Federal Court  Cour fédérale

Date: 20101223

Docket: IMM-2984-10

Citation: 2010 FC 1332

Ottawa, Ontario, December 23, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

A.B.

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review concerns a Pre-Removal Risk Assessment (PRRA) decision of a PRRA officer who found that the Applicant would not face a risk to his life, a risk of torture, or a risk of cruel and unusual treatment or punishment if deported to Guyana.

[2] For reasons that follow, I am granting this application for judicial review.

Background

[3] The Applicant is a 44-year-old homosexual man born in Georgetown, Guyana. He became a permanent resident of Canada at the age of ten on November 29, 1979. He had been adopted and raised by a Canadian family. He describes his experience with the family as physically and emotionally abusive and says he was left in the care of a pedophile who sexually abused him for a number of years.

[4] As an adult, the Applicant has been charged and convicted for a number of criminal offences, including robbery and sexual assault. Because of his criminal convictions, an admissibility hearing was started in January 1999, but was adjourned to allow him to pursue a claim to Canadian citizenship. The Applicant was unable to establish that he was a Canadian citizen, and was subsequently found to be inadmissible. The Immigration Division issued a removal order on January 24, 2001.

[5] The Applicant received a negative PRRA assessment on September 12, 2007, but successfully challenged it on judicial review on June 17, 2009. Upon finding the officer had erred in ignoring relevant evidence in concluding that the Applicant was not likely to experience cruel and unusual treatment in Guyana, Justice Russel Zinn set aside the negative PRRA decision and referred the matter back to another officer for a new PRRA assessment.

[6] The present application for judicial review concerns the second PRRA decision.

Decision Under Review

[7] In a letter dated December 8, 2009, the PRRA Officer informed the Applicant that his application for a PRRA had been rejected on the grounds that the Applicant would not be subject to risk of torture, risk to life, or risk of cruel and unusual treatment or punishment if returned to Guyana.

[8] The Officer accepted the Applicant's evidence with respect to his homosexuality. The Officer also acknowledged the information provided in the documentary sources that were before him, including reports from the Society Against Sexual Orientation Discrimination (SASOD), the Guyana Human Rights Association (GHRA), Freedom House, and the United States Department of States Country Report on Human Rights (US DOS Report).

[9] The Officer gave limited weight to SASOD's claim of a poor or worsening situation for sexual minorities in Guyana, reasoning that if there was objective and reliable evidence concerning serious discrimination or acts of violence targeting sexual minorities in Guyana, this would have appeared in the recent US DOS and Freedom House reports, which reported detailed information about societal discrimination and violence against sexual minorities in Jamaica but not for Guyana. The Officer acknowledged that the lack of information might confirm that such incidents are significantly underreported, but that this could also be interpreted to mean that circumstances had improved in Guyana.

[10] The Officer noted that the report of violent incidents against homosexuals in Guyana largely involved "openly gay" persons, which the Officer saw as defined as someone engaged in

commercial sex work or transvestitism, neither of which applied to the Applicant. The Officer found that the Applicant would have little likelihood of facing criminal charges or jail time for consensual adult homosexual acts. The Officer found insufficient evidence that the state actually condoned homophobia.

[11] However, the Officer did acknowledge that the continuing presence of homophobic legislation may restrict freedom of association and expression for homosexuals. The Officer acknowledged that homosexuals faced difficulties with employment, health care, and education, but did not find that these examples rose to the level that it would pose, on probable grounds, a risk to life, a risk of torture or a risk of cruel and unusual treatment or punishment to the Applicant, although "openly gay" individuals might face such a risk of serious harassment.

[12] The Officer found that social or legal pressures to conceal sexual orientation are not uncommon in the world and concluded with the following statement:

> I acknowledge that the practice of discretion with respect to his sexual orientation, in order to lessen his risk of experiencing related discrimination would compromise, to some degree, the applicant's freedom of expression and that this would likely pose both emotional and psychological hardships to him. However, I do not find that the applicant would be compelled to entirely conceal or deny his sexuality in Guyana, particularly if he resides in Georgetown where the evidence indicates that social events are organized by and for the gay community and where the applicant would reasonably have opportunities to freely express his sexual identity in social settings. While the applicant may feel constrained to exercise discretion with respect to his sexual orientation in some settings, evidence that he need not always feel constrained to do so causes me to find that the sometime exercise of discretion does not constitute cruel and unusual treatment or punishment.

[13] Regarding state protection, the Officer accepted that state mechanisms are in place but offer less than perfect protection. The Officer found that openly gay persons (commercial sex workers and transvestites) may face a serious risk to life, a risk of torture or a risk of cruel and unusual treatment of punishment at the hands of the police in addition to the public, but the Applicant did not fall within this group.

[14] The Officer found that some police officials responded professionally to reports of homophobia while others did not, and therefore concluded that avenues of effective police protection were available to victims of homophobic threats of violence, although perseverance might be required. The Officer therefore found that adequate levels of state protection would be reasonably available to the applicant.

[15] As a result, the Officer found there was insufficient evidence that the applicant would face a probable risk to his life, a risk of torture or a risk of cruel and unusual treatment or punishment.

Legislation

[16] The *Immigration and Refugee Protection Act*, 2001, c.27 (IRPA)

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants : a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

of more than six months has been imposed;

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country…

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

112. (3) Refugee protection may not result from an application for protection if the person

…

(b) is determined to be inadmissible on grounds of

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,

112. (1) La personne se trouvant au Canada et qui n’est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

112. (3) L’asile ne peut être conféré au demandeur dans les cas suivants :

…

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au

serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;	Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
113. Consideration of an application for protection shall be as follows: … (d) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and (i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or (ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.	113. Il est disposé de la demande comme il suit : … d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part : (i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada, (ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

Issues

[17] Although the Applicant raises several issues, I consider the follow issue as being determinative:

> Did the Officer properly assess the Applicant's personal risk to life, risk of torture, or cruel and unusual treatment or punishment?

Standard of Review

[18] The standard of review with respect to the application of the law to evidence in the context of a PRRA decision is reasonableness: *Ariyaratnam v Canada (Minister of Citizenship and Immigration)*, 2010 FC 608; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]. This means that the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process", and whether the PRRA decision is "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, at para 47.

Analysis

[19] The Applicant submits that the Officer erred in finding that the discrimination the Applicant might experience in Guyana would not amount to cruel and unusual treatment. The Applicant submits the Officer also erred in this finding by basing the analysis on the Applicant being discreet about his sexual orientation. The Applicant argues that the assessment of the risk must be based on his fundamental right to live openly as a gay man. Furthermore, the Applicant submits that in concluding that it is only transvestites and male sex workers who are openly gay and at serious risk in Guyana, the Officer misconstrued the source that he was relying on for this definition of "openly gay".

[20] The Respondent submits that given the evidence before the Officer, it was reasonable for the Officer to decide that the evidence does not support that the Applicant would be subjected to a risk

of cruel and unusual treatment. The Respondent also submits that the Officer was not advocating that the Applicant hide his sexual orientation in Guyana, but was rather acknowledging that he may choose to be discreet in certain situations, and that this is reasonable because discretion about one's sexual orientation is exercised in many parts of the world. The Respondent argues that the Officer must consider all the evidence in coming to a decision and must weigh it accordingly. It is not enough for the Applicant to point to some evidence supporting his own argument to prove that the Officer has erred.

[21] In defining "openly gay" in Guyana as being limited to transvestites and male sex workers, the PRRA Officer relied on the following statement from SASOD:

> 'Openly gay' in Guyana usually refers to someone who is usually engaged in sex work and might dress in women's clothes. There is always a risk of violence or verbal abuse. Other gay men who do not wish to live this way would find it difficult to assert themselves, since the homophobia in the society could result in persecution in different ways. There is always the threat of violence, and many gay persons have to live dual lives to avoid that violence.

[22] I would note that the wording of this passage relied on by the PRRA officer indicates that the statement that gay men may face some risk of violence is not limited to only commercial sex workers and transvestites. Another statement by SASOD that was before the Officer describes "the large incidence of unreported physical harassment and violence perpetrated on men perceived to be openly gay, particularly male transvestite commercial sex workers" (emphasis added). The choice of this wording would suggest that the definition of "openly gay" men is not limited only to transvestites or commercial sex workers, although they do compose a subset of the group. The Officer's decision to narrowly define the term "openly gay" as such is difficult to understand.

[23] In limiting the definition of “openly gay” to commercial sex workers and transvestites and concluding with his remarks about exercising discretion, the Officer in effect only examined the risk of cruel and unusual treatment for two types of homosexual persons: commercial sex workers/transvestites, and homosexual persons who are discreet in public about their sexual orientation. Nothing about the Applicant’s history suggests that he would fall into either category.

[24] The Officer was required to analyse whether the Applicant, as he is within his personal context, would face a risk of torture, risk to life, or risk of cruel and unusual treatment or punishment. The Applicant’s history suggests that the Applicant has lived his life being openly gay, that is, in the conventional sense of being open about his sexual orientation. In conducting a risk analysis based on the assumption that the Applicant would not be openly gay in this manner in Guyana, the Officer made an error in his analysis. In conducting the risk assessment, the Officer was not required to dictate how the Applicant should conduct himself in the future. Nor was it the Officer’s place to speculate that the Applicant would choose wisely to be discreet. What was relevant was the Applicant’s personal risk as an openly homosexual man.

[25] There may or may not have been enough evidence for the Officer to conclude that the Applicant would have faced cruel and unusual treatment as a sexual minority in Guyana. Because the Officer based his analysis only on the treatment faced by transvestites/commercial sex workers and by homosexual persons who were discreet about their sexual orientation, the Officer failed to examine whether the Applicant himself, as an openly homosexual man does not fall into either of those categories, would face such a risk.

[26] The Officer's risk assessment is incomplete and as such, the Officer's decision is unreasonable and constitutes a reviewable error.

Conclusion

[27] I allow this application for judicial review and remit the matter back for reconsideration by a different officer.

JUDGMENT

THIS COURT ORDERS and adjudges that:

1. The application for judicial review is allowed, and the matter is remitted back for re-determination by a different officer.

2. I do not certify any question of general importance.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2984-10
STYLE OF CAUSE:	A.B. v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, ONTARIO
DATE OF HEARING:	DECEMBER 1, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN J.
DATED:	DECEMBER 23, 2010

APPEARANCES:

Brenda Wemp	FOR THE APPLICANT
Helen Park	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Brenda J. Wemp Vancouver, BC	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT