras 41, 54-56).

[39] Under a standard similar to that of correctness, this Court owes no deference to the decision maker and conducts its own analysis. If a breach of the duty of fairness is found, the decision must be remitted back to a different decision maker, unless the outcome of the application is “legally inevitable” (*Jayasinghe Arachchige v Canada (Citizenship and Immigration)*, 2020 FC 509 at para 78).

[40] The applicable standard of review on the substance of the decision is one of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. A reasonable decision “is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85).

[41] For the reviewing court to intervene, the challenging party must satisfy the court that “there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency”, and that such alleged shortcomings or flaws are “more than merely superficial or peripheral to the merits of the decision” (*Vavilov* at para 100).

[42] In this particular case, the Applicant submits that because the Officer applied the wrong legal test, ignored relevant evidence and applied illogical reasoning, it is neither justifiable nor intelligible (*Vavilov* at paras 104). As explained in *Vavilov*, "the reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" and "the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise" (*Vavilov* at paras 104, 126).

V. Analysis

A. *The role of a PRRA officer*

[43] Under section 113(a) of the IRPA, an applicant whose claim to refugee protection has been dismissed may present only new evidence that arose after the denial or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the dismissal. The role of a PRRA officer is therefore to consider that new evidence and assess it under the appropriate tests as set out in sections 96 and 97 of the IRPA to determine whether an applicant has demonstrated a well-founded fear of persecution based on a Convention ground under section 96, or that he is a person in need of protection under section 97.

[44] An officer must therefore look at the new country conditions, verify if they have changed since the first time the application was assessed, and then see if there would be a possibility that the claim would be allowed under sections 96 or 97 of the IRPA.

[45] In *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1022, regarding the role of a PRRA officer, Justice Gagné (as she then was) held that:

> [50] A PRRA officer is not a quasi-judicial body, nor does he or she have an appellate function when faced with a RPD decision. The PRRA officer is an employee of the Minister, acting within his or her employer's discretion (insofar as it is circumscribed by the Act and the Regulations). The PRRA officer must give deference to the RPD's determination of the claim, to the extent that the facts remain unchanged from the time it had rendered its decision. Instead, the PRRA officer is specifically looking as to whether new evidence has come to life since the RPD's rejection of the claim for determining a risk of persecution, a danger of torture, a risk to life or a risk of cruel and unusual treatment or punishment. The underlying rationale for paragraph 113(a) of the Act is not appellate in nature but rather to assure the claimant has a last chance to have any new risks of refoulement (not previously assessed by the RPD) assessed before removal can take place.
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> [51] The language of paragraph 113(a) is similar to that of subsection 110(4). The latter provision sets out that the RAD can only declare evidence admissible if it arose after the RPD's rejection of the claim or if it was not reasonably available or if the person could not reasonably have been expected in the circumstances to have presented it (unlike for paragraph 113(a), the French version of subsection 110(4) does not use "reasonably have been expected" but rather the equivalent of "normally have been expected"). The RAD, however, considers this evidence in a very different light than does the PRRA officer; it is doing so in an appellate review of the correctness of the RPD's determination.
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> [Emphasis in the original.]

[46] In *Abdollahzadeh v Canada (Citizenship and Immigration)*, 2007 FC 1310, Justice Noël also held that:

> [27] What Parliament does not want is to have the PRRA application become a disguised second refugee claim. By limiting the evidence to new information for a refused refugee claimant's PRRA application, it is clearly indicated that the intended objective is to analyze the application for protection taking into consideration the situation after the RPD decision, all subject to

> certain adaptations regarding some earlier evidence according to the wording of section 113 of the IRPA and the interpretation given by Sharlow J. and Mosley J.

B. *The Officer breached procedural fairness by relying on undisclosed independent research*

[47] The Applicant argues that the Officer wrongly relied on "independent research" without disclosing it to the Applicant prior to rendering his decision. The Applicant further submits that there was no notice, no ability to know the case to meet or to respond to this independent research, which prevented him to present the full extent of the risks to him in St. Lucia.

[48] According to the Applicant, it is not clear what sources the Officer relied upon to conduct this independent research and conclude that the research is "unanimous" in saying that CC133 is not enforced, as the only sources referenced to in the PRRA decision are the St. Lucia's Criminal Code and the webpage of Outright International, which do not speak to this matter. Those two discernible extrinsic documents do not refer to any comments about CC133 not being enforced nor does it state that no arrests have been made under CC133.

[49] The Applicant also argues that according to the Operational Manual relating to processing pre-removal risk assessment applications, the Officer ought to have shared this extrinsic evidence with him before rendering his decision. Unlike documents from the Immigration and Refugee Board, the UNHCR or Human Rights Watch, which do not need to be disclosed, the Outright International website is not an identified commonly cited source and the Officer therefore ought to have explained why he chose to use these sources instead of the commonly cited ones, and ought to have provided the Applicant with a copy.

[50] The Respondent argues that there was no breach of procedural fairness in this case as the two impugned sources merely confirmed and corroborated the materials that the Applicant had submitted. The information contained in these sources is also not "novel and significant" enough to affect the claim and trigger a duty to disclose (*Mancia v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9066 (FCA), [1998] 3 FC 461 [*Mancia*] at paras 22, 27; *Harripersaud v Canada (Citizenship and Immigration)*, 2022 FC 1368 [*Harripersaud*] at paras 54-57).

[51] In my view, the failure of the Officer to notify the Applicant on the external sources that he would consult in this case breached the Applicant's right to procedural fairness.

[52] The first evidence that is said to be "independent research" is St. Lucia's Criminal Code:

> 133. BUGGERY (1) A person who commits buggery commits an offence and is liable on conviction on indictment to imprisonment for— (a) life, if committed with force and without the consent of the other person; (b) ten years, in any other case. (2) Any person who attempts to commit buggery, or commits an assault with intent to commit buggery, commits an offence and is liable to imprisonment for 5 years. (3) In this section "buggery" means sexual intercourse per anus by a male person with another male person.

[53] The second evidence that is said to be "independent research" is the outrightinternational.org website. The PRRA Officer refers to it in his decision as such:

> Independent research also indicates that St. Lucia's Domestic Violence Act which was passed in March 2022 made it "one of the few countries in the Caribbean to provide legal protections to people in same-sex relationships who experience domestic violence —and the only country in the region to explicitly prohibit discrimination based on sexual orientation and gender identity' in the implementation of such laws".

[54] There are no issues relating to the information contained in the first source. CC133 is not "novel and significant" information that evidenced a change in the general country conditions that may have affected the disposition of the case (*Harripersaud* at paras 54-57). Indeed, CC133 was always a subject of importance in the PRRA analysis and the Applicant was aware of its existence.

[55] As for the evidence in outrightinternational.org, this website discusses the *Domestic Violence Act* and how it cannot be administered in a way that discriminates based on sexual orientation, which has at first view nothing to do with the Applicant's situation.

[56] Nevertheless, as argued by the Applicant, the Officer seems to be relying on this source and perhaps on other uncited sources to state that "independent research is unanimous in stating that CC133 is not enforced by St. Lucian authorities or law enforcement, and that no arrests in the country have occurred under same." However, the Applicant had provided various pieces of evidence before the Officer that showed that CC133 was "rarely enforced" which contradicts the Officer's reasoning that the information is "unanimous" that CC133 is not enforced.

[57] The use of this particular source raises two issues. The first one relates to procedural fairness, and the second relates to the omission by the Officer to consider and address contradictory evidence, which will be discussed below in the section on the reasonableness of the decision.

[58] On the procedural fairness issue, it is important to note that the Outright International website is not an identified commonly cited source. It is not cited on the Sources of country of origin information - Canada.ca website, nor is it cited in the National Documentation Package.

[59] Pursuant to the PRRA Procedures and Guidelines, the Officer ought to have notified the Applicant that this source or any other unreferenced source would be used in his PRRA application before rendering his decision:

> The PRRA officer will undertake research independent of the issues identified in the application. The research sources consulted by the PRRA officer will vary with each individual case, but some sources can be found on the Country Conditions page. When information is obtained through Internet research: Copies of all documents obtained from the Internet [other than those identified above as "conventional sources of research"] and used in the decision-making process will be retained on the case file [this will ensure not only that the document is available for review by the Court, but also that the "version" of the document available to the Court is the same as that consulted by the officer];
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> Subject to the following paragraph, officers will retain discretion with regard to whether a document should be shared with the applicant prior to rendering a decision, if it can be demonstrated that the document is "publicly accessible" ["publicly accessible" documents should originate with reliable sources, and should be available at sites directly related to the source, rather than through cross-references from other sites, the reliability of which may not be as well established];
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> [Emphasis added.]

[60] Even though officers might retain a certain discretion as to the sharing of a specific document with an Applicant prior to rendering a decision, they must still ensure that the Applicant has adequate notice of the elements that the officer will consider and be able to respond.

[61] As stated in *Riaji v Canada (Citizenship and Immigration),* 2011 FC 1240 [*Riaji*]:

> [27] The Officer's conduct in performing her own internet searches to clarify certain narrow issues clearly falls outside of the norm as they are not standard documents from sources such as Human Rights Watch, Amnesty International, or from a government authority such as the United States Department of State. Although officers routinely consider such standard documents, there is no duty to disclose them even though they are extrinsic to the application because an applicant is deemed to know that this type of evidence will be considered and where to find it (see *Mancia*, above, at para 22).
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> [28] However, *Mancia*, above, drew a distinction between the treatment of standard documents and documents from other sources:
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> > [W]here the immigration officer intends to rely on evidence which is not normally found, or was not available at the time the applicant filed his submissions, in documentation centres, fairness dictates that the applicant be informed of any novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case. [At para 22, my emphasis]
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> [29] Here, as was the case in *Zamora*, above,
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> > The documents in question were not standard documents such as Human Rights Watch, Amnesty International or country reports issued under governmental authority, but rather the result of specific research on the internet carried out by the PRRA officer. That research, including such documents she may have found were beneficial to Mr. Aguilar Zamora, should have been disclosed and he should have been given an opportunity to respond. [At para 18]

[62] In my view, the Outright International website was not a website as commonly used as Amnesty International or Human Rights Watch, for example. To ensure that the Applicant was

able to respond to all of the Officer's considerations, the Officer had to disclose that source (*Begum v Canada (Citizenship and Immigration)*, 2013 FC 824 (CanLII) at paras 37-46).

[63] More importantly, as argued by the Applicant, the Officer appears to rely on that particular source (or other unknown ones) to rule that all sources were "unanimous" that CC133 was not enforced, when in fact there is contradictory evidence suggesting that instead of being "unanimous" that CC133 is not enforced, it is rather "rarely" enforced. The sources disclosed in the Officer's reasons are not clear, and one is left wondering what sources the Officer consulted. In other words, even if the specific Outright International website was not material to the outcome of the decision (for example, see *Riaji* at paras 30-33), then there must have been other documents, websites or extrinsic evidence that were not identified nor disclosed by the Officer, in ruling that the "independent research is unanimous". The fact that the Applicant is left questioning where the Officer obtained an information, and the fact that the information was not disclosed to the Applicant to allow him to respond, demonstrate that he was not able to "know the case to meet" and rebut the research of the Officer. That is the hallmark of procedural fairness, which was breached in this case.

C. *The PRRA Officer's decision finding that the Applicant has not rebutted the presumption of state protection is unreasonable*

(1) The legal test applicable to state protection

[64] The parties argue on the applicable test in determining whether the presumption of state protection is rebutted.

[65] The Respondent argues that the Officer did not err in applying the test set out in *Canada (Minister of Employment and Immigration) v Villafranca*, 1992, CanLII 8569 (FCA) [*Villafranca*], which requires that the state make "serious efforts" to protect its citizens.

[66] The Applicant submits that the Officer should rather have relied on *Bito v Canada (Citizenship and Immigration)*, 2022 FC 1370 [*Bito*] at paragraph 25, to measure the adequacy of state protection at the "operational level":

> [25] However, fundamentally and determinatively in my view, the Decision fails to comply with constraining law which requires an assessment of state protection *at the operational level*. This Court has enunciated and applied this test on a great number of occasions over the years, which was not disputed at the hearing. That the adequacy of state protection must be *measured at the operational level* is confirmed in the following: […] [Citations omitted].

[67] The Applicant further purports that an "individualized inquiry is needed to assess whether state protection is available" (*Mathias* 2023 FC 619; *Gonzalez Torres* 2010 FC 234 at para 37).

[68] I agree that the *Bito* line of cases applies here and that the "adequacy of state protection must be measured at the operational level" (at para 25). As Justice Strickland explains in *Dafku v Canada (Citizenship and Immigration)*, 2021 FC 1181 [*Dafku*], the jurisprudence has evolved since *Villafranca*:

> [15] As noted by the Applicant, subsequent to *Villafranca* there has been significant jurisprudence from this Court holding that a decision maker cannot simply rely on the efforts of the state, without actually considering the adequacy of state protection. I have previously addressed this in *Ruszo v Canada (Citizenship and Immigration)*, 2019 FC 397 [*Ruszo*]:

> [32] In my view, the Officer also erred in failing to consider the operational adequacy of the state's efforts. The Respondent submits that the Federal Court of Appeal in *Villafranca* articulated the measure of assessing state protection as the state's "serious efforts to protect its citizens" (*Canada (Minister of Employment and Immigration) v Villafranca*, [1992] 99 DLR (4th) 334, 1992 CanLII 8569). However, there is significant subsequent jurisprudence from this Court, some of which is relied upon by the Applicant, which holds that a decision-maker cannot simply rely on the efforts of the state, without actually considering the adequacy of state protection. As Justice Diner states in *Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 367:
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> > [21] In considering whether state protection is adequate, a decision-maker must focus on actual, operational adequacy, rather than a state's "efforts" to protect its citizens (*Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 20 (CanLII)at para 12 [*Lakatos*]). Efforts must have actually translated into adequate protection at the present time (see *Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 (CanLII) at para 5). In other words, lip service does not suffice. The protection must be real, and it must be adequate.
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> [Citations omitted.]

[69] I also agree with Justice Brown's decision in *Dawidowicz v Canada (Citizenship and Immigration*), 2019 FC 258, that "actual results" are required in that state protection "must be effective to a certain degree and the state must be both willing and able to protect":

> [10] On the issue of the legal test for state protection, this Court has repeatedly held that state protection must be adequate at the operational level. This requires an assessment not only of the efforts made by the state, but actual results [citations omitted].
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> [11] In *Moya*, Kane J states at paras 73–76:

> [73] To be adequate, perfection is not the standard, but state protection must be effective to a certain degree and the state must be both willing and able to protect (*Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 at para 47, [2011] FCJ No 358 (QL)). State protection must be adequate at the operational level (*Henguva v Canada (Minister of Citizenship and Immigration)*, 2013 FC 483 at para 18, [2013] FCJ No 510 (QL); *Meza Varela v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at para 16, [2011] FCJ No 1663 (QL)).
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> [74] As noted by the applicant, democracy alone does not ensure effective state protection; the quality of the institutions providing protection must be considered (*Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646 at para 11, [2011] FCJ No 824 (QL) [*Sow*]).
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> [75] The onus on an applicant to seek state protection varies with the nature of the democracy and is commensurate with the state's ability and willingness to provide protection (*Sow* at para 10; *Kadenko v Canada (Minister of Citizenship and Immigration)*, 1996 CanLII 3981 (FCA), [1996] FCJ No 1376 (QL) at para 5, 143 DLR (4th) 532 (FCA)). However, an applicant cannot simply rely on their own belief that state protection will not be forthcoming (*Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at para 33, [2013] FCJ No 1099 (QL)).
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> [76] Contrary to the applicant's argument, the RAD and the RPD did not rely on the fact that Argentina is a democracy as a "proxy" for state protection, but thoroughly considered the country condition documents.
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> [Emphasis in original.]

[70] As also stated by Justice Grammond in *AB v Canada (Citizenship and Immigration)*, 2018 FC 237, a "decision-maker must do more than simply point to efforts made by a foreign

country to address shortcomings in the areas of policing and criminal justice […]" when state protection may not be available. "Those efforts must translate into operationally adequate measures" (at para 17).

(2) Analysis

[71] In this case, in applying the test articulated in *Villafranca*, the Officer committed reviewable errors. The Officer's consideration of St. Lucia's "serious efforts" to protect its citizens and to measure the "adequacy of state protection" was unreasonable.

[72] On state protection, the Applicant first submits that because St. Lucia criminalizes same-sex activities, there is no operational state protection. The presumption of state protection is rebutted because the criminalization of homosexual activity creates a stigma against LGBTQ+ community members and influences societal behaviour.

[73] Second, the Applicant argues that he did go to the police three times. After being threatened by armed men, he went to the police and they told him that they could not help people "like him". The armed men returned to threaten him, saying that if he did not leave, they would come back to finish him. The Applicant went back to the police this time with his mother and stepfather, but the police still did not help them. The Applicant argues that the fact that he was told by the police that they did not help people like him is evidence of ineffective state protection that is consistent with the country evidence regarding the negative treatment of LGBTQ+ people in St. Lucia.

[74] The Applicant also submits that the Officer wrongly relied on the existence of the *Domestic Violence Act* and on employment laws that protect LGBTQ+ people to find that state protection was indeed available to the Applicant. As his case is based on the risks of persecution he faces as a bisexual person and not on domestic abuse or discrimination in the workplace, the Applicant argues that this information is not responsive to his submissions on operational state protection nor to the evidence he presented in that regard.

[75] The Respondent argues that the reasons provided by the Officer demonstrate that he properly considered state protection. As stated by the Officer, St. Lucia is a democracy and, relying on *Kadenko* individuals living in a democracy have a higher burden to demonstrate a lack of state protection. Such individuals must do more than simply go see the police and state that their efforts were unsuccessful.

[76] The Respondent submits that there was little evidence proving that the state was not doing anything to protect members of the LGBTQ+ community. The Respondent points out to the fact that the Officer noted in his decision that the police in St. Lucia is taking steps to address issues pertaining to the treatment of the LGBTQ+ community.

[77] Finally, the Respondent also argues that the Applicant does not show how the evidence he submitted contradicts the finding that adequate state protection would be available to him in St. Lucia.

[78] As discussed above, the state protection offered to LGBTQ+ in St. Lucia must be analyzed at the operational level and ought to be "real, and it must be adequate" (*Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 367 at para 21). The Officer could not simply rely on the efforts of the state, without actually considering the adequacy of state protection.

[79] The Officer implied in his reasons that the burden of proof resting on the Applicant is directly proportional to the level of democracy in the state in question and that because "St Lucia is a multiparty parliamentary democracy with elections considered free and fair by outside observers", the burden is higher. Although I agree with the Officer on that consideration, democracy is not a proxy for state protection and the Officer still ought to have conducted a proper analysis of the state's operational state protection (*Alassouli v Canada (Citizenship and Immigration)*, 2011 FC 998 at para 42). In this case, there is no analysis of the state protection at the operational level, or evidence that the state is taking action to address the discrimination against the LGBTQ+ community. In fact, the evidence appears to be the opposite. CC133 still criminalizes same-sex intercourse and politicians have voiced their opinion to resist any pressure to repeal the act. There is therefore no analysis as to how, despite the criminalization of same-sex intercourse, there is adequate state protection at the operational level, especially given the evidence presented in this case and the information existing in commonly cited sources.

[80] Further, had the Officer applied the proper legal test, it is possible that the decision maker would have accepted that the Applicant rebutted the presumption of state protection by repeatedly trying to seek help from the police without success because they do not help people "like him" and has therefore "tried enough" (thereby meeting the requirement in *Kadenko*).

There is no evidence suggesting that those attempts at seeking protection were not credible or real.

[81] In *Dafku*, the Court held that the Officer's failure to address evidence that the police refused to help an Applicant constituted in a reviewable error:

> [25] In my view, the Applicant's evidence that the police advised the Applicant during his self-confinement that they would and could not protect him, and the other affidavit evidence speaking to the unsuccessful efforts to resolve the blood feud, were highly relevant to the required state protection analysis – both to the question of whether protection was available in the Applicant's circumstances and whether he had rebutted the presumption of state protection. The Officer's failure to address this evidence constitutes a reviewable error.

[82] The Officer's reasons in relation to the availability of state protection at the operational level, and its adequacy for the Applicant, is therefore not sufficiently intelligible or transparent. The decision is therefore unreasonable.

[83] In this particular case, the Applicant has adduced evidence of an intellectual disability (his IQ is evaluated at 68 or a grade 4 student), evidence that was accepted by the Officer. Accessing state protection therefore requires, in the Applicant's case, to seek police protection at another time, despite his intellectual disability, and disclose a crime in doing so given that homosexuality remains a crime under CC133. In other words, the Applicant would have to confess to being a criminal, and a member of the LGBTQ+ community, with the social opprobrium that comes with this disclosure in St. Lucia.

[84] Moreover, as discussed above, the Officer conducted his own research without disclosing that information to the Applicant. The Officer conducted a selective analysis of that evidence and failed to grapple with contradictory evidence. While CC133 may be rarely enforced, there is no "unanimous" evidence that it is indeed never enforced.

[85] The Officer wrongly justified that state protection would be available to the Applicant because St. Lucia created a *Domestic Violence Act* and this law states that it is not to be administered in a way that discriminates on the basis of sexual orientation. Nevertheless, the Applicant's PRRA is not based on domestic violence, and therefore the existence of such a statute does not assist him and will not result in adequate state protection at the operational level.

[86] The Officer also relied on St. Lucia employment law, however, again the Applicant's PRRA did not relate to employment. Even though such evidence might help to demonstrate the "efforts" that are being made by the state of St. Lucia to improve LGBTQ+ members' situation as discussed in *Villafranca*, it does not demonstrate adequate operational state protection as required in *Bito*. Therefore, the suggestion that the Applicant should turn to the authorities in these circumstances for protection would mean that the Applicant is admitting to committing a crime. Requiring him to do so in this case in unreasonable because of his intellectual capacity to understand the nature of the legal and social context of the criminal prohibition, and given his prior attempts that resulted in no protection.

[87] The Applicant in this case submitted evidence of ineffective state protection and as instructed by Justice Brown in *Aslan v Canada (Citizenship and Immigration),* 2021 FC 1165 at

paragraph 32, a decision maker cannot focus on “one aspect” of a particular piece of evidence “but wholly ignore […] the unchallenged fact”. In this case, that “unchallenged fact” is that his bisexuality is a criminal offence and that the LGBTQ+ community is not supported by society as a whole. Another unchallenged fact is that the Applicant has not received adequate state protection when he sought it. Unfortunately, instead of assessing that evidence, the Officer instead undertook their own research and concluded that the information was “unanimous” that CC133 was not enforced. Such a conclusion can only lead one to believe that the Officer failed to analyze the contrary evidence that was presented by the Applicant.

[88] As I held in *Ehigiator v Canada (Citizenship and Immigration)*, 2023 FC 308 at paragraphs 51, 71-73, the Court may infer that the Officer selectively chose evidence and ignored contradicting facts. In concluding that the information was “unanimous” that CC133 was not enforced, the Officer made an erroneous finding of fact. Not only because it is not accurate, but it is not sufficient on its own to dismiss the Applicant’s request. That conclusion was made without regard to the entire evidence and the Officer failed to explain why contrary evidence adduced by the Applicant, on a critical issue, was not sufficient to justify a different conclusion (*Gill v Canada (Citizenship and Immigration)*, 2020 FC 934 at para 40; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), [1998] FCJ No 1425 at para 15; *Barril v Canada (Citizenship and Immigration)*, 2022 FC 400 at para 17). As stated at paragraph 126 of *Vavilov*: “The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it.”

[89] The Officer's conclusion that CC133 is not enforced was made in breach of the Applicant's right to procedural fairness. Relying on that conclusion and on other evidence not disclosed to the Applicant to suggest that there is adequate state protection is also unreasonable.

VI. Conclusion

[90] This application for judicial review is allowed and the matter is remitted back for redetermination by a different officer in accordance with these reasons.

[91] The parties have not proposed any question for certification and I agree that none arise.

JUDGMENT in IMM-9335-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.
2. The PRRA Decision is set aside and the matter is remitted back for redetermination by a different officer.
3. No questions for certification were argued, and I agree none arise.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9335-22
STYLE OF CAUSE:	KEIRAN CURTIS ST. BRICE v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 19, 2023
JUDGMENT AND REASONS:	RÉGIMBALD J.
DATED:	AUGUST 24, 2023

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