Federal Court  Cour fédérale

Date: 20240403

Docket: IMM-2718-23

Citation: 2024 FC 510

Toronto, Ontario, April 3, 2024

PRESENT: Madam Justice Go

BETWEEN:

Allan Upeterson TROTMAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Alan Upeterson Trotman, fears returning to Barbados due to his sexual orientation. The Applicant alleges that he was publicly known to be gay due to a relationship with an ex-partner who protected the Applicant in Barbados from harassment but had since passed away.

[2] In 2019, the Applicant came to Canada to make a refugee claim. The Applicant was found ineligible to make a claim due to his prior criminal conviction in the United States [US]. The Applicant was offered to apply for a Pre-Removal Risk Assessment [PRRA], which he did. In a decision dated January 27, 2023, a Senior Immigration Officer [Officer] rejected the Applicant's PRRA application [Decision].

[3] The Officer accepted the Applicant's sexual orientation but concluded, "while discrimination may exist in Barbados, it does not amount to persecution." The Officer also found that "[t]here is little documentary evidence on file to demonstrate that the perception of the Applicant's sexual orientation in Barbados would pose a risk to his life, or of cruel and unusual punishment or treatment."

[4] The Applicant seeks judicial review of the Decision. I grant the application based on the reasons set out below.

II. Preliminary Issues

[5] At the start of the hearing, the Applicant asked the Court to strike two paragraphs from the Respondent's Further Memorandum of Argument, paras 19 and 28, because they refer to the Applicant's previously filed motion record for a stay of removal [motion record], a record that is not before me.

[6] The Court may strike out portions of a pleading where there is a motion to strike: Rule 221 of the *Federal Court Rules,* SOR/98-106. Rule 221 generally pertains to pleadings in actions

not applications. The Court does not commonly entertain motions to strike in applications for judicial review, under the premise that these applications should proceed quickly and not be encumbered, especially in immigration and refugee matters: *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at paras 47-48; *Krah v Canada (Citizenship and Immigration)*, 2019 FC 361 [*Krah*] at paras 2 and 14, and *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131 at paras 10 and 14. Further, the Federal Courts Practice 2024 notes that "[t]he strike out rule applies only to actions, and not to applications," citing *Granville Shipping Co v Pegasus Lines Ltd.*, (1994) 86 FTR 77 (TD).

[7] However, the Court has applied Rule 221 in the context of applications at the preliminary stage to strike out an application for leave for judicial review: *Krah* at para 14, *Benhsaien v Canada (Attorney General)*, 2024 FC 307 at para 11, and *Zanjani v Canada (Citizenship and Immigration)*, 2023 FC 1304 at para 4.

[8] In this case, the Applicant did not bring a formal motion, and raised the issue for the first time at the start of the hearing. I decline to exercise my discretion to grant the Applicant's motion, but will instead decide whether I should consider the Respondent's pleadings in my deliberation.

[9] The Respondent acknowledged that para 19 was taken from the evidence in the motion record and should not have been pleaded. The Respondent submitted that in para 28, he was

quoting from the Applicant's affidavit in support of his PRRA application and as such, para 28 should not be struck.

[10] I note, however, at para 28, the Respondent was comparing the Applicant's affidavit for his PRRA application with what he had allegedly sworn before this Court in his stay motion, which is not before me (nor the Officer for that matter).

[11] As such, I find both paras 19 and 28 of the Respondent's Further Memorandum of Argument should not have been pleaded, and as such, I decline to consider them.

III. Issues and Standard of Review

[12] The Applicant raises the following issues:

a. Did the Officer err in finding the Applicant's evidence to be biased?
b. Did the Officer err in their analysis of whether LGBTQI+ Barbadians face persecution?
c. Did the Officer err in their treatment of evidence of similarly situated persons?

[13] The parties agree that the presumptive standard of review is reasonableness, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[14] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker:" *Vavilov* at para 85. The onus is on the Applicant to demonstrate that the Decision is unreasonable: *Vavilov* at para 100. To set aside a decision on this basis, "the reviewing court

must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency:" *Vavilov* at para 100.

IV. Analysis

A. *Did the Officer err in finding the Applicant's evidence to be biased?*

[15] The Applicant submitted a number of documents as evidence including an article from Barbados Today titled "LGBT discrimination costly for Barbados," [Barbados Today article] and an article titled "'I'm free': How Canada's Rainbow Railroad helped a Barbados couple fleeing persecution find peace" published by the CBC [CBC article]. In brief, the two articles discuss the following:

- The Barbados Today article, dated May 18, 2022, primarily discusses a report that outlines that systemic discrimination against the LGBTQI+ community in the Caribbean has cost the region between USD $1.5-4.2 billion, which amounts to 2.1-5.7% of the Caribbean's collective GDP per year.
- The CBC article, dated June 17, 2020, recounts the story of a lesbian couple from Barbados who found safety in Canada with the help of Rainbow Railroad after facing harassment and persecution for their sexual orientation.

[16] After listing the two articles, the Officer stated in the Decision: "I find that the aforementioned documentary evidence contains some bias and therefore assigned them little probative value."

[17] The Applicant submits the Officer erred in finding the news articles "contain[ed] some bias" without any explanation. The Applicant argues that since the Officer never mentioned these

articles again, they were effectively excluded or ignored as evidence. The Officer's finding of bias, the Applicant submits, lacks transparency and justification.

[18] I agree.

[19] The Applicant cites *Arthur v Canada (Attorney General)*, 2001 FCA 223 [*Arthur*] at para 8, which stressed the gravity of making an allegation of bias against a decision-maker. While the context in *Arthur* is different, I find the following analysis of the Federal Court of Appeal [FCA] instructive in understanding the seriousness of a bias allegation:

> [8] ….An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly....

[20] While in this case, the Officer did not allege bias against a decision-maker, the Officer's allegation of bias challenges the integrity of two media outlets, one of which is this country's public national news broadcaster. As such, the caution expressed by the FCA in *Arthur* that such an allegation cannot be done lightly is apt.

[21] The Applicant submits Justice McLachlin (as she then was) held in *Canadian Broadcasting Corp. v Canada (Labour Relations Board)*, [1995] 1 SCR 157 [*Canadian Broadcasting Corp*] that CBC was under a statutory duty "to function as an impartial, unbiased source of information in fact and in perception:" *Canadian Broadcasting Corp* at para 133.

[22] I note, however, that the passage was quoted from Justice McLachlin's dissent in that case. Further, Justice McLachlin found that "CBC's constituting statute does not expressly impose a duty of impartiality upon the CBC. However, the need for impartiality can be inferred from s. 3 of the *Broadcasting Act* ..."

[23] Nevertheless, I accept the Applicant's point that an allegation that a national news agency has engaged in biased reporting is a serious charge, and thus requires a cogent explanation. In this case, the Officer offered no such explanation.

[24] Similarly, the Officer gave no explanation as to why the Barbados Today article, which reported on a study about the cost of systemic discrimination against the LGBTQI+ community in the Caribbean, contained bias. Was the Officer concerned about the bias within the study itself or was the Officer of the view that the newspaper article's summary of the report was biased? Without any explanation, the Court is left to speculate the source of the Officer's concern.

[25] The Respondent counters that the Applicant's submission on the Officer's finding is "inaccurate," arguing there is a difference between allocating "little probative value" and completely excluding or ignoring evidence. The Respondent also cites a series of older decisions to stress that a decision-maker is presumed to have considered all the evidence, unless the contrary is shown.

[26] I reject the Respondent's arguments. Whether or not the Officer excluded the evidence completely or merely assigned it little value, the Officer's treatment of these two articles was unreasonable as it was based on a serious, yet unexplained allegation of bias.

[27] The Applicant emphasizes how both articles contained relevant and direct evidence of the persecutory treatment experienced by LGBTQI+ Barbadians. The Respondent, on the other hand, submits the two articles did not speak to the Applicant's own risk in Barbados.

[28] I note that, due to the unexplained bias allegation, the Officer never considered the substance of the articles. I need not weigh in on the parties' submission on relevance and leave this to be determined by the new officer assigned to the file.

B. *Did the Officer err in their analysis of whether LGBTQI+ Barbadians face persecution?*

[29] The Applicant takes issue with the Officer's finding that the discrimination in Barbados against LGBTQI+ individuals does not amount to persecution. This conclusion, the Applicant notes, was based on only one of the several reports he included in his PRRA application, namely the US Department of State report [US DOS Report]. The Applicant argues the Officer's treatment of the report itself is unreasonable given that the evidence the Officer relied on to establish there was no risk to the Applicant are "events that were *in progress*." That is, the Applicant submits, there is no actual proof that the pending court case or new legislation indicate there would be no persecution against LGBTQI+ Barbadians.

[30] Having reviewed the evidence, I agree with the Applicant.

[31] The Officer relied on the following three conclusions to observe that LGBTQI+ Barbadians do not face persecution:

- While same-sex conduct between adults may be against the law, state authorities have not shown an interest in enforcing the law;
- The law against same-sex conduct between adults is being challenged in the High Court; and
- Barbados' new charter is inclusive to those in the LGBTQI+ community.

[32] Yet, as noted in the same US DOS Report the Officer cited, "as of year's end, a decision was pending" on the court challenge. Likewise, with respect to Barbados' new charter, the US DOS Report clarified that the government has only "introduced a new charter to Parliament." There was no indication as to whether the charter will be adopted by the Parliament of Barbados, let alone implemented into law and enforced by the courts.

[33] As the Applicant submits, it is well established that decision-makers cannot rely on proposed laws or policies as part of their analysis on state protection, but must base their findings on actual country conditions at the operational level: *Han v Canada (Citizenship and Immigration)*, 2011 FC 169 at para 17. The same principle should apply in this context.

[34] The Respondent makes several arguments to submit the Officer's finding was reasonable and contends that the Officer was "simply noting" there was a court case underway and a new, inclusive charter. Essentially, the Respondent argues that the Decision, read as a whole, was reasonable and that deference should be afforded to a PRRA officer's factual determinations.

[35] I find the Respondent's submissions unpersuasive. First, the Officer specifically referenced the charter and the challenge in the High Court when concluding that discrimination against the LGBTQI+ community does not amount to persecution. Second, while the Officer may have other reasons for rejecting the Applicant's claim, the fact that they relied on pending events in their analysis rendered the Decision unreasonable.

C. *Other arguments raised by the Applicants and the Respondents*

[36] As I find the Officer made the above two reviewable errors, I need not consider the Officer's residual findings regarding the treatment of persons similarly situated to the Applicant in Barbados.

[37] I will however, make a few additional comments about the Respondent's key argument at the hearing.

[38] The Respondent focused only on one argument before me, which is that it was reasonable for the Officer to find there was little evidence to corroborate the Applicant's narrative, namely the Applicant's relationship to his ex-partner. The Respondent submitted there is a "qualitative difference" between self-identifying as a member of the LGBTQI+ community and being perceived as one. The Respondent submitted that the Applicant's PRRA application was based entirely on his being perceived as gay because of his relationship with his ex-partner. As the Applicant provided little evidence of his connection to his ex-partner, he therefore provided no evidence that he was perceived to be gay. It was on that basis, the Respondent argued, the Officer found insufficient evidence that the perception of Applicant's sexual orientation would

pose a risk to the Applicant. The Respondent further reminded the Court that as a "convicted felon," there was a credibility issue with regard to the Applicant's claim.

[39] I reject all of the Respondent's submissions.

[40] To start, the Officer found the Applicant's credibility was not a determinative issue in his PRRA and found an oral hearing was not required. The Officer never once cited the Applicant's criminal past to question the evidence he provided.

[41] As to the distinction that the Respondent asks the Court to make between self-identifying as gay and being perceived as one, I am not convinced that the Officer made such a distinction, let alone based the Decision on it. While the Officer did, at one point in the Decision, note there is little documentary evidence to corroborate the Applicant's relationship with his ex-partner; the Officer did not make a finding that the relationship did not exist. Instead, in noting that the Applicant would not face any risk due to being identified as a member of the LGBTQI+ community, the Officer quoted from the Applicant's affidavit that his ex-partner "was known to be gay … [b]ut because he had money [and] had a professional job ... he wasn't harassed for it," before concluding that these statements were indicative that those who may identify as members of LGBTQI+ community may also obtain employment and be entrepreneurs. Thus, far from rejecting the Applicant's evidence about his relationship with his ex-partner, the Officer relied on it to make their finding.

[42] Moreover, as the Applicant rightly points out, at the end of the day, the distinction the Respondent purports to make has no basis in refugee law. The risk assessment required in a PRRA application is forward looking. As well, there is a long line of jurisprudence that confirms sexual minorities are entitled to live their lives openly and without fear of reprisals. As Justice Mosley stated in *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282:

> [29] The meaning of persecution, as set out in the seminal decisions of *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 and *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, is generally defined as the serious interference with a basic human right. Concluding that persecution would not exist because a gay woman in Iran could live without punishment by hiding her relationship to another woman may be erroneous, as expecting an individual to live in such a manner could be a serious interference with a basic human right, and therefore persecution. See for example, the decisions of *Fosu v. Canada (Minister of Employment and Immigration)* (1994), 90 F.T.R. 182, *Husseini v. Canada (Minister of Citizenship and Immigration)* (2002), 20 Imm. L.R. (3d) 92 (F.C.T.D.), dealing with the issue of claimants not being permitted to display their religious beliefs in public.

[43] With respect, the Respondent's attempt to distinguish between the "self-identification" and "perception" of the Applicant as gay is just another way of suggesting that the Applicant should not "out himself" as gay in order to avoid persecution, a proposition long rejected by this Court.

V. Conclusion

[44] The application for judicial review is allowed and the matter is referred back for redetermination by a different decision-maker.

[45] There is no question for certification.

JUDGMENT in IMM-2718-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The matter is referred back for redetermination by a different decision-maker.
3. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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