Federal Court  Cour fédérale

Date: 20151007

Docket: IMM-7865-14

Citation: 2015 FC 1150

Ottawa, Ontario, October 7, 2015

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

V.S.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant challenges a Humanitarian and Compassionate (H&C) decision dated November 10, 2014 denying her claim to relief under section 25 of the *Immigration and Refugee Protection Act* (IRPA).

[2] The Applicant is a citizen of Cameroon. She entered Canada as a visitor in 2009 and sought refugee protection. Her claim to protection was granted in 2010 but later revoked on the basis of a misrepresentation. The record discloses that a pre-removal risk assessment was requested in late 2013 and dismissed on May 23, 2014. A copy of that decision is not in the record before me and I cannot determine the nature of the risk the Applicant asserted, or the reason why her claim was denied.

[3] The Applicant submitted her H&C application on August 11, 2014. She sought relief on the strength of her Canadian establishment and because she had given birth to a daughter in 2014. She also asserted hardship based on her sexual orientation as a lesbian.

[4] The Applicant has raised a number of issues concerning the decision-maker's analysis of the evidence and argues that the decision was unreasonable. The standard of review for this type of issue is, of course, reasonableness. It is unnecessary for me to deal with all of the matters raised in argument because there is one problem with the decision that is determinative.

[5] The determinative issue on this application concerns the Officer's analysis of the evidence of hardship related to the Applicant's claim to be a lesbian. Set out below is that part of the decision dealing with the sexual orientation issue:

> Counsel states that [the applicant] is a lesbian and is in a relationship with a woman here in Canada. A letter from [S.A.] has been included in the submissions attesting to her relationship with the applicant. [S.A.] submits she wishes for [the applicant] and her daughter to remain in Canada. I note that although [S.A.] submits she met [the applicant] in 2011, little documentary evidence has been provided regarding their relationship, such as photographs of the couple together, celebrating the holidays together, or on

outings with friends. While I accept that [the applicant] is a lesbian, I find there is limited information before me that [the applicant] has openly disclosed her sexual orientation. For example [the applicant] has not provided information suggesting she is a part of any activist groups or has ties to the LGBT community in Toronto. I also note that [the applicant] has not provided a personal testimony describing her relationship with [S.A.] or her personal circumstances in relation to being a lesbian.

According to my research on Cameroon, homosexuality is against the law and consensual same sex sexual activity is punishable by 6 months to 5 years jail time and monetary fines. The US Department of State 2013 Human Rights Report, further submits, that members of the LGBT group have been actively targeted and regularly face social stigmatization. Based on a review of my findings I accept that conditions are not ideal for LGBT individuals. However, I also make note that the report submits that despite current views on homosexuality, human rights activists and health organizations have continued to advocate for the LGBT community.

Counsel submits that returning to Cameroon would place [the applicant] at risk of [sic] due to the community's knowledge about [the applicant] being a lesbian. I note a letter of support from [S.S.] has been included in the submissions. The letter submits that the applicant's stepsisters have rumoured [the applicant's] sexual orientation through a reliable source abroad and the family has been ridiculed as a result. No details of who this source was have been provided. I note that two other letters have been submitted on behalf of [the applicant's] application from a family member [(E.S.)] and the family's legal advocate in Cameroon. I note while [E.S.] discloses she is a family relative and the primary caregiver of the applicant's mother, she does not disclose any information or knowledge about [the applicant's] sexual orientation or details about the family being ridiculed as a result.

While I accept that [the applicant] is a lesbian, I find little evidence has been provided to demonstrate that [the applicant] had ever been in a same sex relationship before [S.A.], in Cameroon or any other country in which she has resided. There is limited evidence before me demonstrating that [the applicant] has openly displayed her sexual orientation in Canada or that she would do so upon returning to Cameroon.

For this reason, it is my finding that apart from the letter from [S.A.] referred to above, I have not been provided with supporting evidence that establishes, on a balance of probability that [sic], the

> applicant will be at [sic] face hardship due to her sexual orientation if she were to return to Cameroon. Having examined the totality of the evidence before me, I find that it has insufficient probative value to establish that the applicant is likely known as homosexual/lesbian or would be perceived as such by individuals, Cameroon. Although I have considered the conditions in Cameroon for those suspected of homosexuality, I do not find that the applicant will be adversely and directly affected by these conditions due to her personal situation. I am not satisfied that the applicant's circumstances are such that she will face unusual and undeserved or disproportionate hardship due to her true or perceived sexual orientation.
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> [Emphasis added] [Names redacted]

[6] It is clear from these reasons the Officer accepted that the Applicant was a lesbian and apparently in a sexual relationship with a female partner. The Officer also recognized that Cameroon is a hostile place for LGBT individuals. All of this is borne out by a 2013 United States Department of State Report (Certified Tribunal Record at pp 198-200) which sets out the following disturbing facts:

> Consensual same-sex sexual activity is illegal and punishable by a prison sentence of six months to five years and a fine ranging from 20,000 to 200,000 CFA ($41 to $410). Authorities actively enforced the law and arrested, tried, jailed, and beat alleged LGBT individuals during the year. Security forces reportedly actively targeted alleged LGBT individuals and cooperated with vigilante groups to entrap and arrest them. Credible reports indicated that there may have been as many as 200 individuals incarcerated in the country on charges of sexual relations between persons of the same sex.
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> LGBT individuals regularly faced social stigmatization and mob violence, which sometimes resulted in their deaths.
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> In July, for example, Eric Ohena Lembembe – a journalist, LGBT activist, and the executive director of the Cameroonian Foundation against AIDS – was found strangled to death at his home in Yaounde. Lembembe had been bound, beaten, and burned with an iron. Civil society members and human rights organizations credibly claimed that the killing was linked to Lembembe's

activism and sexual orientation, a contention that the minister of communication publicly questioned in the days following the crime. The official investigation into Lembembe's death was uniformly unprofessional, and no suspects were identified by year's end.

In July a mob in the village of Muyuka, Southwest Region, stoned to death Henry Mbah, an allegedly gay man. Mbah reportedly was killed after his wife caught him in an intimate situation with another man, Elvis Atabong. Although reportedly injured, Atabong was apparently saved from the mob by police officers, who promptly arrested him. The status of Atabong's case and any investigation into Mbah's killing were unknown.

Also in July Joseph Omgbwa was sentenced to two years in prison for having sexual relations with a person of the same sex, along with Nicolas Ntamack, who was sentenced to one year in prison on the same charge. Omgbwa and Ntamack's sentences came two years after Omgbwa was arrested while trying to sell a man a gay pornography DVD in an apparent police sting operation. Ntamack was arrested shortly thereafter when he attempted to visit Omgbwa at the police station.

The Movement of Cameroonian Youth organized anti-homosexual brigades throughout the year to locate and harass LGBT individuals in nightclubs. In August the movement organized a public march to urge a more heavy-handed government crackdown on homosexuality.

Suspected members of the LGBT community received anonymous threats by telephone, text message, and e-mail. LGBT individuals who sought services or protection from the authorities were regularly rebuffed, extorted, or arrested. LGBT organizations also were targeted. In July arsonists set fire to the NGO Alternatives Cameroon Access Center in Douala, resulting in significant damage to the center's HIV testing and counseling records. Police forces ruled the fire a criminal act, but no suspects were identified.

During his first public speech in August, Jean Mbaraga, the newly appointed administrator of the Catholic Archdiocese of Yaounde and the archbishop of Ebolowa, condemned homosexuality as a foreign practice and called on Africans to "resist what will destroy their culture and family."

Despite the environment various human rights and health organizations continued to advocate for the LGBT community by defending LGBT individuals being prosecuted, promoting

> HIV/AIDS initiatives, and working to change laws prohibiting consensual same-sex activity.

[7] A 2014 Immigration and Refugee Board Response to Information Request is equally disturbing. It reported, among other things, that "Cameroon prosecutes people for consensual same-sex conduct more aggressively than almost any country in the world...often based on little or no actual evidence" (Certified Tribunal Record at p 215). The same report described frequent torture, solitary confinement, and degrading treatment by police and prison officials, including unwarranted anal examinations.

[8] The Officer's summary of this evidence was cursory and remarkably understated. Surprisingly, the Officer took pains to include a reference to ongoing advocacy work by non-governmental organizations, as though it represented some form of mitigation for the reported human rights abuses prevalent in Cameroon.

[9] The Officer's lack of sensitivity to the sexual orientation issue is further borne out by the assertion that the Applicant could avoid difficulty in Cameroon by hiding her sexual identity.

[10] Given the consequences of discovery, it is quite plain that the Applicant would take steps in Cameroon to conceal her sexual identity. She would be foolhardy to act otherwise. To slightly paraphrase the words of Lord Rodger in *HT (Cameroon) v Secretary of State for the Home Department*, [2010] UKSC 31, at para 59 "unless she were minded to swell the ranks of gay martyrs, when faced with a real threat of persecution, the applicant would have no real choice: she would be compelled to act discreetly".

[11] Contrary to the Officer's views, the Applicant's ability to hide her sexual identity in Cameroon is not the end-point to the necessary inquiry into hardship. What remained outstanding was an assessment of the hardship associated with the suppression of the Applicant's sexual identity. In the case of Cameroon, where the consequences of discovery would likely be profound, prudence would dictate a life approaching celibacy and it would certainly preclude any outward displays of affection with a same-sex partner. The implications of living "discreetly" and the magnitude of behavioural adjustments demanded by living in fear of discovery have been thoughtfully described by Lord Rodger in *HT (Cameroon)*, above, in the following passage:

> 75. In my view, the approach adopted by the Court of Appeal is unsound. I leave on one side my reasoning so far and also the obvious point that the Court of Appeal's test seems to require the applicant to establish a form of secondary persecution brought on by his own actions in response to the primary persecution. In my view the core objection to the Court of Appeal's approach is that its starting point is unacceptable: it supposes that at least some applications for asylum can be rejected on the basis that the particular applicant could find it reasonably tolerable to act discreetly and conceal his sexual identity indefinitely to avoid suffering severe harm.
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> 76. The New Zealand Refugee Status Appeals Authority observed in *Re GJ* [1998] (1995) INLR 387, 420 that "sexual orientation is **either** an innate or unchangeable characteristic **or** a characteristic so fundamental to identity or human dignity that it ought not be required to be changed" (emphasis in the original). So, starting from that position, the Convention offers protection to gay and lesbian people – and, I would add, bisexuals and everyone else on a broad spectrum of sexual behaviour – because they are entitled to have the same freedom from fear of persecution as their straight counterparts. No-one would proceed on the basis that a straight man or woman could find it reasonably tolerable to conceal his or her sexual identity indefinitely to avoid suffering persecution. Nor would anyone proceed on the basis that a man or woman could find it reasonably tolerable to conceal his or her race indefinitely to avoid suffering persecution. Such an assumption about gay men and lesbian women is equally unacceptable. Most significantly, it is unacceptable as being inconsistent with the underlying purpose of the Convention since it involves the applicant denying or hiding precisely the innate characteristic

> which forms the basis of his claim of persecution: *Atta Fosu v Canada (Minister of Citizenship and Immigration)* 2008 FC 1135, para 17, per Zinn J.
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> 77. At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man. He would have to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialised. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable.

[12] In the circumstances of this case, the Officer erred by assuming that the hardship (i.e. risk) confronting the Applicant could be easily managed by the suppression of her sexual identity. That view is, quite simply, insensitive and wrong. The imposition on LGBT individuals of a legal requirement for discretion is a hold-over from a time when, unlike heterosexual couples, LGBT couples were expected to conceal their affection. This type of anachronistic thinking has no place in a humanitarian assessment.

[13] Refugee cases, of course, examine risk from the perspective of persecution and humanitarian applications turn on an assessment of hardship. But that is not a meaningful distinction that allows a humanitarian decision-maker to simply ignore the practical effects of a

life of sexual confinement. For the purposes of this case, I adopt Justice Russel Zinn's views expressed in *Fosu v Canada*, 2008 FC 1135 at para 17, [2008] F.C.J. No. 1418:

> [17] Further, the Member erred in suggesting that he would find safety in Accra so long as he was "discreet" and appears to have assumed that he could be prepared to do so, and there was no evidence of this, or that he would be able to keep his sexuality secret in such a large city. I cannot accept that the Member's decision can be reasonable in arriving at a finding which requires the claimant do deny or hide the innate characteristic which forms the basis of his claim of persecution: see, for example, *Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 282, at paragraph 29. The Member was clearly of the opinion that the discrimination the Applicant would face was not tantamount to persecution, but it also appears that she was assessing the danger through the lens of the conditions she would impose on him – conditions that are not reasonable or acceptable.

[14] Counsel for the Minister urged me to consider this issue within the context of the complete decision and it is, of course, appropriate to do so. There are certainly aspects of the decision that appear to be well-founded. However, the error made by the Officer was very material to the hardship assessment and like Lord Hope in *HT (Cameroon)*, above, I am not confident that the decision would have been the same had the correct approach been adopted.

[15] It is accordingly necessary to set aside the Officer's decision and remit this matter for reconsideration on the merits by a different decision-maker.

[16] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed with the matter to be redetermined on the merits by a different decision-maker.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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