Federal Court  Cour fédérale

Date: 20191025

Docket: IMM-4767-18

Citation: 2019 FC 1339

Ottawa, Ontario, October 25, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

A.B.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a citizen of the Bahamas. After arriving in Canada in May 2016, he made a claim for refugee protection. The claim was declared abandoned, however, after the applicant failed to submit a Basis of Claim form.

[2] In July 2017, the applicant submitted an application for a pre-removal risk assessment [PRRA] under section 112(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. He alleged that he was at risk in the Bahamas because he is a gay man, he is HIV-positive, and he expresses his sexual orientation in an overtly effeminate manner. As the applicant himself puts it, he is a "proud Black gay diva." He fears that this profile puts him at risk in the Bahamas. He fears being physically attacked if he had to return to the Bahamas. He stated in his PRRA application: "I will have to go back to a life of hiding who I am, of not being able to dress, act, or be the way I want." He submitted that state agencies in the Bahamas would not protect him from harm or provide him with meaningful redress if he faced persecution. A police officer in the Bahamas had assaulted the applicant and, on another occasion, when he was the victim of another violent assault because of his sexual orientation, the police downplayed its seriousness and urged him to drop the charges (which he did). The applicant's PRRA application was grounded in his own experiences when he lived in the Bahamas, the experiences of similarly situated people, evidence concerning the extent of homophobia in the Bahamas, and evidence demonstrating the ineffectiveness of state protection for persons with his profile there.

[3] Since the applicant had not had a refugee hearing, section 113(1) of the *IRPA* did not limit the evidence he could rely upon. As well, the applicant had not had the opportunity to present his case in an oral hearing. In written submissions supporting the PRRA application, counsel for the applicant stated: "If there are any questions arising out of this application or any concerns with respect to [A.B.'s] credibility, we request an oral hearing."

[4] The application was rejected in a decision dated July 11, 2018. In short, the Senior Immigration Officer found that the applicant had not established, on a balance of probabilities, that he "would be at risk in the Bahamas owing to his sexual orientation and his HIV status, and that state protection would not be forthcoming, should the need arise." The officer therefore concluded that the applicant did not meet the requirements of either section 96 or section 97 of the *IRPA*. The officer did not address the request for an oral hearing apart from noting that one was not held.

[5] The applicant now applies for judicial review of this decision under section 72(1) of the *IRPA*.

[6] Having regard to the positions of the parties, I would frame the issues in this application as follows:

1) Did the officer err in assessing the applicant's risk of persecution in the Bahamas?

2) If the officer erred in the risk analysis, is the overall conclusion nevertheless saved by the officer's state protection analysis?

[7] For the reasons that follow, I have concluded that this application should be allowed. The officer's risk analysis is unreasonable and the decision cannot be saved by the state protection analysis because it too is fundamentally flawed.

II. STANDARD OF REVIEW

[8] The parties did not address the standards of review I should apply in considering these issues but they are well-established. Generally speaking, PRRA decisions are reviewed on a reasonableness standard as they largely involve questions of fact and mixed fact and law (*Lakatos v Canada (Immigration and Citizenship)*, 2018 FC 367 at para 13 [*Lakatos*]). Applying this standard, the reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). PRRA officers are entitled to significant deference from a reviewing court. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

[9] The reasonableness standard also applies to the officer's state protection analysis (*Canada (Citizenship and Immigration) v Neubauer*, 2015 FC 260 at para 11; *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 38 [*Hinzman*]). That being said, the jurisprudence has established a clear test for state protection and it is not open to a decision-maker to apply a different test. As a result, the issue of whether the proper test for state protection was applied is reviewable on a standard of correctness (*Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at para 22 [*Ruszo*]; *Kina v Canada (Citizenship and Immigration*), 2014 FC 284 at para 24; *Kaneza v Canada (Citizenship and Immigration)*, 2015 FC 231 at para 25). A conclusion will not be rational or defensible if the decision-maker has

failed to carry out the proper analysis (*Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 41 [*Lake*]; *Németh v Canada (Justice)*, 2010 SCC 56 at para 10).

III. ANALYSIS

A. *Did the officer err in assessing the applicant's risk of persecution in the Bahamas?*

[10] The risk the applicant alleged he faced in the Bahamas is stated succinctly in the written submissions in support of his PRRA application:

> [A.B.] is at risk in the Bahamas as a gay man living with HIV. The country documents establish that gay men in the Bahamas continue to face discrimination amounting to persecution in addition to a risk of physical violence, including murder.
>
> [A.B.] is an out gay man in Canada who participates in the gay community. Living in Canada has allowed him to pursue sexual encounters and be as effeminate and flamboyant as he has wanted to be. He would not be able to enjoy this freedom without facing a risk of persecution in the Bahamas. While [A.B.] is not public about his HIV status, we emphasize that this aspect of his claim must be considered in light of the consequences he would face if his HIV status *were* to be revealed in the Bahamas [emphasis in original].

[11] The PRRA application was supported by a lengthy affidavit from the applicant, corroborative evidence such as photographs and the applicant's social media profile, statements from friends, letters from a psychotherapist and a social worker, and country conditions documentation. The applicant provided extensive and detailed evidence that homophobic attitudes permeate many aspects of Bahamian society including politics, policing, religious institutions and the media, that these attitudes often find expression in violence against gay men, and that state protection is unavailable or ineffective.

[12] A key piece of evidence in support of the PRRA application is the applicant's affidavit. In it, he describes in detail his experiences growing up in the Bahamas, the limited degree to which he was able to express his sexual orientation there, the steps he took to conceal that orientation from those who might not be accepting of it, the persecutory treatment he nevertheless experienced there (including physical assaults), and how in Canada he has been able to be open about his sexual orientation and his particular manner of expressing it.

[13] The PRRA officer found the affidavit to be insufficient to establish the applicant's need for protection. In my view, the officer's assessment of the affidavit is flawed in at least three respects.

[14] First, the officer states that "insufficient objective evidence was provided to corroborate the statements made by the applicant." The applicant made many statements in his affidavit – about growing up in the Bahamas, about the emergence of his sexual orientation there, about the treatment he was subjected to, about his life in Canada, and about many other things as well. Did every statement require corroboration? If not every statement, then which ones? Without knowing which statements the officer had in mind, it is impossible to know whether it was reasonable to expect there to be corroborative evidence or not. Moreover, the officer does not explain why corroborative evidence was necessary in the first place. The officer's bald and conclusory statement leaves the assessment of this key piece of evidence lacking in transparency, intelligibility and justification.

[15] Second, the officer finds that, "by the applicant's own admission," in many respects he had lived free of persecution in the Bahamas. For example, he had been able to go to school and to find a job. The officer finds that these past experiences were inconsistent with the link the applicant sought to draw between his personal circumstances and future persecution. In doing so, however, the officer simply ignores the applicant's evidence that he had tried to conceal his sexual orientation and, despite this, he was still subjected to discrimination and abuse in the Bahamas. Moreover, the applicant had not been diagnosed as HIV-positive when he was living in the Bahamas. He maintained that this was a material change that could affect how he was treated in the future. While the officer found that the applicant would have access to medical services, none of the other ways in which the applicant alleged he would be at risk of persecution as a result of his HIV-positive status were addressed.

[16] Third, the officer likewise ignores a core element of the applicant's claim. The applicant described how, in Canada, he has not only been able to be open about his sexual orientation but also to express it in overt – indeed, flamboyant – ways. He maintained that doing so in the Bahamas would put him at risk and that having to suppress this identity in and of itself amounted to persecution. In support of the latter submission, the applicant cited the Immigration and Refugee Board *Chairperson's Guideline 9: Proceedings before the IRB involving Sexual Orientation and Gender Identity and Expression* [SOGIE]. Specifically, paragraph 8.5.1.1 of the *Guideline* states that it is "well established in law that being compelled to conceal one's SOGIE constitutes a serious interference with fundamental human rights that may therefore amount to persecution, and a claimant cannot be expected to conceal their SOGIE as a way to avoid persecution in their country of reference." Several authorities are cited in support of this

statement, including *Sadeghi-Pari v Canada (Citizenship and Immigration)*, 2004 FC 282 at para 29, UNHCR *Guidelines on International Protection No. 9* (see paragraphs 30-33), and *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, 2010 UKSC 31. Despite the applicant's claim being grounded in detailed evidence, well-supported by authority, and squarely advanced in submissions, the officer does not address how the applicant's particular profile could affect the risk he faces or whether having to conceal this identity to protect himself itself amounted to persecution. The officer did not have to accept the applicant's submissions but those submissions had to be addressed. These significant omissions render the decision unreasonable.

[17] The applicant also submits that the officer erred by conflating the tests under sections 96 and 97 of the *IRPA* and by subsuming the analysis of whether the applicant would be at risk into the analysis of state protection. There is much force to the applicant's submissions. However, since the foregoing determinations are sufficient to find that the officer's risk analysis is unreasonable, it is not necessary to address these other issues.

B. *If the officer erred in the risk analysis, is the overall conclusion nevertheless saved by the officer's state protection analysis?*

[18] The respondent submits that, even if PRRA officer's risk analysis contains reviewable errors (which is not conceded), the overall conclusion is reasonable because the determination that the applicant failed to rebut the presumption of state protection is reasonable. I do not agree.

[19] I will begin with some foundational principles.

[20] It is the duty of all states to protect their nationals, including from persecution. International refugee law "was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations" (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 709 [*Ward*]). Refugee protection is "surrogate or substitute protection" (*ibid.*, quoting James Hathaway, *The Law of Refugee Status* (1991)). As a result, it arises only if the home state fails in the discharge of this duty because it lacks either the capacity or the willingness to do so or if the claimant, by reason of his or her well-founded fear of persecution, is unwilling to avail him or herself of that country's protection. Persecuted individuals, therefore, "are required to approach their home state for protection before the responsibility of other states becomes engaged" (*ibid.*). This is not a legal requirement; rather, it goes to whether the refugee claimant has met his or her evidentiary onus of rebutting the presumption of state protection (*Lakatos* at para 20; *Orsos v Canada (Citizenship and Immigration)*, 2015 FC 248 at para 18). Even so, a claimant's failure to approach the state for protection will defeat the claim only if it was objectively unreasonable for the claimant not to have sought such protection (*Ward* at 724). This is because "it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness" (*ibid*.). Similarly, looking to the future, a claimant is expected to seek protection from his or her home state unless it would be objectively unreasonable to do so, either because such protection would not reasonably be forthcoming or because doing so could itself endanger the claimant.

[21] These principles are reflected in the definition of Convention refugee under section 96 of the *IRPA*. Among the things a claimant must establish is that he or she is "unable or, by reason of [a well-founded fear of persecution] unwilling" to avail him or herself of the protection of the country of nationality. The persuasive burden (or risk of non-persuasion) on this point rests on the claimant. As the Supreme Court of Canada held in *Ward*, absent "a situation of complete breakdown of state apparatus," unless (as was the case there) the state in question admits that it cannot protect the claimant, "clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence," the Court continued, "the claim should fail, as nations should be presumed capable of protecting their citizens" (at 724-25). In other words, in the absence of evidence to the contrary, the decision-maker must assume that the state in question is capable of protecting the claimant. Depending on the nature of that state, it can be more difficult in some cases than in others to rebut this presumption (*Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 26). In the end, the question is whether the claimant has established that adequate state protection would not be forthcoming, either because the state is unable or unwilling to provide it or because it would be unreasonable to expect the claimant to seek it out in the first place. If not, the claim must fail because, no matter how genuine the claimant's fear of persecution may be, if the state in question is able to protect him or her, then the fear is not, objectively speaking, well-founded (*Ward* at 712; *Hinzman* at para 42).

[22] What is adequate state protection can be a difficult question in a given case. On the one hand, the measures and mechanisms in place do not need to be perfect or to guarantee the protection of all citizens at all times to count as adequate (*Canada (Minister of Employment and Immigration) v Villafranca*, 1992 CanLII 8569 at para 7 (FCA); *Resulaj v Canada (Minister of Citizenship and Immigration)*, 2006 FC 269 at para 20). On the other hand, even sincere efforts by a state to provide protection may not be adequate. A state protection analysis must consider not only the efforts of the state but also the actual results being achieved at the time of the application for protection (*Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at paras 5-6; *AB v Canada (Citizenship and Immigration)*, 2018 FC 237 at para 17 [*AB*]). It requires an assessment of the actual adequacy or effectiveness of that protection at an operational level (*Ruszo* at paras 26-27; *Lakatos* at para 21; *Galamb v Canada (Citizenship and Immigration)*, 2016 FC 1230 at paras 32-33; *Benko v Canada (Citizenship and Immigration)*, 2017 FC 1032 at para 18). The state must be both willing and able to protect (*Soe v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 557 at para 118). The presumption of state protection can, therefore, be rebutted by clear and convincing evidence that protection against the form of persecution alleged is either unavailable or ineffective (*Hinzman* at para 54).

[23] In *Lakatos*, Justice Diner observed that this Court "has repeatedly held that whether a state protection analysis will withstand scrutiny on judicial review is case-specific, and depends on how the decision-maker conducted its analysis in light of the evidence tendered with respect to the claimant's particular circumstances" (at para 23; see also *Odeesh v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 661 at para 31).

[24] As has also been emphasized, the nature of the state in question (e.g. being democratic or based on the rule of law) does not alone ensure adequate state protection (*Sow v Canada (Citizenship and Immigration)*, 2011 FC 646 at para 11; *AB* at para 22). While democratic elections and other such forms of accountability can, at least in theory, promote the effectiveness of organs of the state in protecting citizens from persecution, "an assessment of state protection must always rest on a more nuanced analysis, taking into account the particular circumstances of a claimant, as well as the state involved" (*Alassouli v Canada (Citizenship and Immigration)*, 2011 FC 998 at para 42).

[25] In the present case, the applicant relied on the following to rebut the presumption that the Bahamas would protect him from persecution:

- Police authorities in the Bahamas often fail to protect members of the LGBT community by refusing to take seriously or to investigate offences against them. They can even be agents of persecution themselves.

- Even where crimes of violence against members of the LGBT community are investigated and prosecuted, many perpetrators have the charges reduced or they are acquitted because the law grants considerable leeway to those who respond to homosexual "advances" with violence.

- Despite there being a law prohibiting discrimination in employment on the basis of HIV status (among other grounds), the government does not enforce it effectively, such discrimination continues to occur, and victims have little effective recourse.

- There is no law protecting against discrimination on the basis of sexual orientation. Members of the LGBT community who suffer from discrimination have no legal recourse.

- A number of laws in the Bahamas expressly discriminate against the LGBT community. For example, laws concerning domestic violence omit same-sex couples from protection.

[26] These contentions were supported by evidence of the applicant's own experiences in the Bahamas. The applicant also pointed to the experiences of similarly situated individuals and, more generally, to the prevailing legal, social, cultural and political conditions in the Bahamas, as documented in the evidence he provided.

[27] As noted, the officer concluded that the applicant had failed to rebut the presumption of state protection. The applicant challenges this conclusion on several grounds but it suffices to address only two. One is that the officer's assessment of the applicant's evidence of his past contacts with the police is unreasonable. The other is that the officer erred by treating evidence that the state was making serious efforts to address discrimination against individuals with the applicant's profile as sufficient to outweigh the applicant's evidence that state protection is inadequate. I agree with the applicant in both respects.

[28] Before addressing these grounds, I must observe that the way the officer's decision is drafted makes it very difficult to follow the reasoning concerning state protection. The officer deals with both risk and state protection at the same time throughout the decision. The officer describes the evidence in detail but the analysis rarely rises above conclusory statements. As

well, rather than assessing the evidence the applicant relied upon holistically, the officer approached the evidence item by item and concludes seriatim that individual items of evidence do not establish, on a balance of probabilities, that state protection will not be forthcoming, even though many of the items of evidence were not tendered for that purpose at all and even though it is the cumulative import of the evidence that does bear on this issue that must be considered. I am prepared to accept that, despite how the decision is drafted, the officer actually considered the evidence cumulatively. But even taking a holistic view of the decision, there are serious flaws in the officer's analysis of the applicant's experiences with the police in the Bahamas. This evidence was capable of having significant probative value both on its own and against the backdrop of the country conditions evidence. As a result, any errors in the officer's assessment of this evidence have significant ramifications for the reasonableness of the decision as a whole.

[29] Turning, then, to the applicant's past contacts with the police in the Bahamas, he described two key incidents. One was when he was the victim of a violent assault by a police officer in 2013. The applicant was returning home early one morning from an underground gay club in Nassau. He describes himself as looking "like a sissy." He was wearing tight clothes and "gay" jewellery. He felt safer than usual because the streets were deserted. A police car pulled up and stopped. One officer got out, the other stayed in the car. The first officer used homophobic slurs against the applicant and then struck him in the face several times with the butt of his gun, saying "this is what happen to batty man and sissy people around here." The second officer did nothing. The other incident was when the applicant was the victim of a violent attack by a family member because of his sexual orientation (he was attacked with a machete). The attack had resulted in a charge of attempted murder but the police persuaded the applicant not to

pursue the charge and it was eventually dropped. The applicant came away from the experience believing that the police did not take the matter seriously because he is gay.

[30] The officer deals with the first of these incidents as follows: "The applicant states that he was assaulted by a police officer on his way home from a gay club; however, he provides insufficient objective evidence to indicate that he sought redress from organizations such as the Police Complaints and Corruption Branch, which reports directly to the deputy commissioner, and is responsible for investigating allegations of police brutality." On this basis, the officer concludes that the applicant's affidavit evidence was not sufficient to establish, on a balance of probabilities, "that state protection would not be forthcoming, should the need arise."

[31] I begin by observing that the officer's finding that the applicant had provided "insufficient objective evidence to indicate that he sought redress" after being assaulted by a police officer is puzzling. This was not a question of the sufficiency or insufficiency of evidence. The applicant acknowledged unequivocally in his affidavit that he did not pursue the matter. He also explained why, stating: "I never reported this incident to anyone. Who could I report to, when it was the police who did it? I knew that because it was the police, nothing would come out of it." The officer does not address this explanation anywhere in the decision.

[32] As discussed above, the probative value of the applicant's failure to make a complaint about the assault depends on whether it was objectively unreasonable for him to have acted as he did. The applicant stated in his affidavit that he believed that state protection would not be forthcoming because his assailant was a police officer. The PRRA officer could not reasonably

draw an adverse inference from the applicant's failure to make a complaint without addressing the applicant's explanation for why he acted as he did and whether, given his particular circumstances, seeking state protection was a reasonable option.

[33] Turning to the second incident, the PRRA officer finds that, contrary to the applicant's submissions, it actually demonstrates the availability of state protection in the Bahamas. After reviewing the circumstances of the machete attack and its aftermath, the officer writes:

> In this circumstance, the applicant was able to approach the police, file the necessary reports, and the police were going to charge [the assailant] accordingly. I therefore find, on a balance of probabilities, that state protection is available in the Bahamas for those seeking it.

The officer goes on to conclude that the applicant therefore failed to rebut the presumption of state protection "given that he was able to approach the police and access assistance following the [machete attack]."

[34] Of course, the applicant had relied on this incident as evidence pointing to the opposite conclusion. He had argued that state protection is not available because, among other reasons, the police do not take criminal offences against gay men seriously. His own experience was an example of this. For the applicant, the efforts of the police to persuade him not to pursue this matter despite its seriousness was evidence of a widespread attitude amongst the police. The PRRA officer did not address this submission in any way. As Justice Grammond observed in *AB*, "[i]ndividual policing failures do not prove that state protection is inadequate, and neither does the fact that the police took some action in an individual case prove the adequacy of state protection" (at para 19). The officer did not have to accept the applicant's interpretation of this

event but it had to be addressed in order to assess the event's probative value properly. Once again, this is a significant omission that undercuts the reasonableness of the decision.

[35] The applicant did not rely on his own experiences alone to rebut the presumption of state protection. He also relied on country conditions evidence to demonstrate that his experiences were consistent with those of others who were similarly situated. As I have just explained, in my view the officer's assessment of the applicant's experiences is unreasonable. I have also found that, separate and apart from this, the officer's state protection analysis is flawed because the wrong test was applied. I turn to this now.

[36] The applicant relied upon a substantial amount of country conditions evidence in support of his PRRA application. The officer alluded to some of this evidence in the decision but also purported to undertake an "independent" review of country conditions. The officer explained that the fruits of that review were preferred over the information filed by the applicant, stating:

> After careful consideration, I prefer and assign greater probative value to the numerous documents reviewed while conducting my own independent research, because it is impartial, current, detailed and comes from a diverse range of sources which have no interest in the outcome of this application for protection, rather than to the opinion of the applicant, the arguments of his counsel or counsel's documentary evidence.

[37] Even if the officer did not come right out and say it, it is certainly implied by the foregoing that the officer judged the applicant's materials to be biased, outdated, lacking in detail and tainted by an interest in the outcome of the application. In my view, this characterization of the evidence relied upon by the applicant is both inaccurate and unfair. However, the result of

this application for judicial review need not turn on this because there is a deeper problem with the officer's analysis.

[38] The evidence the officer preferred and gave greater probative value to actually supported the applicant's position in several material respects, including:

- The law in the Bahamas does not protect against discrimination on the basis of sexual orientation.

- The law in the Bahamas prohibits discrimination in employment on the basis of HIV status but it is not enforced effectively by the government and many citizens have been unable to avail themselves of legal remedies for discrimination.

- The Bahamas shares the same strong anti-gay attitudes as the rest of the British Caribbean and homophobia permeates cultural attitudes as expressed in religion, music and other forms of expression.

- Sexual minorities in the Bahamas face stigmatization; indeed, the Prime Minister of the Bahamas has conceded that "significant stigma" against homosexuality persists there.

[39] Despite this, the officer concluded that the applicant had not rebutted the presumption of state protection. The officer writes:

> I am satisfied, based on the totality of evidence before me, that should the applicant require assistance there are recourses available to him as a homosexual and a person living with HIV in the Bahamas. The applicant has provided insufficient objective evidence to establish that if he were to return to the Bahamas today, protection would not be reasonably forthcoming, or that it is objectively unreasonable for him to seek protection. The Bahamas

> is in control of its territory, and has a functioning security, both defence force and police force in place. There is no evidence of a total breakdown of state authority in the country. The government also has mechanisms in place to support the LGBT community. I accept that the Bahamas continues to face challenges with respect to the state of affairs for the LGTB population; however, I note the evidence also reveals that the country has taken initiatives and continues its efforts to promote the integration of the group as well as addressing the situation and treatment of the LGBT, including discrimination and prejudice. I am satisfied that should the applicant encounter any difficulties in the Bahamas, he would have avenues of recourse available to him [emphasis added].

[40] In assessing this issue, the officer had to determine whether the applicant had rebutted the presumption that the Bahamas would provide him with adequate protection. As discussed above at paragraph 22, the critical question is whether the mechanisms and measures that are in place are operationally effective for someone with the applicant's particular profile. "Initiatives" and "efforts" alone are insufficient to answer the applicant's argument (based on his own experiences and country conditions documentation) that he would not receive adequate protection in the Bahamas. There was a substantial body of evidence before the officer suggesting that, despite the initiatives and efforts that had been undertaken, and despite the existence of bodies such as the Police Complaints and Corruption Branch and the Police Complaints Inspectorate Office, individuals with the applicant's profile continue to be vulnerable to persecution and have little in the way of effective recourse available to them. Questions about the attitude of police towards individuals with the applicant's profile were especially significant given the applicant's experiences and his fear of being the victim of physical attacks again. Even on the evidence preferred by the officer, the willingness of the Bahamas to create effective legal protection for HIV-positive gay men like the applicant was very much in doubt. For example, while the officer observes that the Bahamian government had "acknowledged and noted" recommendations from

the United Nations High Commissioner for Refugees in 2012 concerning protections against persecution on the basis of sexual orientation, in fact it expressly did not "support" them, as it had with respect to a number of other recommendations.

[41] It was the PRRA officer's responsibility to assess the evidence and reach a reasonable determination. A decision is not rational or defensible if the decision-maker has failed to carry out the proper analysis (*Lake* at para 41). By failing to address in any way the operational effectiveness of the mechanisms and measures in place in the Bahamas, the officer failed to carry out the proper analysis of state protection. As a result, the state protection analysis cannot save the decision despite the reviewable errors in the officer's risk analysis, discussed above.

IV. CONCLUSION

[42] For these reasons, the application for judicial review is allowed, the decision of the PRRA officer dated July 11, 2018, is set aside, and the matter is remitted for redetermination by a different decision-maker.

[43] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-4767-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the PRRA officer dated July 11, 2018, is set aside, and the matter is remitted for redetermination by a different decision-maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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