

Federal Court



Cour fédérale

Date: 20140305

Docket: IMM-773-13

Citation: 2014 FC 214

Ottawa, Ontario, March 5, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

**RICARDO STEVENSON BEST
(AKA RICARDO STEVENS BEST)**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Paul Ariemma, a member of the Refugee Protection Division of the Immigration and Refugee Protection Board [the Board], pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The Board dismissed the Applicant's claim for refugee protection, concluding that he was not a convention refugee or person in need of protection under sections 96 and 97 of the Act.

I. Issue

[2] Was the Board's decision unreasonable?

II. Background

[3] The Applicant is citizen of Barbados. He is homosexual and HIV positive.

[4] In his Personal Information Form [PIF] narrative, the Applicant details his life as a homosexual in Barbados. He realized he was homosexual when he was 11-years-old but states that he has not been able to live openly for fear of being the target of physical and verbal abuse. He started attending private parties for the gay community when he was a teenager.

[5] In 1991, a group of men started yelling homophobic slurs and threw a bottle at the Applicant. In 1999, the Applicant became a radio announcer, hosting his own radio show. In 2001, the Applicant began hosting private parties in his home for the gay community in Barbados.

[6] In 2004, a gossip column appeared in the Daily Nation newspaper [the Article] which strongly hinted that the Applicant was gay. The Applicant alleges that this Article caused him to lose work as a voice actor for beer commercials and his job with the radio station. Since that time, the Applicant has maintained employment as master of ceremonies and as a host of private parties for the gay community, but alleges that his employment situation has been more tenuous and short-term since the Article was published and his sexuality became known. In addition, since the Article was published, he was verbally abused on several occasions and was the subject of much gossip.

[7] In November, 2006, the Applicant was evicted from his home, a fact he attributes to rumours that he was hosting private parties for the gay community. During the final party, the police raided his home, and took the names and addresses of the guests. The Applicant alleges that this was done for intimidation purposes.

[8] Between 2006 and 2011, the Applicant travelled to various countries, including Canada on several occasions, but did not apply for refugee protection. He alleges that he was unaware it was possible to claim refugee protection in Canada on the basis of sexual orientation until a friend informed him in 2011. On August 22, 2011, the Applicant applied for refugee protection in Canada.

[9] The Board found that the discrimination and harassment suffered by the Applicant did not amount to persecution as per section 96 of the Act nor does it bring him within the scope of section 97.

[10] The Board accepted that the Applicant is homosexual and acknowledged that homosexuality is illegal in Barbados but cites a United States Department of State Report which states that the law is rarely enforced. The Board also found that the Applicant faced some discrimination and harassment in Barbados, but prospered as an entrepreneur, bar owner, radio and television personality and a master of ceremonies until May, 2011, just prior to applying for refugee protection in Canada.

[11] Finding that the Article was central to the Applicant's claim, and allegedly the impetus for him leaving the country, the Board notes that the Applicant did not provide the Article at the

hearing. In addition, the Board notes that the Applicant visited Canada after the Article was published, in 2007, 2008, 2010 and 2011, before applying for refugee protection. He also travelled to St. Lucia, Guyana and St. Martin from 2008-2010. As a result, the Board found that the Applicant's repeated re-availment to Barbados shows he lacked a subjective fear of persecution.

[12] The Board states that contrary to the Applicant's claim that his sexual orientation became known only after the Article was published, there is evidence that shows he was living openly prior to this. In particular, the Applicant points to a letter from Sylvester Shepherd, director of the United Gays and Lesbians Against Aids Barbados (UGLAAB) which states that the Applicant hosted several parties for the gay community between 2001 and 2006 and briefly in 2007 which provided an arena where members of the same sex community could socialize openly. In describing this letter, the Board noted that UGLAAB operates openly. The Board concluded that this is evidence that the Applicant lived an openly homosexual life prior to the Article being published. At paragraphs 25-27, the Board cites letters of support submitted by friends, co-workers and former partners of the Applicant to further support this conclusion.

III. Standard of Review

[13] The parties agree that the standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 47, 49).

IV. Analysis

[14] The Applicant argues that the Board committed a serious error in reaching its conclusions and that the Board's decision is unreasonable.

[15] First, the Board allegedly ignored five letters, from a former partner, two former friends, and two former co-workers, which detail the societal backlash and under-employment suffered by the Applicant after his sexuality was publicized in an Article.

[16] Second, the Applicant argues that the Board was wrong to conclude that the Applicant's activities and recognition within the gay community meant that he "maintained a gay lifestyle openly." The Applicant and many of his letters of support were clear that parties held were private events, attended mostly by members of the gay community and were kept secret from wider society in Barbados, for fear of homophobic reprisals.

[17] The Applicant also argues that the Board ignored relevant evidence in failing to describe objective evidence of the systemic persecution faced by homosexuals in Barbados. This evidence shows that homosexuality is illegal in Barbados, that there are no laws prohibiting discrimination on the basis of sexual orientation, and that anecdotal evidence confirms societal discrimination against homosexuality, including physical and verbal abuse, continues to take place. By ignoring evidence which directly contradicted its conclusions, the Board's decision was unreasonable (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at paras 15, 17;

Hall (Litigation guardian of) v Canada (Minister of Citizenship and Immigration), 2008 FC 865, at paras 1-5).

[18] The Applicant also argues that the Board erred in failing to consider and articulate whether the Applicant's claims of discrimination cumulatively justified a finding that he had a well-founded fear of persecution (*Canada (Minister of Citizenship and Immigration) v Munderere*, 2008 FCA 84, at para 41).

[19] In addition, the Applicant argues that aside from mentioning the Applicant's delay in claiming refugee protection in Canada, no analysis is undertaken with regard to subjective fear. Given that delay alone is not determinative in assessing subjective fear, and that the Applicant provided a reasonable explanation for the delay, the Board's analysis was unreasonable (*Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1291, at paras 57-62).

[20] Finally, the Applicant argues that the Board undertook no analysis of whether he was a refugee under section 97 of the Act (*Thuraiveerasingam Kandiah v Canada (Minister of Citizenship and Immigration)*, 2005 FC 181, at para 18).

[21] In the Applicant's Further Memorandum of Argument, he notes that the Board ought not to have drawn an adverse inference based on the fact the Applicant failed to claim elsewhere (*Ay v Canada (Minister of Citizenship and Immigration)*, 2010 FC 671, at paras 39-40; *Rajadurai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 532, at para 65).

[22] The Applicant cites testimony from the Board hearing where he explains why he did not know about the possibility of receiving refugee protection in Canada based on sexual orientation. The Applicant notes that the Board's decision does not discuss this testimony.

[23] I find that the Board's decision was reasonable.

[24] I do agree with the Applicant that the Board's conclusion that he lived as an openly gay man prior to the Article being published is not supported by the evidence before the Board. Absent a clear negative finding of credibility, the evidence as presented by the Applicant shows that while he was well-known within the Barbados gay community, the Applicant was not publicly homosexual. Additionally, while the Board's summary of the Applicant's letters of support and psychological report at paragraphs 25-27 and 30 was cursory in nature, I do not find that these issues make the Board's decision unreasonable as a whole.

[25] The Board was reasonable in asserting that while the discrimination and harassment suffered by the Applicant is unfortunate, the evidence of verbal harassment and gossip which occurred after he was publicly exposed by the Article in 2004 does not rise to the level as articulated in *Portuondo Vasallo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 673, at para 15:

The concept of persecution is not defined in the IRPA. In Canada (*Attorney General v Ward*, [1993] 2 SCR 689 at paragraph 63 (available on CanLII), the Supreme Court defined the concept of persecution as a "sustained or systemic violation of basic human rights demonstrative of a failure of state protection.

[26] Moreover, while the Applicant argues that he was under-employed as a result of his sexual orientation, the evidence provides a reasonable basis for the Board to conclude that the Applicant

was able to live a successful and productive life in Barbados. Additionally, while the Board did not clearly articulate that he considered cumulative persecution based on this harassment, it can reasonably be inferred here that the Board did so (*Szabados v Canada (Minister of Citizenship and Immigration)*, 2004 FC 719, at paras 9-10).

[27] With regard to the documentary evidence in this case, the Board did acknowledge evidence of discrimination and harassment of homosexuals in Barbados. Accordingly, Applicant has not met his high burden to show that specific contradictory evidence should have been mentioned by the Board. Moreover, the Supreme Court of Canada has made it clear that a decision-maker is not required to make an explicit finding on each constituent element of an issue when reaching its final decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paras 12, 16).

[28] As well, even if the Board failed to specifically mention contradictory evidence, the Applicant's repeated re-availment to Barbados provides a reasonable basis for the Board to conclude that the Applicant lacked a subjective fear of persecution (*Ortiz Garcia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1346, at para 11). While the Applicant is correct that he offered an explanation, it was within the Board's discretion to consider and reject that explanation, and it is clear from the transcript of the hearing that the Board did so (*Abu Ganem v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1147, at para 29).

[29] Finally, with respect to the Applicant's argument that the Board failed to conduct a section 97 analysis, the Board clearly concluded at paragraph 31 that the Applicant did not fall within the

scope of section 97. While a distinct analysis was not conducted, the Board's decision makes it evident how that conclusion was arrived at.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant's application is dismissed;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-773-13

STYLE OF CAUSE: Best v. MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 4, 2014

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** Justice Manson

DATED: March 5, 2014

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