

Federal Court



Cour fédérale

Date: 20160824

Docket: IMM-4828-15

Citation: 2016 FC 958

Ottawa, Ontario, August 24, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DWAYNE BROWN

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS
CANADA BORDER SERVICES AGENCY**

Respondents

JUDGMENT AND REASONS

[1] Mr. Brown is a Jamaican national. His claim for refugee protection on the basis that he is bi-sexual was dismissed by the Refugee Protection Division [RPD], but it did accept that he was bi-sexual. This Court allowed his application for judicial review, but before the claim was reconsidered, Mr. Brown was convicted of a criminal offence and thus he is no longer eligible to make a refugee claim.

[2] Mr. Brown filed an application for a Pre-Removal Risk Assessment [PRRA]. His first PRRA was denied on the basis that there was insufficient evidence to support his claim that he was bi-sexual. That decision was reviewed by this Court and the application for judicial review dismissed in a speaking order dated October 7, 2014.

[3] Mr. Brown submitted a second PRRA application, with new evidence in January 2015, and this Court issued a stay of removal. A negative PRRA decision was rendered on October 25, 2015, and that is the decision under review.

[4] In my view, the decision under review must be set aside. The decision-maker never addresses the fundamental question of whether or not Mr. Brown is bisexual and his risk can only properly be assessed after that decision is made. The Court acknowledges that there have been differing decisions on that fundamental question regarding Mr. Brown. Both the RPD and this Court appear to have accepted that he is bisexual, however others have not. A person's sexual orientation is a difficult thing to determine. In this case perhaps the officer ought to have accepted Mr. Brown's invitation for an interview to satisfy him or herself as to this issue.

[5] The officer's analysis is not intelligible because at points the officer appears to proceed on the basis that he is bisexual while at other points the officer appears to say that the evidence is insufficient.

[6] In any event, the officer applied the wrong test. The officer writes:

[T]he applicant has provided insufficient objective evidence to support that his sexual orientation is common knowledge in

Jamaica or Canada.... I am not satisfied with the information before me that the applicant would be perceived as bisexual upon returning to Jamaica, as there is minimal information before me to demonstrate that the applicant's sexual orientation is public knowledge in Jamaica. As such I am not satisfied that anyone has a vested interest in harming the applicant based on his sexual orientation. [emphasis added]

[7] If Mr. Brown is bisexual, then it is irrelevant whether he would be perceived to be bisexual. Being perceived to be bisexual may be relevant if one is not bisexual because the mere perception may create a risk of harm in some societies.

[8] Moreover, whether or not he is bisexual, the question of whether his sexual orientation is common knowledge in Canada or Jamaica is irrelevant to any legitimate examination by the PRRA officer.

[9] The questions the officer must address but does not are these:

1. Based on the evidence, on the balance of probabilities, is Mr. Brown bisexual?
2. If he is not bisexual, then is there any evidence that he would be at risk in returning to Jamaica.
3. If he is bisexual, then is there evidence in the record from which one can conclude on a balance of probabilities that he would face a risk to life or a risk of cruel and unusual treatment or punishment under paragraph 97(1)(b) of the *Immigration and Refugee Protection Act*?

[10] This officer found that “there continues to be some long standing and persistent human rights violations in Jamaica and that the LGBT group continues to be a vulnerable one.” Mr. Brown’s risk simply cannot be properly assessed unless and until it is determined by the decision-maker whether he is or is not a member of the LGBT group.

[11] For these reasons, this application is allowed and Mr. Brown’s PRRA application is remitted to a different officer for decision in accordance with these reasons. Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the applicant's PRRA application is to be determined by a different officer who has made no previous PRRA decision concerning the applicant, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4828-15

STYLE OF CAUSE: DWAYNE BROWN v THE MINISTER OF PUBLIC
SAFETY AND EMERGENCY PREPAREDNESS
CANADA BORDER SERVICES AGENCY

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 11, 2016

JUDGMENT AND REASONS: ZINN J.

DATED: AUGUST 24, 2016

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