

Federal Court



Cour fédérale

Date: 20160224

Docket: IMM-3708-15

Citation: 2016 FC 239

Toronto, Ontario, February 24, 2016

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**MARKO FERGUSON A.K.A. MARKO
DELINO FERGUSON**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, a citizen of the Bahamas, claims refugee protection in Canada as a gay man based on subjective and objective fear that, should he be required to return to Bahamas, he will suffer more than a mere possibility of persecution under s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, or probable risk under s. 97.

[2] The RPD dismissed the Applicant's claim on a finding that it has no credible basis because the Applicant is not credible. The key passage grounding the dismissal is paragraph 14 of the decision:

Nevertheless, in light of the claimant's lack of credibility and his behaviour inconsistent with a well-founded fear of persecution, the panel is left doubting the claimant's sexual orientation. There are documents that support his sexual preference towards men [Footnote: Exhibits 4 and 5], however, he was able to successfully live for 37 years, allegedly fabricating stories of make-believe girlfriends. In the opinion of the panel, the claimant is capable of fabricating any story that will serve his best interests. Accordingly, having considered the totality of the evidence, the panel finds that that the claimant has not established that he would require state protection if he were to return to the Bahamas.

[3] The Applicant's sexual orientation is the ground upon which his claim is based, and as stated in the paragraph quoted, it is the ground that the RPD found was not established. The obvious problem with the finding is the acknowledgement that uncontested evidence was presented going to establish that he is a gay man. Counsel for the Applicant reinforces the obvious with the following argument supported by the evidence contained in Exhibits 4 and 5 (Tribunal Record, pp. 100 – 157) footnoted by the RPD in the passage above quoted:

16. The Applicant submitted various documents that helped to confirm his sexual orientation. These included:

- Three letters from well-established community organizations confirming the Applicant's involvement with the LGBTQ community in Toronto (the 519 Church Street Community Centre, the el-Tawhid Juma Circle Toronto Unity Mosque, and the Black Coalition for AIDS Prevention).
- Proof of volunteering with the 519 Church Street Community Centre for Pride.
- Letters from three friends confirming his sexual orientation

- Online dating profiles showing that the Applicant is seeking to meet men.
- Printouts of conversations the Applicant had online at various times with men he dated in the past, a friend who told him he disapproved of his being gay, and a transsexual friend to whom he described his feelings after attending his first Pride in Toronto.

(Affidavit of Applicant, Ex. B, p. 41-88)

17. The Member indicates no concerns about the authenticity of any of this evidence. She did not ask the Applicant a single question about any of this evidence at the hearing. She raises no concerns with any of his testimony, in response to counsel's examination, about the evidence. Indeed, at one time she even relies on this evidence: she finds that his online dating shows that he has good computer skills and so should have been able to find out about the US asylum process.

(Reasons, para. 8)

18. The Member does acknowledge this evidence, noting that "[t]here are documents that support his sexual preference towards men". But she goes on to dismiss all of these documents unilaterally, without considering them in any way. This is tantamount to ignoring them.

19. The Member is not entitled to consider a claim without considering the Applicant's evidence. The evidence came from various sources and various time periods, was consistent, and went to the heart of the claim. This alone is more than sufficient reason to overturn the decision.

(*Cepeda-Gutierrez v. M.C.I.* [1998] F.C.J. No. 1425; *Hilo v. M.C.I.* [1991] F.C.J. No. 228 (C.A.)) [...]

(Applicant's Application Record, pp. 146 – 147)

[4] Because the decision under review was made in apparent disregard of cogent evidence on the record, I find that it is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision under review is set aside and the matter is referred back for redetermination by a differently constituted panel.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3708-15

STYLE OF CAUSE: MARKO FERGUSON, A.K.A. MARKO DELINO
FERGUSON v THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 23, 2016

JUDGMENT AND REASONS: CAMPBELL J.

DATED: FEBRUARY 24, 2016

APPEARANCES:

Leigh Salsberg FOR THE APPLICANT

Michael Butterfield FOR THE RESPONDENT

SOLICITORS OF RECORD:

Leigh Salsberg FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of
Canada