Date: 20080129

Docket: IMM-1934-07

Citation: 2008 FC 112

Ottawa, Ontario, January 29, 2008

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

KISHA BOWEN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant, Kisha Bowen, seeks judicial review of her negative Pre-Removal Risk Assessment (PRRA). The PRRA Officer (the Officer) determined that the Applicant would not be at risk if she were to return to Grenada.

II. Background

[2] The Applicant, a citizen of Grenada, was born on August 21, 1979. She alleges that she was sexually abused as a child by her maternal grandfather and her uncle. She later ran away

with her boyfriend and had two children with him. They lived at his mother’s home where the Applicant claims she was beaten by her.

[3] The Applicant alleges she was visited by the police as a result of her boyfriend’s mother informing the authorities that she was an unfit mother and was involved in a homosexual relationship. As a result of this accusation, the Applicant contends that her life became difficult. She claims to have been insulted and hit by rocks when walking in her neighbourhood. In addition, her family refused to have anything to do with her because of her sexual orientation.

[4] In 2001, the Applicant met a man who assisted her in leaving the country. She placed her children with different aunts in Grenada and on September 9, 2001, left Grenada and arrived in Canada on the same day. Upon arrival, she informed the border authorities that she was on vacation. She remained and worked in Canada illegally to support her children.

[5] On February 6, 2005, the Applicant attempted suicide. Subsequently, social workers and a psychiatrist advised her to inquire about refugee protection. As a result, she claimed refugee protection in Montréal on February 14, 2005, on the basis of membership in a particular social group, namely women. The Applicant's claim for refugee protection was rejected by a decision of the Immigration and Refugee Board (the Board) rendered on September 7, 2005. An application for leave and judicial review of that decision was dismissed by the Federal Court on February 9, 2006.

[6] On January 24, 2007, the Applicant submitted a PRRA application. A negative decision was rendered on April 11, 2007, by the Officer. The within application for judicial review of the negative PRRA decision was filed on June 4, 2007.

III. The PRRA Decision

[7] The Officer summarized the Board's September 7, 2005 negative decision regarding the Applicant's claim for refugee protection. He noted that the Board found that as a child she had suffered sexual abuse at the hands of her maternal grandfather until 1996. The Officer also noted that the Board found that the Applicant had fled Grenada in 2001 "not from persecution but from a dire economic/social situation" and that state protection was afforded to sexually abused women in Grenada and would be available to her.

[8] The Officer noted that although the Applicant had been aware of the social circumstances in Canada for at least three years, she made no mention of her homosexuality or any persecution she may have suffered in Grenada by reason of her sexual orientation in her background information sheet dated February 25, 2005; during her immigration interview on March 1, 2005; in her personal information form dated March 9, 2005 or during the Board's hearing held on September 7, 2005. The Officer determined that the Applicant had not provided any explanation as to why she failed to disclose her sexual orientation earlier.

[9] The Officer considered the four following letters as "new evidence":

1) An undated letter from the Applicant wherein she expresses her desire to stay in Canada. She states that she had to leave Grenada for her own safety because of he

laws against homosexuality and that she could not live in Grenada as a free lesbian;

2) A letter dated January 19, 2007 from David Rizk who knew the Applicant for two years as a work colleague. Mr. Rizk attested to the Applicant's good character in the work place and expressed the view that societal discrimination against homosexuals in Grenada was unacceptable and that she would be in danger if she were to return;

3) A letter dated January 25, 2007 from Gemma Bowen, the Applicant's aunt, referring to Applicant's childhood abuse and homosexuality. Mrs. Bowen attests that the Applicant left Grenada not only because of her homosexuality but stressed that she also left because of the disgrace she brought upon herself for having born a child from the incestuous relationship with her grandfather;

4) A letter dated February 3, 2007 from Natalya Koziak, who attests that she had become romantically involved with the Applicant. She speaks of the Applicant's good character, the time they spent together, the Applicant's love and support for her children. She also relates that the Applicant had shared with her difficult past in Grenada and the dangers entailed in returning and living life openly as a lesbian.

[10] The Officer considered these documents, but found that they did not support the Applicant's contention that she had or would suffer in Grenada by reason of her sexual orientation. In particular, the Officer found that Gemma Bowen had given no example of any event the Applicant suffered due to being a lesbian, nor did she mention any hardships that gays suffer in Grenada. The Officer also observed that the Aunt did not mention any threats of danger from family members.

[11] Regarding Mr. Rizk's evidence, the Officer remarked that he is not an expert on the social life of homosexuals in Grenada nor does he provide any personal insight into the Applicant's circumstances as a lesbian in Grenada. The Officer further found that his knowledge of the situation in Grenada appears to be "second-hand".

[12] The Officer then assessed the documentary evidence before him. He noted that Grenada has laws banning homosexual acts, though no evidence to support enforcement or prosecution was found. He canvassed several documentary sources including the UK Foreign Office travel advisory dated June 28, 2007, the Foreign Affairs and International Trade Travel Report dated June 28, 2007, the Response for Information Request (RIR) (GDR 100712.E) dated November 17, 2005, and an article from the 2004 fall issue of the Out Traveler website and the RIR (GRD 42060.E) dated October 2, 2003. He concluded that:

> Owing to the presumption that the state is able to provide protection, the applicant has not provided clear and convincing evidence that state protection will not be afforded to her in Grenada. […] I do not find that the applicant requires surrogate protection. Grenada still has laws banning homosexual activity, however, applicant has not provided sufficient evidence, nor have I found any, to substantiate that these laws are enforced or that Grenada imposes penalties in disregard of accepted international standards.
>
> Based on applicant's submissions and publicly available documentation, I have found insufficient objective evidence to establish that it is more likely than not that the applicant would face torture, personal risk to her life, or cruel and unusual treatment or punishment upon return to Grenada due to her homosexual status.

[13] Consequently, the Officer found that there was no more than a mere possibility that the Applicant would be persecuted upon her return to Grenada by reason of her membership in a particular social group, namely homosexuals.

IV. Issues

[14] The following issues are raised in this application:

A. Did the Officer err in finding that state protection was available to the Applicant in Grenada?

B. Did the Officer err in finding that the Applicant would not be at risk if returned to Grenada by reason of her homosexuality?

C. Did the Officer breach procedural fairness and principles of natural justice?

D. Did the Officer's decision violate section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 *of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982 c. 11 (the *Charter*)?

V. Standard of Review

[15] It is well established that PRRA officers have a specialized expertise in risk assessment. In *Kandiah v. Canada (Solicitor General)*, 2005 FC 1057, Justice Dawson summarized the current state of the law on the applicable standard of review for decisions of PRRA officers. At paragraph 6 of her reasons she wrote:

> As to the appropriate standard of review to be applied to a decision of a PRRA officer, in *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 437, Mr. Justice Mosley, after conducting a pragmatic and functional analysis, concluded "the appropriate standard of review for questions of fact should generally be patent unreasonableness, for questions of mixed law and fact, reasonableness *simpliciter*, and for questions of law, correctness". Mr. Justice Mosley also endorsed the finding of Mr. Justice Martineau in *Figurado v. Canada(Solicitor General)*, 2005 FC 437, that the appropriate standard of review for the decision of a PRRA officer is reasonableness *simpliciter* when the decision is considered "globally and as a whole". This jurisprudence was followed by Madam Justice Layden-Stevenson in *Nadarajah v. Canada (Solicitor General)*, 2005 FC 713 at paragraph 13. For the reasons given by my colleagues, I accept this to be an accurate statement of the applicable standard of review **[**emphasis added**]**.

[16] The first question involves a question of mixed law and fact reviewable on the reasonableness standard. **(***B.R. v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 269 at paragraph 17; *Ali v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1360 at paragraph 19 and *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 232 at paragraph 11).

[17] The second question under review is essentially a question of fact. Such questions warrant considerable deference from the Court and are reviewable on the patently unreasonable standard (*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 872 at para. 16).

[18] The third question concerns procedural fairness. Any decision resulting from a process that is determined to be materially unfair or in breach of the rules of natural justice will be set aside.

[19] With regards to the fourth issue dealing with the Applicant's s.7 *Charter* rights, the applicable standard of review is correctness (*Taylor v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1053 at para. 36; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 20).

VI. Analysis

Position of the Parties

[20] The Applicant submits that the Officer did not give proper regard to the documentary evidence before him on the following two grounds. First, he did not draw the appropriate conclusions regarding state protection. The Applicant contends that the existence of penal laws banning homosexuality, the comments by the Minister of Tourism stating that "promiscuous behavior [was] not allowed in Grenada" and the statement by the International Lesbian and Gay Association (ILGA) that the government supports repressive and violent policies against homosexuals clearly indicate the absence of state protection. Second, the Applicant contends that the Officer failed to properly consider the evidence regarding the persecution of homosexuals in Grenada. It is submitted that the Officer's conclusion in respect to the absence of enforcement of laws banning homosexuality, his incorrect assessment of the letters from her aunt and friends and his reliance on an article about Mr. Patrick Levine's experience render his findings unreasonable.

[21] The Respondent contends that the Officer's findings are supported by the evidence and were reasonably open to him. Regarding state protection, it is argued that the Applicant failed to provide clear and convincing evidence to rebut the presumption of state protection. Concerning the risk of persecution, the Respondent maintains that the Applicant failed to establish that there was a serious possibility of persecution upon her return to Grenada.

A. *Did the Officer err in finding that state protection was available to the Applicant in Grenada?*

[22] The onus is on the Applicant to adduce clear and convincing evidence of the state's inability to protect her. Absent such evidence a state is presumed capable of protecting its citizens (*Canada (Attorney General) v. Ward*, [1993] 2 S.R.C. 689 at 724-725).

[23] In assessing state protection, the Officer considered the documentary evidence before him. His review revealed the existence of laws banning homosexuality, the fact that certain homosexual acts were illegal, that same-sex couples visiting Grenada may be refused entry by local officials, and that the ILGA, believed that the government of Grenada supported repressive and even violent policies against local communities of gays and lesbians. According to information contained in the RIR dated November 17, 2005, the latter statement by the ILGA could not be corroborated among the sources consulted by the Research Directorate. Further, the documentary evidence before the Officer indicates that discrimination against homosexuals in many of the Caribbean Islands has led to occurrences of violence against persons pursuing same-sex relationships.

[24] The Officer also found that there was no evidence regarding the enforcement of the above-noted laws and that homosexuals such as Mr. Patrick Levine were able to live comfortably and earn a living in Grenada. Further, the Officer noted that no persuasive evidence was adduced regarding violence against persons in same-sex relationship in Grenada. The Officer also considered the above-noted letters produced by the Applicant. He concluded that this evidence was of little help in establishing that the Grenadian State was incapable of protecting her.

[25] There is no dispute that Grenada is a democratic state and as such is presumed capable of protecting its citizens. In my view the Applicant has failed to rebut this presumption. She has failed to establish with clear and convincing evidence that the State of Grenada was unwilling or incapable of protecting her. Indeed, her undisputed evidence is that she never sought or attempted to seek protection in her country. The Officer did recognize that there were difficulties in Grenada, but based on the totality of the documentary evidence on Grenada, he concluded that protection was available. This Court has held that adequate state protection need not necessarily be perfect (*Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 341 (QL) at para. 21; *Canada (Minister of Employment and Immigration) v. Villafranca*, [1992] F.C.J. No. 1189 (QL)). It is my view that the finding regarding state protection was reasonably open to the Officer on the evidence. The Officer committed no reviewable error in concluding as he did. I will now turn to the issue of danger of persecution.

B. *Did the Officer err in finding that the Applicant would not be at risk if returned to Grenada by reason of her homosexuality?*

[26] The Supreme Court of Canada stated in *Chan v. Canada* (*Minister of Employment and Immigration*), [1995] 3 S.C.R. 593 at para. 70, that "[t]he essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way". It is settled law that in PRRA applications, the burden of proof is on the person claiming protection under subsection 114(1) of the *Immigration and Refugee Protection Act*, (IRPA) S.C. 2001, c. 27 (*Bayavuge v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 65 at para. 43).

[27] In this case, the evidence adduced by the Applicant regarding the alleged persecution resulting from her homosexuality, consisted of the four above-noted letters. These letters reference certain discriminatory practices against gays but provide little or no evidence regarding the risk of persecution to the Applicant if she returned to Grenada. The letter by her aunt does not state that the Applicant would suffer any undue hardship due to her sexual orientation. The letters by D. Rizk and N. Koziak provide only second-hand and uncorroborated information and as such, were given very little weight. In her own letter, the Applicant claims persecution in general and vague terms:

> Going back home would be very difficult not only because of my uncle and grandfather but also because of my sexual orientation. Homosexuality in my country is taboo and is illegal, people are very ignorant. Gays are not admitted to church if you are gay. Gays are seen as degenerates, not fit to be parents and as abnormal people who need to be treated. This is the prevalent attitude not only in Grenada but in the Caribbean in general.

The Officer reviewed all of the evidence submitted by the Applicant in support of her application, including new evidence she filed. The Officer considered her personal situation, assessed the country conditions in Grenada with respect to the social circumstances for homosexuals, and based the risk assessment on the totality of the evidence submitted. I am satisfied that the Officer's findings are based on the evidence and are not patently unreasonable. The Officer committed no reviewable error by concluding as he did.

C. *Did the Officer breach procedural fairness and the principles of natural justice?*

[28] The Applicant claims that the Officer breached his duty of procedural fairness by not allowing the Applicant the opportunity to respond to the article about Mr. Levine on the basis

that it is extrinsic and novel. The Respondent disputes this claim and states that the Officer was entitled to consult the article as it is specifically mentioned in the RIR of November 17, 2005.

[29] The Applicant's request for a PRRA was filed on January 24, 2007 and a decision was rendered on April 11, 2007. The evidence considered by the Officer included the impugned article which was specifically mentioned in the RIR of November 17, 2005 and originally published in the fall of 2004. It predates the Applicant's submissions and could therefore have been consulted by her as it was publicly available. The article is therefore not extrinsic and novel as claimed by the Applicant. In my view, the Officer had no obligation to disclose this specific evidence to the Applicant for comments. The evidence was available to the Applicant and it was open to her to address this evidence before the Officer. The Officer did not violate the principles of procedural fairness in proceeding as he did.

D. *Did the Officer's decision violate section 7 of the Canadian Charter of Rights and Freedoms*, Part 1 *of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.) 1982, c.11*

[30] The Applicant essentially argues that she cannot be sent back to her country where she will be forced to live her sexual orientation in secret or fear retribution from Grenada's society in general and its government. It is claimed that such conditions engage her section 7 rights under the *Charter*. In support of her claim, the Applicant raises three arguments. First, she has become accustomed to her ability to live her sexual orientation openly in Canada and a return to Grenada would oblige her to live her sexuality in a clandestine manner. Second, when the Officer found that homosexuals cannot live their sexuality openly in Grenada and that Canadians would find such a situation unacceptable, this should have automatically led him to conclude the existence

of persecution and/or cruel and unusual treatment. Consequently, she should have received a favorable response to her PRRA application. Finally, it is argued that the finding by the Officer that the Applicant would not suffer persecution if returned to Grenada, on condition that she live her sexual orientation discreetly is a violation of her section 7 rights as protected under the *Charter*.

[31] The Respondent argues that the Applicant's claim is based on unproven, speculative and hypothetical allegations and should not succeed. Additionally, the Respondent states that the PRRA decision is not a removal order and is but one step in an administrative process that may eventually lead to removal from Canada. Consequently, the *Charter* argument is premature.

[32] The scheme of the IRPA provides for a PRRA to ensure that no one is removed from Canada to a place where his or her life is at risk. This is consistent with Canada's *Charter* values and international commitments (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 53). However, the law requires that sufficient evidentiary foundation be produced to make a *Charter* determination (*MacKay v. Manitoba*, [1989] 2 S.C.R. 357 (QL) at para. 9; *Adviento v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1430 at para. 79) and *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97. Absence of such evidentiary foundation would trivialize the *Charter* and result in ill-considered opinions.

[33] The proceeding under review is provided for under the IRPA and engages the discretion of an immigration officer charged, in this instance, with assessing the Applicant's risk of return

to Grenada. The legal outcome of the PRRA process does not result in the Applicant's removal to Grenada, but in a determination by the PRRA officer regarding risk. With respect to the PRRA process, it is not entirely clear what unconstitutional effect is being alleged here. What is clear, however, is that in a *Charter* challenge, the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects (*Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at 1101).

[34] In the present case, the evidence before me in support the Applicant's *Charter* allegation is limited at best. The letters by her aunt and friends essentially attest to the Applicant's character and past events and do not provide any evidence which would engage her s. 7 *Charter* rights. Speculation as to what the Applicant's life would be like in Grenada is insufficient to establish a factual foundation for a proper s. 7 Charter analysis. While the documentary evidence establishes that homosexuality is not openly practiced in Grenada and that it is not socially accepted at large, there is also evidence to support the Officer's finding that society in Grenada does not exclude homosexuals from normal opportunities and socialization. The Officer points to certain examples of openly gay businessmen successfully operating in Grenada.

[35] On the facts before me, it would be speculative to suggest that the Applicant's "life, liberty and security" rights would be engaged by reason of her sexual orientation, should she return to Grenada. I do not believe there is sufficient evidence in this case to support the proposed *Charter* challenge. In my view the Applicant has failed to establish the necessary factual foundation to support her s. 7 Charter claim.

VII. Conclusion

[36] In conclusion, I can find nothing in the Officer's decision, or in the process he adopted, which would warrant the Court's intervention. I also find that the Applicant has not established a sufficient factual foundation to support her s. 7 Charter claim. It follows therefore, that this application will be dismissed.

VIII. Proposed question for certification

[37] The Applicant proposes the following questions for certification:

> When considering a risk of return to a person's country of origin, under either section 96 or 97 of the *Immigration and Refugee Protection Act*, what impact is there on that assessment of risk, if at all, to find the possibility for a person to return to their country of origin and live their sexual orientation discreetly or in hiding?
>
> (a) Does the person's **unwillingness** to live their sexual orientation in hiding or discreetly have any impact on that analysis?
>
> (b) In light of the fact that the IRPA must be interpreted and applied in a manner that is consistent with the *Charter*, does section 7 include as a fundamental choice the right to live one's sexual orientation openly, and if the answer is yes, what impact does that have on the analysis of risk to be conducted under either section 96 or 97 of the IRPA? (Emphasis by the Applicant.)

[38] I determined earlier in these reasons that the Applicant had not established that her s. 7 *Charter* rights were engaged on the facts of this case. The risk alleged is speculative and not founded in the evidence. In the circumstances, the questions proposed, therefore, cannot be determinative of the appeal and are consequently not appropriate for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. No question is certified.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1934-07
STYLE OF CAUSE:	KISHA BOWEN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 28, 2007
REASONS FOR JUDGMENT:	Blanchard J.
DATED:	January 29, 2008

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