Federal Court  Cour fédérale

Date: 20140912

Docket: IMM-665-13

Citation: 2014 FC 870

Ottawa, Ontario, September 12, 2014

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ERROL WOSLEY SPOONER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] Mr. Errol Wosley Spooner (the "Applicant") seeks judicial review of the decision of a Pre-Removal Risk Assessment Officer (the "Officer") dated December 21, 2012, denying his Pre-Removal Risk Assessment ("PRRA") application that was made pursuant to section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

[2] The Officer found that the Applicant would not be at risk of cruel or inhumane treatment if he returned to his country of nationality.

[3] The Applicant is a citizen of Barbados. He arrived in Canada on April 11, 2011 and claimed refugee status the same day on the ground of membership in a particular social group, that is as a gay man facing homophobic and HIV-related discrimination in Barbados.

[4] In a decision dated April 26, 2012, the Refugee Protection Division of the Immigration and Refugee Board (the "Board") denied the claim on the basis that the Applicant was excluded from refugee protection pursuant to Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can T.S. No. 6 (the "Convention").

[5] Under cover of a letter dated October 5, 2012, the Applicant submitted his PRRA application, asserting a fear of death in Barbados due to homophobic societal attitudes and anti-HIV sentiments. He also claimed to be at risk of his life due to inadequate treatment in Barbados for HIV.

[6] In the decision denying his PRRA application, the Officer reviewed the Applicant's immigration history, as well as the evidence he had submitted with the PRRA application. The Officer also reviewed the disclosure material submitted by the Minister of Citizenship and Immigration (the "Respondent"), the evidence generated by the Officer through independent research and the submissions filed on behalf of the Applicant.

[7] The Officer noted that the Applicant was excluded from refugee protection pursuant to Article 1F(b) of the Convention, that is on grounds of serious criminality, risk could not be assessed under section 96 of the Act. Accordingly, the PRRA application was assessed only pursuant to section 97. The Officer observed that in order to succeed, the Applicant needed to show on a balance of probabilities that he was more likely than not to experience treatment that constitutes torture, cruel and unusual punishment, or endangers his life in his country of origin.

[8] The Officer found on a balance of probabilities that the Applicant is a man who has sex with men and who would be perceived as homosexual in Barbados. The Officer found little evidence showing Barbados actively enforces its laws criminalizing homosexual sex. While accepting that these laws contribute to the stigmatization of homosexuals, the Officer also found that the evidence showed that homosexuals were not completely marginalized in Barbados.

[9] The Officer determined that the Applicant had not presented sufficient evidence to support the attacks that he had allegedly sustained in Barbados. The Officer also found that the Applicant had failed to rebut the presumption of state protection.

[10] Further, the Officer commented upon the evidence submitted by the Applicant to the effect that he was following a specialized treatment program for HIV infection because his infection is resistant to multiple medications. The Officer acknowledged evidence submitted by the Applicant that the medication he was taking is not available in Barbados.

[11] The Applicant alleged in his PRRA application that removal to Barbados would violate his right to life pursuant to section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the "Charter").

[12] The Officer observed that subparagraph 97(1)(b)(iv) excludes risks arising solely from inadequate health care. The Officer referred to the decision in *Covarrubias v. Canada (Minister of Citizenship and Immigration) (F.C.A.)*, [2007] 3 F.C.R. 169, where the Federal Court of Appeal dismissed a Charter challenge to subparagraph 97(1)(b)(iv) of the Act. The Officer further noted that in *Covarrubias, supra*, the Federal Court of Appeal said that subparagraph 97(1)(b)(iv) does not apply when the denial of medical treatment results from discriminatory or persecutory treatment.

[13] The Officer concluded that he did not have jurisdiction to consider a Charter claim. He was not satisfied that the Applicant had shown that the lack of adequate healthcare in his case was due to discriminatory or persecuting treatment that would exclude the operation of subparagraph 97(1)(b)(iv) of the Act.

[14] The Officer found that subparagraph 97(1)(b)(iv) applied to the Applicant. The Officer was not satisfied that the Applicant had submitted sufficient evidence to show that he was at risk if he returned to Barbados, as a result of his HIV positive status.

[15] The Officer also noted that the Applicant appears to be the subject of an outstanding arrest warrant in Barbados and concluded that the evidence did not support a finding that the warrant constituted a section 97 risk if the Applicant was returned to Barbados.

I. ISSUES

[16] The Applicant is not challenging the merits of the Officer's decision but limits this application for judicial review to the constitutionality of paragraph 97(1)(b)(iv) of the Act. He argues that this provision offends both subsection 15(1) of the Charter, that is the right to equal treatment without discrimination, and section 7 of the Charter, that is his right to life and security of the person.

[17] The first question to be addressed is the standard of review. The Applicant has raised a question of constitutionality. According to the decision in *Singh v. Canada (Minister of Citizenship and Immigration) (F.C.)*, [2004] 3 F.C.R. 323, the PRRA process is not the forum to consider complex questions of constitutionality and that issue will be reviewed *de novo* in this application.

[18] The following issues arise in the within application:

i. the interpretation of subparagraph 97(1)(b)(iv);

ii. the appropriateness of conducting a Charter analysis in this case.

[19] The interpretation of subparagraph 97(1)(b)(iv) is a question of law, reviewable on the standard of correctness. In my opinion, this issue has been decided in *Covarrubias*, *supra*, where

the Federal Court of Appeal, at paragraph 31, said that the provision is to be broadly interpreted as follows:

> Having considered the parties' arguments and the limited authorities, I am of the view that the provision in issue is meant to be broadly interpreted, so that only in rare cases would the onus on the applicant be met. The applicant must establish, on the balance of probabilities, not only that there is a personalized risk to his or her life, but that this was not caused by the inability of his or her country to provide adequate health care. Proof of a negative is required, that is, that the country is not unable to furnish medical care that is adequate for this applicant. This is no easy task and the language and the history of the provision show that it was not meant to be.

[20] The determinative issue here, in my opinion, is the appropriateness of entertaining the Applicant's Charter challenge which he makes by reference to subsection 15(1) and section 7 of the Charter. These provisions read as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[21] Briefly, the Applicant argues that he is entitled to protection pursuant to subsection 15(1) because subparagraph 97(1)(b)(iv) creates a distinction on the grounds of physical disability, that is the life-threatening disease of HIV/AIDS, and that subparagraph 97(1)(b)(iv) perpetuates disadvantages to disabled persons who cannot access medical treatment in their countries of nationality.

[22] The Applicant also submits that if removed to Barbados, he will face severe illness and premature death thereby losing the protection conferred by section 7 of the Charter.

[23] The Respondent, for his part, argues that the Applicant's Charter challenge cannot succeed, in the absence of a sufficient evidentiary foundation. Otherwise, he submits that the issues were decided by the decision in *Covarrubias*, *supra*, and furthermore, that subparagraph 97(1)(b)(iv) infringes neither subsection 15(1) nor section 7 of the Charter. Finally, he argues that an application for admission to Canada on humanitarian and compassionate ("H & C") grounds is an adequate alternative remedy.

[24] I am persuaded by the position advanced by the Respondent about the sufficiency of the factual foundation for adjudication of a Charter issue. The Supreme Court of Canada has clearly stated that Charter applications should not be decided in a factual vacuum; see the decision in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 and *MacKay v. Manitoba*, [1989] 2 S.C.R. 357.

[25] In *Covarrubias v. Canada (Minister of Citizenship and Immigration)* (2005), 48 Imm. L. R. (3d) 186, the trial judge, Justice Mosley, commented on the lack of a proper evidentiary basis to support the Charter challenge raised in that case. At paragraphs 47 to 49, he said the following:

> In this case, the evidence properly before me to support the applicants' *Charter* allegations is very limited. As noted above, I do not accept as evidence that part of the affidavit submitted by the applicants that contains information received from a third party. The remaining evidence consists of an affidavit by Ms. Covarrubias, sworn for the purposes of the stay application, in which she deposes to her husband's medical condition, describes the family's financial circumstances and asserts that they would be unable to pay for dialysis treatment if returned to Mexico. In addition, there are letters on the record from hospital staff physicians stating that Mr. Ramirez requires continuous dialysis treatment, expensive medication to maintain his blood chemistry and follow up visits with specialists, all of which it is asserted would not be available to him based upon the physicians' understanding of health care in Mexico. There is no evidence before me as to what that understanding was based upon. As hearsay without any additional evidentiary support, I am not satisfied that it is sufficiently reliable to prove the truth of the content of the statements as fact.
>
> Apart from the brief excerpt from the explanatory notes to Parliament referred to above, there is no evidence before me of the purpose and background of the legislation and the social, economic and cultural context in which it was enacted.
>
> Taking the applicants' evidence at its highest, I am not satisfied that it is sufficient to allow the Court to properly decide whether a constitutional violation arises from the operation of subparagraph 97(1)(b)(iv) to exclude persons from consideration for protection where the risk to life arises from the lack of adequate medical care in their countries of origin.

[26] The observations of Justice Mosley were endorsed by the Federal Court of Appeal at paragraph 60 of its decision.

[27] The same objection arises here. The evidence submitted by the Applicant consists primarily of newspaper and journal articles about the treatment of homosexual people in Barbados. He also presented a letter from a doctor in Barbados confirming the Applicant's diagnosis as HIV positive. As well, he submitted a letter from another physician in Toronto who advised that if "moved to a country without advanced medical therapies for HIV", the Applicant's physical condition would rapidly deteriorate, leading to death.

[28] There is no evidence in the Certified Tribunal Record or in the Applicant's application record of the nature referred to by Justice Mosley at paragraph 48 above. The evidence submitted addresses the circumstances of the Applicant and the current social and legal environment in his country of origin. The evidence is largely confined to the personal circumstances of the Applicant and his fears.

[29] In my opinion, there is not an adequate evidentiary context for the adjudication of the Charter issues raised by the Applicant in this application.

[30] Further, I accept the submissions of the Respondent that an alternate remedy is available to the Applicant by way of an H & C application pursuant to subsection 25(1) of the Act. This remedy was discussed by the Federal Court of Appeal in *Laidlaw v. Canada (Minister of Citizenship and Immigration)* (2012), 440 N.R. 105 (F.C.A.). In that decision, the Court held at paragraph 61 that:

> …it is inappropriate for the appellants to turn to the Court for relief under the *Charter* before exhausting their other remedies.

[31] In *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at paragraph 104, the Supreme Court of Canada said the following:

> The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*. We are of the view that the prohibition on medical insurance in s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29, and s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28 (see Appendix), violates s. 7 of the *Charter* because it impinges on the right to life, liberty and security of the person in an arbitrary fashion that fails to conform to the principles of fundamental justice.

[32] I also agree with the Respondent's argument that if there is no independent constitutional rights to health care for Canadians, there is no current right for non-Canadians facing risk in their countries of origin to obtain protected status in Canada in order to access certain health care in Canada.

[33] I agree with the submissions of the Respondent that, on the basis of the record before me, there is no basis to adjudicate the Charter challenge and no basis to distinguish the decision of the Federal Court of Appeal in *Covarrubias, supra.*

[34] In the result, the application for judicial review is dismissed.

[35] The Applicant asks that the Court certify the same question that was certified by Justice Mosley in *Covarrubias, supra,* as follows:

> Does the exclusion of a risk to life caused by inability of a country to provide adequate medical care to a person suffering a life-threatening illness under section 97 of the *Immigration and Refugee Protection Act* infringe the *Canadian Charter of Rights*

> *and Freedoms* in a manner that does not accord with the principles of fundamental justice, and which cannot be justified under section 1 of the *Charter*?

[36] The Respondent opposes certification of this question.

[37] The question was answered in the negative by the Federal Court of Appeal. The test for certification is set out in *Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 262 F.T.R. 246 (F.C.) as a serious question of general importance, that is dispositive of the issue. In view of the decision of the Federal Court of Appeal in *Covarrubias, supra*, there is no practical benefit in certifying the same question again. No question will be certified.

ORDER

THIS COURT ORDERS that the application for judicial review is dismissed, no question for certification is arising.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-665-13
STYLE OF CAUSE:	ERROL WOSLEY SPOONER v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 12, 2014
ORDER AND REASONS:	HENEGHAN J.
DATED:	SEPTEMBER 12, 2014

APPEARANCES:

John Norquay	FOR THE APPLICANT
Martin Anderson and Norah Dorcine	FOR THE RESPONDENT

SOLICITORS OF RECORD:

HIV & AIDS Legal Clinic Ontario Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT