Federal Court  Cour fédérale

Date: 20121108

Docket: IMM-3364-12

Citation: 2012 FC 1305

Ottawa, Ontario, November 8, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

DONAVAN DERRICK BROWN

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of a Senior Immigration Officer (Officer), dated 24 February 2012 (Decision), which refused the Applicant's application for a Pre-Removal Risk Assessment (PRRA).

BACKGROUND

[2] The Applicant is a 36-year-old man from Jamaica. The first time he came to Canada was in 2008, as a Farm Worker on a Temporary Foreign Worker program. He returned to Jamaica in 2008 once the season was over. The Applicant came back to Canada in 2009 on the same type of visa. This time, he stayed in Canada once his visa expired. Based on his overstay, the Applicant was barred from making a refugee claim. He applied for a PRRA on 30 November 2011 on the basis that he is bisexual and risks serious harm if returned to Jamaica.

[3] To help him prepare his PRRA, as well as an In-Canada Spousal Sponsorship application (which is still underway), the Applicant hired Mr. Vernal Pinnock. Mr. Pinnock is an immigration consultant and member of the Immigration Consultants Regulatory Council of Canada (ICCRC). The Applicant says that Mr. Pinnock had him sign blank PRRA forms, and that he only spoke to Mr. Pinnock for 20-25 minutes on the phone before submitting the PRRA. The Applicant also claims that when he asked Mr. Pinnock if he needed to gather any supporting documents, Mr. Pinnock told him that none would be necessary.

[4] The Applicant filed a complaint to the ICCRC against Mr. Pinnock on 12 April 2012. A Further Affidavit of Kathryn Lynch was filed on 20 August 2012 detailing this complaint. On 11 May 2012, ICCRC wrote to the Applicant requesting further details about his complaint. The Applicant replied on 11 June 2012. On 14 June 2012, ICCRC wrote to Mr. Pinnock advising him of the complaint. On 17 August 2012, ICCRC informed the Applicant that the complaint had been closed because the Applicant was "unable to corroborate [his] allegations." The Applicant was informed by way of email on 20 August 2012 that he would be unable to see Mr. Pinnock's reply because the matter was confidential. The Applicant also submitted a letter to Citizenship and

Immigration Canada (CIC) on 30 May 2012 advising them of the complaint against Mr. Pinnock, and asking them to replace his existing Sponsorship Application with new sponsorship forms and supporting evidence.

[5] The Applicant's PRRA includes the requisite forms, an unsworn letter from the Applicant, and a letter from Mr. Pinnock. The Certified Tribunal Record (CTR) includes a 2011 United States Department of State Country Report on Jamaica, which the Applicant says in his Memorandum of Argument was not submitted by Mr. Pinnock. The portion of the Department of State Report relevant to the Applicant is found on pages 44-45 of the CTR. It details many incidences of violence against homosexuals in Jamaica, including some perpetrated by the police. The document states that conditions in Jamaica are such that homosexual people suffer prejudice and are offered little to no protection by the state.

[6] The unsworn letter from the Applicant is found on page 15 of the CTR. In it, the Applicant states that he is bisexual and that in Jamaica homosexuals are targeted by the general population, as well as the police. The letter states that the Applicant was in a secret same-sex relationship for a number of years, but in 2007 he was caught on a beach with his partner and they were beaten up and threatened. In the Applicant's Affidavit submitted in support of this Application (pages 11-26 of the Application Record), the Applicant states that the incident on the beach never happened, and it was made up by Mr. Pinnock.

[7] The Applicant's letter goes on to say that while he was working in Canada in 2008, his partner was shot and killed. When the 2008 season was over he returned to Jamaica. The Applicant states that in December 2008, he was shot at by two men, and then he stayed underground until coming back to Canada in 2009. The Applicant says he went to the police in Simcoe, Ontario, to tell

them his story while working in the summer of 2009 and was told that an officer would come to see him within 4 days, but no one ever showed up. He says that soon after this some of the other Jamaicans in his bunk started teasing him and leaving notes about how homosexuals have AIDS and must die. The Applicant says he started staying away from his job for days at a time, and eventually stopped going altogether. He states that he regrets not making a refugee claim earlier, but cannot go back to Jamaica because he fears he will be killed.

[8] The letter from Mr. Pinnock included with the PRRA application is found on pages 22-23 of the CTR. It states that there "is no way of showing new evidence" and that the Applicant is "relying on the nature of the harm." No other evidence was included, and a hearing was not conducted. The Officer rejected the Applicant's PRRA application on 24 February 2012.

DECISION UNDER REVIEW

[9] The Decision in this case consists of a letter the Officer sent the Applicant on 24 February 2012, along with the Officer's notes on the file. The Officer rejected the PRRA application because she determined the Applicant had provided insufficient evidence to establish the risk asserted.

[10] The Officer started her Decision by reviewing the events described by the Applicant in his letter. She then stated that the Applicant had not provided sufficient evidence to establish his claim, nor did it appear he made any efforts to do so. The Officer found it unreasonable that the Applicant had not provided more detailed information on:

- His homosexual relationship and partner;
- How and why his partner was killed in Jamaica, and specifically what this had to do with his partner's sexual orientation;

- The 2007 beating and 2008 shooting: whom he thinks may be responsible, how they are connected to his sexual orientation, and whether the two incidences are connected;
- Why he felt he could not approach the police to report the shooting;
- The report filed with the Canadian police in Simcoe.

[11] The Officer stated that in assessing the Applicant's overall statements she found it unreasonable that he did not make a refugee claim while on a valid work permit, and even more unreasonable that he did not submit any supporting documentation whatsoever. The Officer found the Applicant had provided insufficient evidence to establish the risk alleged, and though conditions may be unfavourable for bisexuals in Jamaica, the Applicant had not established a risk against which to weigh these conditions. The Officer found the Applicant did not face a risk as described in section 96 or 97 of the Act, and rejected his PRRA application.

ISSUES

[12] The Applicant raises the following issues:

1) Did the Officer err by failing to make an adverse credibility finding against the Applicant, and then failing to conduct an analysis of the risk of returning a bisexual man to Jamaica?
2) Was the Applicant denied a fair hearing due to the incompetence of Mr. Pinnock?

STANDARD OF REVIEW

[13] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[14] The first issue goes to the Officer's evaluation of evidence and credibility in regards to the PRRA. In *Hnatusko v Canada (Minister of Citizenship and Immigration)*, 2010 FC 18 at paragraph 25, Justice John O'Keefe held the standard of review applicable to a PRRA Officer's decision is reasonableness. Justice Maurice Lagacé made a similar finding in *Chokheli v Canada (Minister of Citizenship and Immigration)*, 2009 FC 35 at paragraph 7, as did Justice André Scott in *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2012 FC 89 at paragraph 19. The Applicant agrees, at paragraph 18 of the Applicant's Memorandum of Argument, that the standard of review applicable to the first issue is reasonableness.

[15] Although not presented as a separate issue, the Applicant argues at page 187 of the Applicant's Memorandum of Argument that the Officer used the excuse of "insufficiency of evidence" to avoid holding an oral hearing in accordance with subsection 113(b) of the Act and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). Views have differed in the Federal Court as to whether the core of the issue is procedural fairness (see *Prieto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 253; *Sen v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1435) or an evaluation of facts

requiring deference (see *Puerta v Canada (Citizenship and Immigration)*, 2010 FC 464; *Marte v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 930). Justice Judith Snider dealt with this issue in *Mosavat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 647, where she said at paragraph 9:

> In my view, the applicable standard of review is reasonableness. The Officer's task is to analyze the appropriateness of holding a hearing in light of the particular context of a file and to apply the facts at issue to the factors set out in s.167 of the Regulations. Thus, the question is one of mixed fact and law. As the Supreme Court held at paragraph 53 of *Dunsmuir v New Brunswick*, 2008 SCC 9, questions of mixed fact and law attract deference and are reviewable on the reasonableness standard.

This was cited with approval by Justice Roger Hughes in *Rajagopal v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1277 [*Rajagopal*] and Justice Yves de Montigny in *Adetunji v Canada (Minister of Citizenship and Immigration)*, 2012 FC 708. The Applicant seems to agree; he included his arguments in regards to the oral hearing as part of the first issue dealing with credibility, and advanced Justice Hughes' decision in *Rajagopal* in support of his case. Thus, this issue will be reviewed on a standard of reasonableness.

[16] When reviewing a decision on the standard of reasonableness, 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." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[17] The second issue goes to the Applicant's right to fully present his case, which is an issue of procedural fairness (see *Xu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 718, *Baker v Canada (Minister of Citizenship and Immigration*, [1999] 2 SCR 817 [*Baker*] at paragraph 22). In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29, the Supreme Court of Canada held at paragraph 100 that it "is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The Respondents agree that the standard of review applicable to the second issue is correctness.

STATUTORY PROVISIONS

[18] The following provisions of the Act are applicable in this proceeding:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces

each of those countries;

[…]

Person in Need of Protection

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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

pays;

[…]

Personne à protéger

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,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
[…]	[…]
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**. (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).
[…]	[…]
113. Consideration of an application for protection shall be as follows:	**113**. Il est disposé de la demande comme il suit:
[…]	[…]
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	*b*) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
[…]	[…]

[19] The following provisions of the Regulations are applicable in this proceeding:

Hearing – prescribed factors	**Facteurs pour la tenue d'une audience**
167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors	**167.** Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une

are the following: (*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	audience est requise : *a*) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(*b*) whether the evidence is central to the decision with respect to the application for protection; and	*b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(*c*) whether the evidence, if accepted, would justify allowing the application for protection.	*c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

ARGUMENTS

The Applicant

The Officer's Credibility and Risk Assessment

[20] The Applicant states that the Officer failed to make a credibility finding in regards to the Applicant's bisexuality, and then having not made a negative credibility finding declined to conduct a state protection analysis. Even if the Officer did not believe the details of the Applicant's story, she did not specifically dispute his sexual orientation. The Applicant submits that his undisputed membership in this group – bisexual men – is enough to ground refugee protection under s. 97 of the Act based on the risks associated with returning a member of this group to Jamaica.

[21] The Applicant points out that the word "credibility" does not specifically appear anywhere in the Decision. The Applicant characterizes the Officer's complaint as a lack of detail or

corroborating proof of the events recounted in the PRRA, but argues that even if the Officer discounted all these events it was still possible to find that he is bisexual. The Applicant argues that though the Officer rejected the PRRA on the basis that the Applicant failed to provide sufficient evidence to corroborate the stories in his claim, this does not mean the Officer made a credibility finding in regards to the Applicant's bisexuality.

[22] The Applicant's sexual orientation is the core of the claim, and as Justice Sean Harrington stated in *John Doe 2004 v Canada (Minister of Citizenship and Immigration)*, 2004 FC 360 at paragraph 13, in this situation the Officer has a duty to identify adverse credibility findings in "clear and unmistakeable terms." The Officer failed to make any clear finding in regards to the Applicant's sexuality, and thus it must be concluded that she accepted that the Applicant is bisexual. The Applicant contrasts this Decision to that in *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 [*Ferguson*] at paragraph 6, where a "clear and unmistakable" finding was made when the Officer stated "there is insufficient objective evidence before me to establish that the applicant is, on the balance of probabilities, a lesbian." No finding of this nature was made; the Applicant's statements in regards to his sexual orientation were unchallenged by the Officer, and thus presumed to be true (see *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA) at paragraph 5).

[23] The Applicant submits that once it is established that he is a member of a group whose members are, by sole virtue of their membership in the group, likely to suffer persecution, a risk analysis must be conducted. This is because section 97 of the Act does not require a subjective basis for the fear. As demonstrated by *Odetoyinbo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 501 [*Odetoyinbo*] at paragraphs 6-8, *Alemu v Canada (Minister of Citizenship and*

Immigration), 2004 FC 997 at paragraphs 45-46 [*Alemu*], and *Bastien v Canada (Minister of Citizenship and Immigration)*, 2008 FC 982 [*Bastien*] at paragraphs 8-12, notwithstanding negative credibility findings in regards to events in the Applicant's claim, if objective evidence establishes that a certain group is at risk, and the Applicant is a member of that group, then a claim will be made out under section 97. As Justice Luc Martineau said at paragraph 8 of *Odetoyinbo*:

> In the case at bar the Board did not explicitly state in its reasons that it did not believe that the applicant was bisexual. Accordingly, it could not ignore compelling objective evidence on record demonstrating the abuses which gay men are subjected to in Nigeria. Therefore, even if the Board rejected the applicant's account of what happened to him in Nigeria, it still had a duty to consider whether the applicant's sexual orientation would put him personally at risk in his country.

This point was also made in *Alemu*, where Justice Carolyn Layden-Stevenson said at paragraph 45: "Whether or not an applicant was a credible witness does not prevent him from being a refugee if his political opinions and activities are likely to lead to his arrest and punishment." The Applicant asserts that the Officer had a duty to consider whether his bisexuality would put him personally at risk if returned to Jamaica.

[24] The Applicant argues that there is clear evidence that bisexual men face persecution in Jamaica. He submitted three documents in support of this risk as part of this Application, including the US Department of State Report that forms part of the CTR. The Applicant also states that the Officer had an independent duty to consult publicly available resources concerning country conditions (see *Hassaballa v Canada (Minister of Citizenship and Immigration)*, 2007 FC 489; *Jessamy v Canada (Minister of Citizenship and Immigration)*, 2009 FC 20; *Lima v Canada (Minister of Citizenship and Immigration)*, 2008 FC 222). The Applicant concludes that the sum of the lack of an adverse finding in regards to his bisexuality combined with general knowledge on

country conditions in Jamaica renders the Officer's Decision unreasonable. The failure of the Officer to conduct a risk analysis under section 97 was erroneous, and the Decision ought to be quashed on this ground.

The Lack of an Oral Hearing

[25] The Applicant also states that it was unreasonable for the Officer not to hold an oral hearing, as per subsection 113(b) of the Act and section 167 of the Regulations. He says that the Officer used the finding of insufficient evidence as an excuse to get around holding an oral hearing, a practice that was condemned by Justice Roger Hughes in *Uddin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1289. Justice Hughes said at paragraph 3 of that decision:

> The Court is concerned about decisions of PRRA Officers in which there is an endeavour to avoid the use of the word "credibility" in the hopes of avoiding a hearing. The intent of IRPA, its *Regulations* and attendant jurisprudence is clear; if credibility is an issue central to the matter before the Board and likely to lead to a result unfavourable to the applicant, a hearing should be held. It is not for a PRRA Officer to finesse these requirements by endeavouring to couch what are, in reality, credibility concerns, in language suggesting lack of evidence or contradictory evidence.

The Applicant alleges that the Officer was engaging in this practice. In cases where the risk is based on sexual orientation credibility will almost always be an issue, and it was unreasonable for the Officer not to hold an oral hearing.

[26] The Applicant submits that the Officer's failure to conduct an oral hearing, as well as her failure to conduct a risk and state protection analysis in light of the Applicant's unchallenged statement that he is bisexual, renders the Decision unreasonable.

The Negligence of Mr. Pinnock

[27] The Applicant further submits that he did not have proper representation, and thus he was unable to participate effectively in the determination of his PRRA (see *Hillary v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 51 at paragraph 34). The Applicant's right to representation is essential to his right to be heard, and is a fundamental principle of natural justice (*Canada (Minister of Citizenship and Immigration) v Panahi-Dargahloo*, 2010 FC 647 at paragraph 27). The Applicant submits that he was denied a fair hearing due to the incompetence of his immigration consultant, and this amounts to a breach of procedural fairness. Had he been properly represented he would have included a detailed narrative like the one included with this application, as well as other supporting materials.

[28] The Applicant states that he is an uneducated man from Jamaica, and cannot be expected to know anything about Canada's immigration system. He did not even know the difference between criminal law and immigration law and this is why he went to the local police station to try and make a refugee claim. Mr. Pinnock approached the Applicant while he was in immigration detention and the Applicant accepted his help. When Mr. Pinnock told the Applicant that he would take care of everything in regards to the PRRA, the Applicant accepted it. Mr. Pinnock was negligent in holding himself out to be a lawyer when he was not, in failing to instruct the Applicant to obtain supporting documentation, in only speaking with the Applicant briefly over the phone, and in not having the Applicant review the PRRA before submitting it.

[29] The Applicant submits that the incompetence of Mr. Pinnock denied him a fair hearing. In *Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51 [*Shirwa*], Justice Pierre Denault said at paragraph 12: "…where the incompetence or negligence of the applicant's

representative is sufficiently specific and clearly supported by the evidence such negligence or incompetence is inherently prejudicial to the applicant and will warrant overturning the decision…" The Applicant lists numerous other cases that have followed this reasoning. As established by *Cove v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 266 (CA) [*Cove*], immigration consultants are held to the same standards as counsel.

[30] The Applicant submits there are three requirements that must be met for negligence of counsel to establish a breach of procedural fairness (see *Memari v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1196; *Shakiban v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1177 [*Shakiban*]; *Nizar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 557; *Rodrigues v Canada (Minister of Citizenship and Immigration)*, 2008 FC 77; *Yang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 269 [*Yang*]; *Bedoya v Canada (Minister of Citizenship and Immigration)*, 2007 FC 505; *M.R.A. v Canada (Minister of Citizenship and Immigration)*, 2006 FC 207). The three requirements are:

1. The Applicant must establish actual incompetence based on a "precise factual foundation" and sufficient evidence to establish the "exact dimensions of the problem";

2. The Applicant must demonstrate that the incompetence resulted in prejudice. That is, but for the alleged incompetence, the result of the original hearing would have been different;

3. The Applicant must prove that his former counsel had an opportunity to respond to the complaint, or the matter has been referred to the proper governing body.

[31] The Applicant submits that he has met all three prongs of the test. Firstly, Mr. Pinnock's conduct and the submitted PRRA establish the factual basis to demonstrate incompetence. Specifically, Mr. Pinnock approached the Applicant's common-law wife while she was in an especially vulnerable state, he had the Applicant sign a blank PRRA form, he told the Applicant supporting documentation was not needed, he enclosed a cover letter with the PRRA mistakenly inferring that a refugee claim was made, he failed to include readily available corroborating evidence, he only ever contacted the Applicant for approximately 20 minutes on the phone, and he never showed the Applicant a copy of the completed PRRA before submitting it. Considered as a whole, these incidences meet the first requirement.

[32] In regards to the second requirement, the Applicant submits that the Officer rejected the PRRA based on insufficiency of evidence, and this insufficiency was caused by Mr. Pinnock's negligence. The PRRA was rejected before even evaluating the Applicant's credibility. The Officer listed specific things she found lacking in the PRRA application, and these insufficiencies would have been addressed had the Applicant had proper representation. It would have been easy for Mr. Pinnock to include things such as an affidavit by the Applicant, police reports, affidavits by people who knew about the Applicant's bisexuality, and photos of the Applicant's scars from an anti-gay attack. An affidavit by the Applicant providing many of the details mentioned by the Officer has been included with this Application, as well as photos of his scars, an affidavit from his common-law wife detailing the Applicant's bisexuality, and a copy of the report to the Simcoe police. The Applicant points out that the last two documents listed are dated in 2009 – two years before his PRRA application. But for Mr. Pinnock's negligence in not including these materials with the PRRA application, it is impossible to say whether the Officer would have come to the same conclusion.

[33] The Applicant also points out that the Respondents have not challenged the allegations of Mr. Pinnock's negligence, though there were many opportunities to do so. Affidavit evidence from Mr. Pinnock was not provided, nor was the Applicant cross-examined on his affidavit. The Applicant has also filed a formal complaint with the ICCRC. The Applicant requested a copy of Mr. Pinnock's reply to the complaints from ICCRC, but they would not provide it. The details of this complaint were provided in the Further Affidavit of Kathryn Lynch included with this Application, and are summarized above. Having met all the branches of the test, the Applicant submits that he was denied his right to procedural fairness, and the decision of the Officer ought to be quashed.

The Respondents

The Officer's Credibility and Risk Assessment

[34] The Respondents remind the Court that the onus is on the Applicant to provide evidence in support of his PRRA Application. The Applicant provided virtually no detail about every allegation he made; nor did he provide any supporting documentation. The only thing before the Officer was the Applicant's unsworn statement, and it was reasonable for the Officer to afford little weight to it. The Respondents cite *Ferguson*, above, at paragraph 32:

> When, as here, the fact asserted is critical to the PRRA application, it was open to the officer to require more evidence to satisfy the legal burden. Had the statement been affirmed by the Applicant in a sworn affidavit submitted with her application, it would have been deserving of somewhat greater weight than it was given. Had it been supported by other corroborative evidence such as evidence from her lesbian partner(s), public statements, and the like, it would have attracted even more weight.

The Respondents cite numerous cases that state that a written statement alone is not sufficient to discharge the Applicant's burden of proof in a PRRA application: see *Parchment v Canada*

(Minister of Citizenship and Immigration), 2008 FC 1140; *Buio v Canada (Minister of Citizenship and Immigration)*, 2007 FC 157; *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94.

[35] The Respondents say that the Officer did make a finding in regards to the Applicant's sexual orientation, and that the *Odetoyinbo* decision relied on by the Applicant can be distinguished from the one at hand. In *Odetoyinbo*, there was an oral hearing and the Applicant gave "elaborate testimony" in regards to his homosexuality, yet the Refugee Protection Division Panel was "totally silent" on the issue. In the present case, the Officer was not silent on the issue of the Applicant's sexual orientation; she found that bisexual people faced risks in Jamaica, but the Applicant had not proven that he would face such a risk. In other words, the Officer found that the Applicant had not proven that he is bisexual.

[36] The Respondents submit that the Applicant's reliance on the decision in *Bastien*, above, is misplaced. In that case, the applicant was a member of a particular social group and it was required that a risk assessment be conducted on this ground despite credibility concerns. The present case is distinguishable because there was insufficient evidence of the Applicant's membership in a particular social group before the Officer.

[37] As the Officer was unconvinced of any of the Applicant's claims, she was not obliged to conduct an analysis of the risks he would face if returned to Jamaica. This is supported by the *Ferguson* decision, at paragraph 6, where the finding by the Officer that "Without sufficient evidence that the applicant is a lesbian, an assessment of current country conditions does not establish that she is personally at risk in Jamaica" was upheld. The Applicant did not meet his burden of proof in this case, and there was nothing unreasonable about the Officer's decision.

The Lack of an Oral Hearing

[38] The Respondents submit that considering the lack of evidence provided, it was open for the Officer to decide there was no need to hold an oral hearing to determine the issue of credibility. As stated by Justice Russel Zinn at paragraph 26 of *Ferguson*: "It is open to the trier of fact, in considering the evidence, to move immediately to an assessment of weight or probative value without considering whether it is credible." The Officer gave little weight to the Applicant's allegations of risk based on the lack of detail and supporting documentation provided, and thus it was unnecessary to assess the Applicant's credibility.

[39] The jurisprudence makes clear that Officers do not have a duty to hold an oral hearing when sufficiency of evidence is the central issue; see *Iboude v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1316 at paragraph 14; *Kazmi v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1375 at paragraphs 9-11; *Abdou v Canada (Solicitor General)*, 2004 FC 752 at paragraphs 3-8; *Malhi v Canada (Minister of Citizenship and Immigration)*, 2004 FC 802 at paragraphs 7-9; *Kim v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 321 at paragraph 6. These cases establish that it is open to an Officer to determine there is not enough objective evidence to justify holding an oral hearing.

[40] The Respondents point out that the Applicant has submitted additional evidence and a detailed affidavit with this Application for Judicial Review, but the reasonableness of the Officer's decision must be assessed based on the limited evidence that was before her at the time. The Respondents submit that the Officer's Decision fell within the range of possible acceptable outcomes, and was reasonable.

The Negligence of Mr. Pinnock

[41] The Respondents submit that the bar for demonstrating that the Applicant was denied a fair hearing through the incompetence of his former counsel is very high. The first part of the test in *Shirwa*, above, requires "…sufficient evidence to establish the exact dimensions of the problem" so that the review is based on a "precise factual foundation"." See also *Betesh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 173 at paragraph 16. This sort of evidence has not been adduced by the Applicant.

[42] In *R v GDB*, 2000 SCC 22 [*GBD*], the Supreme Court of Canada held at paragraphs 27-29 that for incompetence of counsel to result in a breach of procedural fairness an applicant must establish that: (1) counsel's acts or omissions constituted incompetence; and (2) a miscarriage of justice resulted from the incompetence. The Court also stated that the onus is on the applicant to establish both branches of the test, and "the wisdom of hindsight has no place in this analysis."

[43] *GBD* states that there is a wide range of reasonable professional judgment, and the Applicant bears a heavy onus in establishing misconduct. The brevity of the PRRA application does not render Mr. Pinnock incompetent. As stated in *Cove*, above, at paragraphs 5-6, applicants are bound by their choice of counsel. If the Applicant chooses to hire an immigration consultant rather than a member of the immigration bar, he has to deal with the consequences. In the same vein, the Applicant is also responsible for the choices he made in dealing with his counsel.

[44] The Applicant is fluent in English and appeared in person to obtain his PRRA application, so he should have known the importance of looking it over before it was submitted. It is reasonable to expect the Applicant to have made more of an effort to ensure his complete story was put forward

to the Officer. The Applicant did not act diligently in this regard, and he must bear the responsibility for not acting when he found Mr. Pinnock's actions troubling.

[45] The Respondents also point out that though the Applicant has now submitted some of the missing details in support of his story as part of this Application, he has still not provided some of the evidence which the Officer noted was missing. For example, the Applicant has still not provided letters from anyone who knew of his bisexuality in Jamaica, or the incident of shots being fired at him. There remains a serious lack of supporting evidence that the Applicant is bisexual. The Applicant has not demonstrated that had he provided the Officer with the details and documents provided in this Application, the Officer's determination would have been different (see *Shirvan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1509).

[46] As the Supreme Court of Canada said in *GDB*, complaints about counsel are best dealt with by the appropriate governing body. The Applicant has filed a complaint with ICCRC, and thus has a forum to address his concerns. The Respondents point out that the Affidavit of Kathryn Lynch states that Mr. Pinnock did respond to the Applicant's complaint, but the ICCRC found that the Applicant was unable to corroborate his allegations. This constitutes evidence that Mr. Pinnock was not incompetent. The test from *Shirwa* is conjunctive, and the Applicant has not met all three branches. The Respondents submit that there has not been a breach of procedural fairness in this case.

The Applicant's Reply

The Officer's Assessment of the Applicant's Sexual Orientation

[47] The Applicant further states that the Respondents' arguments are contradictory: on the one hand the Officer was entitled to dismiss the PRRA application based entirely on insufficiency of

evidence, but on the other hand Mr. Pinnock did an adequate job of preparing the materials to be submitted with the PRRA. The Applicant submits that both statements cannot be true.

[48] The Applicant reiterates the *Odetoyinbo* decision, and states that when country conditions such as those in Jamaica are established, it is mandatory that an Officer make a clear and unambiguous finding as to his sexual orientation. There is no such finding in this Decision; the Officer simply went from finding there was insufficient evidence to corroborate the events in the Applicant's letter to dismissing the application. The Officer did not even state that she was declining to make a finding due to insufficient evidence. The Respondents are asking the Court to infer what the Officer concluded, and this is inappropriate. The Applicant says that the Respondents' reliance on the *Ferguson* case is misplaced because in that case the officer clearly stated there was insufficient evidence to establish the Applicant's sexual orientation, not just the events leading up to the application. The Officer failed to conduct an essential step in the PRRA analysis and this renders the Decision unreasonable.

[49] The Applicant points out an additional deficiency in the Officer's analysis. It has been recognized by the Court that it can be difficult to prove sexual orientation based on the inherently private nature of the activities involved, and the Officer ought to have been alive to this issue (see *Ogunrinde v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 760). As stated at paragraph 42 of that decision: "When evaluating claims based on sexual orientation, officers must be mindful of the inherent difficulties in proving that a claimant has engaged in any particular sexual activities."

[50] In regards to Mr. Pinnock's incompetence, the Applicant points to the decision in *Shakiban*, above, that establishes that it is either notice to counsel or a complaint to the appropriate governing

body that is required. The same conclusion was reached in *MAC v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1174, where Justice Michael Kelen said at paragraph 32: "the requirement to give of notice will be satisfied either when the applicants makes a complaint to a governing body, in that case the Canadian Society of Immigration Consultants (CSIC), or when the applicants provide evidence that their consultant was informed of the allegations against them." The Applicant points to the Further Affidavit submitted with this Application that confirms that this requirement was met.

[51] The Applicant argues that it is unfair to expect a Jamaican man without a high school education or any knowledge of Canada's immigration system to disregard the explicit advice given to him by his immigration consultant. If the Applicant were capable of spotting and dealing with the negligent actions of his counsel he would not need counsel in the first place. Mr. Pinnock was a member of the body (the ICCRC) created to regulate immigration consultants, and it was reasonable for the Applicant to rely on this fact as assurance that Mr. Pinnock was properly qualified to give him advice. Mr. Pinnock acted in an incompetent and negligent manner, and the Applicant is entitled to relief in this regard. The Applicant asks that the Decision be quashed and returned for review by another Officer.

ANALYSIS

[52] It is my view that the procedural fairness issue is decisive in this case.

[53] I see no disagreement between the parties concerning the legal test and principles that I must apply.

[54] As pointed out by the Respondents, the Applicant is required to submit very clear proof in this matter. According to *Shirwa*, above, at para 12, a decision "can only be reviewed in 'extraordinary circumstances', where there is sufficient evidence to establish the 'exact dimensions of the problem' and where the review is based on a 'precise factual foundation.'"

[55] In order to establish that the incompetence of one's counsel resulted in a breach of procedural fairness, the Supreme Court of Canada in *GDB*, above, at paras 27-29, held that (1) , it must be established that counsel's acts or omissions constituted incompetence; **and** (2) the Applicant must demonstrate that a miscarriage of justice has resulted. The Supreme Court of Canada also confirmed that the onus is on an applicant to establish the acts or omissions of counsel that are alleged to have been incompetent and "the wisdom of hindsight has no place in this assessment."

[56] In proceedings under the *Immigration and Refugee Protection Act*, the incompetence of counsel will only constitute a breach of natural justice in "extraordinary circumstances." With respect to the performance component, at a minimum, the incompetence or negligence of the applicant's representative [must be] sufficiently specific and clearly supported by the evidence. It must also be exceptional and the miscarriage of justice component must be manifested in procedural unfairness, the reliability of the trial results having been compromised. In this regard, the Applicant must demonstrate that there is a reasonable probability that the result would have been different but for the incompetence of the representative.

[57] However, before examining allegations of incompetence, the Court must first determine whether the Applicant has met the preliminary burden of giving notice to his former immigration consultant of the allegations of incompetence and a chance to respond.

[58] At the hearing of this matter, the Respondents conceded that the appropriate notice and a chance to respond to the Applicant's former immigration consultant had been given in this case. I agree with that conclusion, and I will only address the issues of incompetence and prejudice.

[59] Essentially, I am in agreement with the Applicant that the facts of the present case present particularly egregious conduct by the immigration consultant that has led to a breach of procedural fairness.

[60] The right of a refugee or PRRA claimant to be represented by competent counsel is a principle of natural justice in and of itself. As early as *Shirwa* (1994) — and affirmed many times since — this Court has held that "where the incompetence or negligence of the applicant's representative is sufficiently specific and clearly supported by the evidence, such negligence or incompetence is inherently prejudicial to the applicant and will warrant overturning the decision."

[61] While this jurisprudence has generally been developed in relation to incompetence of lawyers, the Court has applied the same high standard to immigration consultants despite their lesser training and qualifications. As stated by Justice Pelletier in *Cove*, at para 10:

> If individuals are going to hold themselves out as skilled in immigration matters and, as is increasingly the case, adopt the designation of counsel", then they will be held to the same standard as those who customarily appear before the Court. The consequences to their clients of non-performance will be the same as it is for clients of the immigration bar. There is no reason why the Court should shelter consultants from negligence claims by overlooking their mistakes. Members of the immigration bar pay large liability insurance premiums for coverage which is subject to being called upon every time a court refuses to gloss over their mistakes. To apply a different standard to consultants is to subsidize their competition with the immigration bar.

[62] The Applicant submits that all of the requirements listed above have been made out in his case. The Applicant lacks a high school education and has spent most of his life doing agricultural work. He had little to no knowledge of the Canadian immigration and refugee protection system. He placed enormous trust in Mr. Pinnock to help guide him through the PRRA process – the one and only opportunity he would have for a Canadian official to examine the risk he faces in Jamaica. Mr. Pinnock abused that trust. There can be little doubt that his conduct and performance in representing the Applicant in his PRRA fell far below of the standards of mere professionalism. Indeed, they plummet into the range of negligence and incompetence.

[63] In relation to the first requirement of the negligence test – the so-called "performance branch" – the Applicant highlights the following negligent and/or incompetent conduct by Mr. Pinnock:

- When the Applicant's common-law spouse first met Mr. Pinnock, she was crying in the waiting room of the Immigration Detention Centre in October 2011. Seeing she was vulnerable, Mr. Pinnock approached her to ask if he could be of assistance. After explaining the Applicant's story, Mr. Pinnock said: "You're going to need a damn good lawyer to sort this out and I am your man." Mr. Pinnock is not, and never has been, a lawyer. The Applicant only learned that Mr. Pinnock is actually an immigration consultant in April 2012 when he was told by CBSA Officer Basra;

- Through his wife and fellow consultant, Donna Pinnock, Mr. Pinnock had the Applicant sign blank PRRA forms at 6900 Airport Road so they would not have to actually meet between the time when the PRRA was served on 16 November 2011 and when it was filed on 30 November 2011;

- Mr. Pinnock only ever called the Applicant once – and only for a 20-25 minute conversation – to advise him about the requirements of the PRRA and to elicit his entire narrative. Indeed, during the course of their entire retainer, neither the Applicant nor Mary Devos, the Applicant's spouse, ever set foot in Mr. Pinnock's office. When the Applicant tried to provide details of his story during their phone conversation, Mr. Pinnock would cut in, telling him not to give so many details and to keep his story short;

- When the Applicant and Ms. Devos asked whether it was necessary to obtain supporting documentation, they were specifically told by Mr. Pinnock that it was not. Indeed, the Applicant and Ms. Devos personally called the OPP Simcoe detachment to obtain a copy of the police report the Applicant made in the summer of 2009. The detachment advised them it would take 30 days to obtain the record under the *Freedom of Information and Protection of Privacy Act* – beyond the deadline for filing the PRRA – but that a lawyer might be able to get it sooner. When they asked Mr. Pinnock to make the request, he advised: "don't worry about it – you don't need it. They will either believe your story or they will not;"

- Despite rebuffing the Applicant's request to obtain the OPP police report, Mr. Pinnock's cover letter enclosed with the PRRA states that "[t]here is no way of showing evidence of new risks under the circumstances and therefore Mr. Brown is unable to prove an argument to support a balance of probability." The reference to "new risks" mistakenly infers that subsection 113(a) of the IRPA applies, which it does not, since the Applicant never made an IRB claim for refugee protection. Moreover, the statement is incredibly negligent since Mr. Pinnock is essentially inviting the Officer to reject the claim. More

importantly, however, the statement flatly contradicts the fact that corroborating evidence like the OPP police report was readily available.;

- Mr. Pinnock never showed the Applicant a copy of the completed PRRA, specifically the PRRA narrative, before he submitted it to CIC. In fact, the Applicant never saw the package until April 2012 when his present counsel requested it from Mr. Pinnock. When the Applicant reviewed it at that time, several glaring errors were apparent. His siblings were not listed on the PRRA forms and, more importantly, the PRRA narrative contained an incident that the Applicant never described – an attack on him and his boyfriend on a beach in Jamaica in 2007. The Applicant points out that no person would be so foolish as to have same-sex relations on a public beach in Jamaica. Mr. Pinnock appears to have added this incident himself – whether by mistake or for embellishment is not known.

[64] I agree with the Applicant that this list of conduct makes it clear that Mr. Pinnock lacked any degree of professionalism and competence when it came to preparing the Applicant's PRRA. The complaints are clear and precise. They identify the "exact dimensions of the problem" and review the negligence on a "precise factual foundation."

[65] The Respondents have not challenged or contested the above-listed allegations of negligence set out in the Applicant's affidavit testimony.

[66] I also agree with the Applicant that Mr. Pinnock' s misconduct meets the second branch of the negligence test; namely, that there is a reasonable probability that but for this alleged incompetence, the result of the original hearing would have been different. As stated throughout, the Officer refused the PRRA on the basis of insufficiency of evidence; there were no credibility

findings or state protection analysis. The Officer found that the Applicant had provided insufficient details about certain aspects of his story and had failed to provide corroborating proof of other aspects of his story. As stated by Officer Mustaq,

> I find it even more unreasonable that the applicant has not provided any further evidence, beside his statements, of any of his risks when he had ample time to do so by collecting a police record in Canada or letters from anyone who of his bisexuality [sic] or about the incident of shots being fired at him. These factors and the applicant's overall lack of details leads me to find that the applicant has provided insufficient evidence to establish his risk.

[67] In terms of the details the Officer found lacking, they included: (i) who the Applicant thinks shot at him in 2008 and how he knew it was related to his sexuality; (ii) how or why his same-sex sexual partner was shot in 2008 and how he knew it was related to his sexuality; and (iii) the name of his same-sex sexual partner and the duration of the relationship.

[68] These insufficiency of evidence issues could have been addressed by Mr. Pinnock had he demonstrated the professionalism to elicit a proper PRRA narrative and to do the basic gathering of documents. The Applicant's present counsel had less than one month to prepare this application record and yet it contains within it almost all of the information and/or documents that the Officer requested.

[69] Mr. Pinnock had ample time to obtain this simple evidence but he completely failed to do so. As the Officer's entire decision was based on the insufficiency of evidence, there is more than a reasonable possibility that her decision would have been different had she been presented with the evidence above.

[70] In bringing to the Court's attention the high burden upon the Applicant in this type of case, the Respondents draw the Court's attention to the words of Justice Danièle Tremblay-Lamer in *Sedeh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 424:

> 42. In response to this submission, I adopt the argument of the respondents, that the decisions in *Cao v Canada (Minister of Citizenship and Immigration)*, 2010 FC 450, and *Haque v Canada (Minister of Citizenship and Immigration)*, 2011 FC 315, require that an applicant be held responsible for the contents of an application which he or she has signed.
>
> 43. Justice Mosley's comments at paragraph 16 of *Haque*, above, are instructive:
>
> > [16] The applicant was in Bangladesh at the time the updated application was submitted. He admitted during the phone conversation on May 26th that he "could have signed the blank form for the consultant". The new form had further discrepancies. The applicant apparently chose to rely on the consultant to submit the required information without personally verifying that it was accurate.
>
> The applicants in this case chose to rely on their consultant. The principal applicant acknowledges having signed his application. It would be contrary to the applicant's duty of candour to permit the applicant to rely now on his failure to review his own application. It was his responsibility to ensure his application was truthful and complete -- he was negligent in performing this duty.

[71] It should not be forgotten, however, that the *Sedeh* case involved an application for permanent residence by a physician. In the present case, we are dealing with a PRRA application (there has been no RPD decision) by a farm worker who does not have a complete high school education. The Applicant had no familiarity with the PRRA process, and he was deliberately misled by someone who claimed to be a qualified lawyer and who advised him that he did not need to submit documentation that, as the Officer tells us in her Decision, was needed to establish the

Applicant's case. The submission of the OPP report in particular (its omission is specifically referred to in the Decision) could well have made a difference to the Officer's conclusions about insufficient evidence.

[72] On the evidence before me in this application, the PRRA package submitted by the consultant was woefully inadequate. Instead of obtaining relevant supporting documentation he actually said that "there is no way of showing new evidence of new risks under the circumstances and, therefore, Mr. Brown is unable to prove an argument to support a balance of probability." Here we have a consultant who has represented himself to the Applicant as a lawyer, and who has ensured that the Applicant has not had an opportunity to review the application, and who tells the PRRA Officer that the Applicant does not have the evidence needed to prove his case for protection. This goes well beyond incompetence and borders on the bizarre.

[73] The Applicant is not entirely blameless. He should not have signed blank forms. But I do not think it was unreasonable for someone with his education and lack of familiarity with the PRRA system to follow the advice of someone who told him he was a competent lawyer. The Applicant's life may well be at risk in Jamaica and he has yet to have his case meaningfully assessed as a result of the egregious incompetence of an immigration consultant. Quite apart from satisfying the legal requirement, it is my view that not to allow the Applicant a fair chance to have his case assessed would be offensive to Canadian values.

[74] On this ground alone, I think this matter has to be returned for reconsideration.

[75] Counsel agree that, as regards this issue, there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-3364-12
STYLE OF CAUSE:	**DONAVAN DERRICK BROWN** - and - **THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 10, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	November 8, 2012

APPEARANCES:

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