

**Date: 20071019**

**Docket: IMM-2761-06**

**Citation: 2007 FC 1079**

**Ottawa, Ontario, October 19, 2007**

**PRESENT: The Honourable Mr. Justice Barnes**

**BETWEEN:**

**DENEIVA OLIVIA RIGG**

**Applicant(s)**

**and**

**SOLICITOR GENERAL FOR CANADA**

**Respondent(s)**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review by Deneiva Olivia Rigg from a pre-removal risk assessment (PRRA) decision rendered on April 26, 2006 whereby Ms. Rigg was found not to be at risk if she was deported to Jamaica.

**Background**

[2] Ms. Rigg came to Canada from Jamaica in 1975 with her family. She was then 10 years old. Ms. Rigg became a permanent resident in 1977 but she never obtained Canadian citizenship. She is now 42 years of age and faces deportation to Jamaica because of a lengthy history of criminality including convictions for prostitution, trafficking and theft. Ms. Rigg has also been

addicted to cocaine for most of the past 20 years and she contends that this addiction has been a "large contributor" to her criminal record. She is also a lesbian who has been quite open about her sexual orientation. She has no immediate family outside of Canada.

[3] On March 29, 2006, Ms. Rigg made an application for a PRRA. In support of that application, she submitted a substantial package of documentary evidence describing her personal circumstances and the risks she would face as a lesbian returning to Jamaica. Of particular note in this submission was an 8-page letter from Amnesty International Canada describing the profound risks faced by gays and lesbians in Jamaica and offering the following stark conclusion with respect to Ms. Rigg:

In view of these factors, Amnesty International believes that it is highly plausible that Ms. Rigg's life would be in great danger should she return to Jamaica. As a lesbian woman, she would not be able to relocate safely within Jamaica. Ms. Rigg would be considered an outsider in Jamaica since she has lived in Canada in the last over 30 years. She will be easily identifiable and targeted for persecution including sexual violence or death.

### **The PRRA Decision**

[4] The PRRA Officer assessed Ms. Rigg's risk in Jamaica primarily on the basis of her sexual orientation. Indeed, the other aspects of her vulnerability were largely dismissed as being either speculative or irrelevant to the assessment of risk. In the result, her drug addiction, her lack of family support and her lengthy absence from Jamaica were all ignored in the risk analysis. In rejecting Ms. Rigg's claim to protection based on her sexual orientation, the PRRA Officer concluded:

I accept that the applicant is who she claims to be. I do not challenge her credibility with regard to her sexual orientation, her drug addiction or her family situation. Having carefully considered the evidence provided in support of her PRRA, I do not agree that the applicant will face more than a mere possibility of persecution or likely face a risk of torture or a risk to life or of cruel and unusual treatment or punishment. I do not find that the applicant presents sufficient evidence that she will be at risk as a lesbian in Jamaica. In the absence of persecutory events in the past in Jamaica, her fear is based on speculation and I do not agree that her risks in Jamaica reach the threshold necessary for her to be considered a Convention refugee or a person in need of protection.

The documentary evidence indicates that although Jamaica continues to encounter serious problems with criminal violence and drug and gang-related violence and societal discrimination against homosexuals, Jamaica is a Commonwealth country with a constitutional parliamentary democracy and a generally independent judiciary. DOS reports that the government generally respects human rights.

The applicant has failed to rebut the presumption of state protection. While I acknowledge that societal discrimination against homosexuals is a serious problem in Jamaica, the applicant has never sought state protection in Jamaica, nor has she presented sufficient evidence to persuade me that it would be unavailable to her. The Supreme Court of Canada held in Ward that:

Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in Zalzali, it should be assumed that the state is capable of protecting a claimant...Although this presumption increases the burden on the claimant, it does not render illusory Canada's provision of a haven for refugees. The presumption serves to reinforce the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the claimant. Refugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already.

Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 at p. 18 (internet version)

I acknowledge the evidence of ill treatment of homosexuals and of reports of police inattention to the problems. I find, however, that the applicant did not seek protection, and that the evidence does have examples of police action to protect homosexuals from mob violence. The evidence also indicates that the law does not mention lesbian activities and that although society discriminates against homosexuals, there is not evidence that lesbians generally face serious ill treatment:

Although it is not illegal to be homosexual in Jamaica, the Offences Against Persons Act criminalises homosexual intercourse between men, with a penalty of up to ten years' imprisonment with hard labour. The law also criminalises "acts of gross indecency" between men – in public or in private. The number of prosecutions, if any, brought under this legislation is not reported. Homosexual activity between women is not mentioned. 23

[...]

There is no evidence that lesbians generally face serious ill treatment in Jamaica and in the absence of evidence to the contrary may be certified as clearly unfounded. Where a lesbian is able to establish a real risk of treatment amounting to persecution or Article 3 treatment, sufficiency of protection cannot be relied upon. Where the well-founded fear is a localised one it may be possible for the claimant to avoid the threat by moving to a different part of Jamaica. However, only if it clearly could not reasonably be argued that a claimant would experience persecution or ill-treatment were she to relocate and it is clear that it would not be unduly harsh for her to do so should a claim be certified on this basis. Where exceptionally it is found that a lesbian does have a well-founded fear of persecution in Jamaica and that she could not avoid the threat by internal relocation or it would be unreasonable for her to do so, as lesbians in Jamaica may be considered to be a particular social group a

grant of asylum would be appropriate. (January 2006  
UK Operational Guidance Note)

[Quoted from original text]

## Issues

- [5] (a) What is the appropriate standard of review for the issues raised by the Applicant?
- (b) Did the PRRA Officer err in the treatment of the evidence?

## Analysis

[6] As a general statement describing the standard of review applicable to PRRA decisions, I would adopt the following passage from the decision of Justice Carolyn Layden-Stevenson in *Nejad v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1444, [2006] F.C.J. No. 1810 at para. 14:

In *Nadarajah v. Canada (Solicitor General)* (2005), 48 Imm. L.R. (3d) 43, I adopted Mr. Justice Mosley's pragmatic and functional analysis in *Kim v. Canada (Minister of Citizenship and Immigration)* (2005), 272 F.T.R. 62 regarding the standard of review applicable to PRRA decisions. The standard of review for questions of fact is patent unreasonableness, for questions of mixed law and fact, reasonableness, and for questions of law, correctness. When the decision is considered "globally and as a whole", as noted by Mr. Justice Martineau in *Figurado v. Canada (Solicitor General)*, [2005] 4 F.C.R. 387 (F.C.), the standard of review is reasonableness.

[7] The issues raised on behalf of Ms. Rigg do not involve pure factual findings but involve the Officer's treatment of the evidence generally. These are matters of mixed fact and law for which the standard of review is reasonableness.

[8] There are several problems with this PRRA decision and I am satisfied that the assessment must be redone.

[9] In some respects, the decision is strangely written. Despite the fact that Ms. Rigg left Jamaica at the age of 10, the decision contains two references to the fact that she did not seek state protection before leaving. Given that her protection claim was based primarily on her sexual orientation, the failure to seek protection before the age of puberty was hardly unexpected and was irrelevant to the merits of her claim. These references are somewhat ambiguous and could be interpreted as attempting to state the obvious that Ms. Rigg had no personal risk experiences in Jamaica. It is difficult to understand, though, why such a point would be made indirectly by referring to her failure to pursue state protection. Standing alone, I would not be inclined to set aside this decision because of this awkward choice of language. However, there are other more serious problems with the PRRA Officer's risk analysis. One of those is contained within the following sentence:

In the absence of persecutory events in the past in Jamaica, her fear is based on speculation and I do not agree that her risks in Jamaica reach the threshold necessary for her to be considered a Convention refugee or a person in need of protection.

[Emphasis added]

[10] It is not accurate to say that in the absence of personal experiences of persecution, Ms. Rigg's alleged fear was based on speculation. The documentary evidence submitted on her behalf was not speculative. It came from reputable evidentiary sources and it provided strong

support for her stated fear of persecution based on her sexual orientation. By treating this evidence as speculative, instead of assessing its weight relative to the other country-condition evidence, the Officer clearly erred.

[11] This decision is plagued by other problems. It was unreasonable for the Officer to assess Ms. Rigg's sexual orientation risk without considering her personal circumstances. As an isolated outsider with a drug addiction and a lengthy criminal record, Ms. Rigg's situation, were she to return to Jamaica, could only be considered dire. It was naïve to suggest that homelessness and a relapse to drug addiction would be speculative outcomes for her. Her risk of being a target for violence and abuse in the highly homophobic society of Jamaica could not be fairly assessed in isolation from the other obstacles she would face there. The failure by the Officer to consider her sexual orientation risk in the context of her personal circumstances was unreasonable and also constitutes a reviewable error.

[12] This decision is also profoundly deficient in its assessment of the evidence concerning the risks faced by lesbians in Jamaica. The Officer's conclusion that "well respected country condition sources indicate that lesbians are not generally targeted for abuse in Jamaica" is supported only by an ambiguous and unsubstantiated statement in a 2006 United Kingdom Operational Guidance Note which reported:

There is no evidence that lesbians generally face serious ill-treatment in Jamaica and in the absence of evidence to the contrary may be certified as clearly unfounded. Where a lesbian is able to establish a real risk of treatment amounting to persecution or Article 3 treatment, sufficiency of protection cannot be relied upon.

[Emphasis added]

[13] It is not at all clear what the authors of the above passage meant by their use of the word "generally," but if it was intended to suggest that there is no evidence that lesbians are at risk of severe physical abuse in Jamaica, it is obviously wrong<sup>1</sup>. The documentary record before the PRRA Officer disclosed an appalling history of persecution and intolerance directed at both gays and lesbians in Jamaica coupled with a very troubling climate of police indifference and abuse.

Included in that evidence was the following:

#### **Amnesty International**

Amnesty International has received consistent reports alleging that police officers routinely fail to take seriously, to make reports on, and subsequently to investigate crimes reported by gay men and lesbians, including homophobic attacks.

Police protection is often unavailable. In some cases, the police have themselves tortured or ill-treated LGBT victims of crime seeking assistance from the police. Often they fail to investigate homophobic hate-crimes or do not take written or verbal reports of incidents. Police appear to also target health care providers working with the LGBT community and there have been several reports of nurses, social workers and others being unlawfully detained and ill-treated by the police.

The reluctance of the victims of assault to come forward is not, in Amnesty International's view, the sole or main reason for the pattern of inadequate investigation of such crimes. The failure to adequately investigate crimes committed by citizens against gay men and women is compounded by the authorities' general inadequacy in investigating reports of ill-treatment or torture by the police; as documented in numerous Amnesty International reports.

...

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<sup>1</sup> In fact, the same report states that "alleged gay men and lesbians in inner city areas are at particular risk of homophobic violence".



Amnesty International believes that the retention of the laws described below fosters impunity for police officers who are commonly reported to ill-treat and torture men and women publicly identified as gay, including through the use of rape or other forms of sexual assault, and to inadequately investigate homophobic-related crimes.

...

Despite the fact that consensual same-sex relations between women are not criminalised in law, Amnesty International considers it important to note that the overwhelming public impression is that all forms of homosexuality are illegal.

...

Lesbians in Jamaica remain at risk of suffering violence. These risks include that of sexual violence. Given the reported prevalence of this phenomenon in Jamaica, it is not implausible to suggest that a lesbian woman could be singled out for such attacks on the grounds of “mannish” physical appearance or other visible manifestations of homosexuality.

...

In Jamaica, differences in social location can be expected to result in qualitative as well as quantitative variations in the expression or experience of violence in lesbian’s lives. It is not implausible to suggest that such a person would be singled out for ill-treatment or violence on account of her sexuality. In Amnesty International’s view, a young lesbian from an inner-city area could face considerable risk of torture or ill-treatment, possibly even death, as a result of her sexuality becoming known to the community. Vulnerability to such attacks would be increased by the familial and social isolation that may occur in an attempt to adhere to the mores of the local community. Risk of violence includes that of sexual violence.

...

It is important to state that Amnesty International is also of the view that existing data on violence against lesbian women in Jamaica expressed only the tip of the iceberg. Since so much shame and disbelief surrounds violence against the gay community and against

women – the number of women who report abuse is assumed to be many times fewer than the number of actual incidents.

Violence against women in especially stigmatised communities, such as women who have sex with other women, is an especially hidden form of violence in Jamaica. Even when men and women undergo similar violations, women's cases are often less visible and therefore less frequently condemned. We therefore image the data to be the absolute minimum rather than a realistic estimate.

...

### **Human Rights Watch**

...Women who have sex with women are also targets of community violence and police harassment; and, as with men who have sex with men, their complaints of violence are often ignored by police.

...

...Women who are or are perceived to be lesbians are at an even greater risk of rape, as they may be targeted for sexual violence based on both their gender and sexual orientation.

...

Police abuse is a fact of life for many men who have sex with men and women who have sex with women in all of the communities that Human Rights Watch visited in Jamaica. As in the incident described above, homophobic police violence can be a catalyst for violence and abuse by others. It is sometimes lethal. Police abuse is also profoundly destructive because it creates an atmosphere of fear sending a message to other lesbian, gay, bisexual, and transgender people that they are without any protection from violence.

...

Women who have sex with women reported that they were subjected to constant threats of sexual violence, in some cases serious enough to force them to leave their homes and their neighborhoods. Several women who have sex with women told Human Rights Watch that the message they were given was clear: that they could be "cured" of their homosexuality by having sex with a man.

[14] It is clear that the PRRA Officer's conclusion that Ms. Rigg would not be at risk was based on a single ambiguous observation taken out of context. That conclusion was also completely at odds with all of the other documentary evidence which the Officer essentially ignored. This highly selective treatment of the evidence also constitutes a reviewable error: see *Babai v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1341, [2004] F.C.J. No. 1614 at paras. 35 to 37.

[15] While Ms. Rigg is a person with a troubled and troubling background, she is entitled, nonetheless, to a thorough and balanced risk assessment. It is also worth remembering that her personal history was largely wrought in Canada and had little, if anything, to do with her childhood in Jamaica. It is that history that has led her to the threshold of deportation but it is the same history that arguably creates for her an increased risk of persecution in Jamaica. She is entitled to have that risk assessed on the same objective basis that would apply to any other foreign national facing removal from Canada.

[16] This application for judicial review is allowed with the matter to be remitted for reconsideration on the merits by a different decision-maker.

[17] Neither party proposed a certified question and no issue of general importance arises on this record.

**JUDGMENT**

**THIS COURT ADJUDGES that** this application for judicial review is allowed with the matter to be remitted for reconsideration on the merits by a different decision-maker.

“ R. L. Barnes ”

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Judge

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

**DOCKET:** IMM-2761-06

**STYLE OF CAUSE:** Rigg  
v.  
SGC

**PLACE OF HEARING:** Toronto, Ontario

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**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** Mr. Justice Barnes

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