Federal Court  Cour fédérale

Date: 20100611

Docket: IMM-5171-09

Citation: 2010 FC 636

Ottawa, Ontario, June 11, 2010

PRESENT: The Honourable Frederick E. Gibson

BETWEEN:

MARLON CUNNINGHAM

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS and THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR ORDER AND ORDER

Introduction

[1] These reasons follow the hearing at Toronto on the 20th of May, 2010 of an application for judicial review of a decision of a Pre-Removal Risk Assessment Officer (the "Officer") wherein the Officer concluded:

> Risk by definition is forward-looking and the PRRA process requires that the risks faced by the Applicant be personalized. Based on a review of the current country documentation, I find that there has not been a material change in country conditions in Jamaica since the decision of the RPD [Refugee Protection Division of the Immigration and Refugee Board] in May 2009, which would now

> bring the applicant within the definition of a Convention refugee or a person in need of protection. Further, I have been provided with insufficient evidence to demonstrate that the applicant faces additional, forward-looking personalized risks in Jamaica that were not contemplated by the RPD.
>
> Based on a review of the applicant's PRRA application and the publicly available documentation, I find that there is less than a mere possibility that the applicant faces persecution as described in section 96 of the IRPA [*Immigration and Refugee Protection Act*], if returned to Jamaica. Similarly, there are no substantial grounds to believe that he faces a danger of torture; nor are there reasonable grounds to believe that the applicant faces a risk to life or of cruel and unusual treatment or punishment as described in section 97 of the IRPA.

Preliminary Issue

[2] The pleadings in this matter indicate that the Respondent is the Minister of Public Safety and Emergency Preparedness and in fact PRRA decisions are made under the authority of the Minister of Citizenship and Immigration; for that reason I have added, at the Court's own initiative, the Minister of Citizenship and Immigration as an additional Respondent.

Background

[3] The Applicant is a citizen of Jamaica. He is 45 years of age. He is an admittedly openly gay male. In fact, on the 17th of July, 2009, he married another Jamaican male, now a Canadian citizen, at Toronto.

[4] The Applicant attests that, in Jamaica, he faced a lifetime of harassment and insults, notwithstanding that he was not then openly gay, because people assumed he was gay due to his mannerisms. On one occasion, he was even stoned.

[5] Eventually, he acknowledged his homosexuality to his family. In the result he faced what he described as a "barrage of hatred and rejection". He eventually had a nervous breakdown.

[6] In 1996, despairing of acceptance in Jamaica, he moved to the United States where, he attested, his immigration status was uncertain but his safety was secure. Through lack of knowledge, he failed to claim asylum in the United States until it was too late to do so. A sister of the Applicant in the United States determined that she was not qualified to sponsor him for status there.

[7] The Applicant attests that the situation in Jamaica for homosexuals continued to deteriorate following his departure from that country with the result that he determined he could not return. In the result, in August of 2007, he came to Canada and initiated a refugee claim here. The hearing of his refugee claim took place on the 29th of April, 2009. By decision dated the 7th of May, 2009, his claim was denied. While the presiding member of the Refugee Protection Division (the "RPD") found that the Applicant had testified in a credible and forthright fashion, that he had not embellished his claim and that he was in fact a homosexual, he found that the Applicant had only suffered discrimination in Jamaica and not persecution and further, that there were no objective grounds to support the Applicant's fear of persecution if he were required to return to Jamaica.

[8] The Applicant sought leave to pursue judicial review in this Court of the denial of his Convention refugee claim. Leave was denied on the 8th of September, 2009.

[9] The proximity of some relevant dates is worthy of note: the date of the Applicant's hearing before the RPD was the 29th of April, 2009, the date of the decision of the RPD is the 7th of May, 2009, the Applicant married on the 17th of July, 2009, leave on this application for judicial review of the RPD decision was denied on the 8th of September, 2009 and the decision here under review is the 6th of October, 2009. Thus, the opportunity for the development of "new evidence" within the scope of paragraph 113(a) of the *Immigration and Refugee Protection Act*[1] ("IRPA") was severely restricted.

[10] The Applicant has an outstanding application for leave to apply for landing from within Canada on humanitarian and compassionate grounds.

The Decision Under Review

[11] The portion of the decision under review under the heading "Assessment of Risk" is relatively brief. It is reproduced in full here:

> I have read and considered the applicant's PRRA application, submissions and Reasons for Decision of the RPD. Risk by definition is forward-looking; as a result, I look to the most current, publicly available documentary evidence regarding country conditions and human rights in Jamaica in order to make a determination regarding risk.
>
> The applicant entered Canada and made a claim for refugee protection on 07 August 2007 at the Fort Erie, Ontario Port of Entry.
>
> The determinative issue for the panel was: *whether the harm allegedly feared by the claimant rises to the level that he would face a serious possibility of persecution, or whether he would instead be subject to discrimination.* It made the following factual determinations:

1 S.C. 2001, c. 27

Counsel submitted that Jamaica remains a society which is homophobic, a position which is somewhat supported by the documentary evidence before the Board and one that I do not disagree with. However, while I accept that the claimant has faced discrimination in Jamaica, the claimant has failed to place any persuasive evidence before the Board that he has suffered persecution. The claimant freely admitted, when asked by the Tribunal Officer, that he has never in his life been subjected personally to any level of violence, nor does he even know anyone personally in the homosexual community who has ever been subjected to violence. The claimant testified that on no occasion has he ever had to engage the protection of the state while living in Jamaica. The evidence before me does not suggest that he has experienced persecution in the past. I find that he has not demonstrated that he possesses a well-founded fear of persecution, nor is there any evidence that there is an agent of persecution waiting for him to return to Jamaica.

The onus to establish a claim rests on the claimant. Although the claimant testified in a credible and forthright manner, and did not embellish his answers, I do not find that the claimant has established his claim.

In the specific circumstances of this claimant, I find that he did not suffer persecution. While I accept that he suffered discrimination in Jamaica, his experiences did not rise to the level of persecution. I find that what the claimant has experienced in the past, and what he fears upon return to Jamaica is not persecution, but rather discrimination. His fear of returning to Jamaica is now purely speculative as he has not been there in thirteen years.

Accordingly, his claim for protection was rejected on 12 May 2009. Leave to seek judicial review of the negative RPD decision to the Federal Court of Canada was denied on 08 September 2009.

The risk cited by the applicant in his PRRA application are essentially the same as those heard and considered by the RPD. The purpose of this assessment is not to reargue the facts that were before the panel. The decision of the RPD is to be considered as final with respect to the issue of protection under sections 96 and 97 of the IRPA, subject only to the possibility that new evidence shows that the applicant would be exposed to new, different or additional risk developments that could not have been contemplated at the time of the RPD decision. (Escalona Perez v. Canada, 2006) I do not find that the applicant's past treatment, in and of itself, warrants a granting of protection nor is it necessarily indicative of a forward-looking risk in light of the documentary

evidence regarding country conditions and his personal circumstances.

The applicant has submitted his affidavit, dated 18 August 2009. There is a written account of the events which caused him to leave Jamaica and eventually seek protection in Canada. While this document post-dates the RPD decision, it reiterates events that transpired prior to his departure from Jamaica. It does not add to the information concerning personal risk and does not enlighten as to new risk developments for the applicant in Jamaica; I afford this document little weight.

An affidavit from Gareth Henry has been submitted in support of this application. This affidavit is undated; however, in fairness to the applicant, it has been considered in this assessment. The deponent states that he was the co-chair of the Jamaican Forum for Lesbians, All-Sexuals and Gays (J-Flag) from 2004 until January 2008. He states that he left Jamaica for Canada in January 2008, and was found to be a Convention refugee in July 2008. In his co-chair capacity, he submits that he: *was privy to information concerning attacks on gays in Jamaica and was constantly kept updated about conditions in Jamaica for the LGBT* (Lesbian, Gay, Bi-Sexual, Trans-Sexual) *community*. It is his opinion that an openly gay man such as the applicant would face considerable risk to his personal security and safety, and ultimately, to his life if he were to return to Jamaica. While this affidavit may post-date the decision of the RPD, the information contained within it pre-dates the decision and does not add to the information concerning personal risk, nor does it enlighten as to new risk developments for the applicant in Jamaica. I find the deponent's opinion to be speculative in nature and afford this document low probative value.

Subsection 161(2) of the IRPA Regulations requires that, "*A person who makes written submissions must identify the evidence presented that meets the requirements of paragraph 113(a) of the Act and indicate how that evidence relates to them*." I have read and considered the applicant's remaining submissions and it is determined that they describe the general country conditions in Jamaica, and he has not linked this evidence to his personalized risk. The applicant has not provided objective documentary evidence to support that his profile in Jamaica is similar to those persons that would currently be at risk of persecution or harm in that country. I find that the documents relate to conditions faced by the general population, or describe specific events or conditions faced by persons not similarly situated to the applicant. The applicant has not been in Jamaica since 1996. The evidence before me does not support that he is being sought by a person or persons in Jamaica. The applicant states that he is at risk in Jamaica due to

> his homosexuality. Evidence does not indicate that he is being targeted by any organization or person from Jamaica or that any of his family members in Jamaica are being targeted due to his sexual orientation. I find it objectively unreasonable that after approximately 13 years, the applicant is of interest to anyone in Jamaica as a result of his homosexuality. The evidence before me does not support that the applicant faces a personalized risk in Jamaica due to his homosexuality.
>
> I now turn to objective documentary evidence to determine whether there has been a material change in country conditions in Jamaica, since the panel's negative RPD decision in May 2009, which would now bring the applicant within the definition of a Convention refugee or a person in need of protection.
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> [Italicized portions, as in the original]

[12] In an Addendum, it is noted that the Gareth Henry affidavit was signed and sworn on the 5th of October, 2009.

The Issues

[13] In the Applicant's Memorandum of Fact and Law, the issues on this application for judicial review are identified as the following:

a) Did the Officer breach the principles of procedural fairness in failing to consider or analyze the Applicant's evidence concerning the additional risk he faced as a result of his marriage?

b) Did the Officer err in her risk analysis – namely, in misunderstanding and misapplying the test for personalized risk, and in failing to perform a forward-looking analysis?

c) Did the Officer err in fact by according minimal weight to the affidavit of Gareth Henry?

[14] As with all applications for judicial review before this Court, in addition, the issue of standard of review arises. In what follows, I will deal first, and briefly, with the issue of standard of review.

Analysis

a) Standard of Review

[15] The standard of review of a decision such as that here under review is, in respect of a pure question of law, or a breach of procedural fairness or natural justice, "correctness". In all other respects, the appropriate standard of review is "reasonableness". Where the "reasonableness" standard applies, the analysis will be concerned with:

> ... the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law... [2]

I am satisfied that the first issue raised on behalf of the Applicant is reviewable on a standard of correctness while the second and third issues raised on behalf of the Applicant are reviewable on a standard of reasonableness.

b) *Impact of the Applicant's Marriage*

[16] Counsel for the Applicant urged that the Applicant's marriage, occurring as it did after the RPD's decision in respect of the Applicant's refugee claim, was new evidence and represented a new risk factor if he were required to return to Jamaica. The marriage was highlighted in the Applicant's affidavit that was before the Officer and was referred to in the submissions that were before the Officer in the following terms:

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[2] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph [47].

> Since Jamaican law punishes any sexual intimacy between two men, whether in public *or in private*, Marlon's marriage exposes him to the risk of an immediate sentence of ten years of imprisonment with hard labour if he is forced to return to Jamaica. Marriage is not a crime and treating it as such is clearly persecutory. Moreover, sentencing someone to ten years of hard labour for exercising the fundamental human right to love and cherish one's spouse also clearly constitutes cruel and unusual treatment and punishment.
>
> Evidence of Marlon's marriage is therefore material to the determination of whether Marlon is a person in need of protection. Moreover, since the marriage took place after Marlon's refugee hearing, and Marlon was not living common law before the hearing, it is submitted that evidence of Marlon's marriage constitutes new evidence warranting the acceptance of this PRRA application.
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> [italics in the original]

[17] In the decision under review, the Officer noted that he or she did not give consideration to documents which pre-dated the RPD decision and that he or she did not give consideration to evidence speaking to humanitarian and compassionate factors not speaking to risk. The Officer concluded the paragraph in which these exceptions were noted with the following sentence:

> Otherwise, all other evidence submitted has been accepted as new evidence and considered in this risk assessment.

[18] Counsel for the Applicant urged that, particularly taking into account the foregoing submissions, the evidence and submissions regarding the Applicant's marriage did not fit within either of the exceptions noted by the Officer and therefore were accepted by him or her and were therefore accepted as new evidence and were allegedly considered in the Officer's risk assessment. The foregoing notwithstanding, the evidence and submissions regarding the Applicant's marriage were no where specifically mentioned in the decision under review.

[19] In *B.(A.) v. Canada (Minister of Citizenship and Immigration)*[3], Justice Zinn of this Court found a PRRA Officer to have erred in discounting reports of violence against homosexuals in Guyana. He concluded at paragraph 24 of his Reasons that such a failure to consider relevant evidence would, standing alone, be sufficient to grant the judicial review that was before him. I am prepared to reach the same conclusion here. I am prepared to take judicial notice of the fact that the region of Canada in which the Applicant lives has a significant Canadian-Jamaican population. The Applicant is active in that community. It is entirely possible that the Applicant's openly gay lifestyle in Canada is already known to persons in Jamaica who might pose a risk to the Applicant. His same-sex marriage only enhances the risk that his openly-gay lifestyle might become known in Jamaica, if it is not already known. The failure to acknowledge this new evidence and to take it into account in determining whether the Applicant now faces a personalized risk of persecution or a risk to his life or of cruel and unusual treatment or punishment if returned to Jamaica constitutes a reviewable error against the standard of review of correctness and, even more certainly, against the standard of review of reasonableness.

[20] On this ground alone, this application for judicial review will be allowed.

c) and d) Error in the Officer's Risk Analysis and According Minimal Weight to the Affidavit of Gareth Henry

[21] In light of my foregoing conclusion, I will deal only briefly with these two allegations on behalf of the Applicant of reviewable error. Apart from failing to give any consideration to the impact of the Applicant's marriage in the Officer's risk analysis, with particular emphasis on the requirement that such analysis be personalized to the particular circumstances of the Applicant and that it be forward-looking, I find no reviewable error against a standard of review of

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3 2009 FC 640, June 17, 2009.

reasonableness. By contrast, the Officer's explanation for according minimal weight to the affidavit of Gareth Henry, I find to be less than convincing, once again, particularly in the light of the Applicant's uncontested openly gay lifestyle in the community in which he lives in Canada.

Conclusion

[22] For the foregoing reasons, this application for judicial review will be allowed, the decision under review will be set aside and referred back to the Respondent for redetermination by a different officer.

Certification of a Question

[23] At the close of hearing, counsel were advised of the Court's conclusion and consulted on the issue of certification of a question. Neither counsel recommended certification of a question. The Court itself is satisfied that this application for judicial review turns entirely on its particular facts. No serious question of general importance arises that would be determinative on an appeal of the Court's decision herein. No question will be certified.

ORDER

THIS COURT ORDERS that:

1. This application for judicial review is allowed. The decision under review is set aside and the Applicant's application for a pre-removal risk assessment is referred back to the Respondents for reconsideration and redetermination by a different officer.

2. The style of cause herein is amended to include The Minister of Citizenship and Immigration as a Respondent.

"Frederick E. Gibson"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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