Date: 20081008

Docket: IMM-1350-08

Citation: 2008 FC 1140

Ottawa, Ontario, October 8, 2008

PRESENT: The Honourable Orville Frenette

BETWEEN:

TANIA-SUE MARIE PARCHMENT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review, of a decision made of an Immigration officer, dated January 25, 2008, where the officer found that the Applicant would not be subject to persecution, torture or risk of loss of life if returned to Jamaica, is made pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

FACTUAL BACKGROUND

[2] The Applicant, a Jamaican citizen, landed in Canada in 1975 at the age of 12. She is the mother of three daughters, born in 1984, 1988, and 1997 and of one son, born in 1986. She was convicted in Canada of the following criminal offences:

a) assault with a weapon, Burlington, ON; sentence 2 years probation;

b) assault & fraud, Toronto, ON; 3 years probation;

c) possession & drug trafficking, Toronto, ON; 11 months plus 1 year probation;

d) failure to officer in court, Toronto, ON; $100.00 fine.

[3] The Applicant claims that she is a lesbian since 1999 and fears persecution in Jamaica from government officials because she is a lesbian. She has alleged that she would produce evidence of her sexual orientation but she has not done so. On the basis of documentary evidence, it was established that in Jamaica, lesbians face a severe risk of discrimination and "unusual, undeserved and disproportionate hardship".

THE DECISION

[4] The officer noted that documentary evidence shows gays and lesbians are discriminated against and persecuted in Jamaica. He also writes that police agencies and jail conditions were deplorable and that the judicial system is over burdened. He declared, however, that it had been established that Jamaica was a constitutional parliamentary democracy with a government which generally respected the human rights of its citizens.

[5] The officer concluded that notwithstanding the above facts, the Applicant had not provided sufficient evidence, of the standard required of the balance of probabilities, that she was a homosexual.

[6] In her 2007 written statement, she alleged that she had evidence to corroborate her same-sex relationship but she did not provide any beyond her own affirmation. The officer wrote that because of her nine year relationship, it would not be unreasonable to provide details to corroborate her claim.

[7] The officer also found that there was insufficient evidence to substantiate her claim that she would be at the risk of cruel and unusual, unjustified punishment or persecution, if she returned to Jamaica.

STANDARD OF REVIEW

[8] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 1 S.C.R. 190, has established that there are two standards of judicial review, correctness and reasonableness.

[9] The standard of correctness applies to questions of law, of procedural fairness, and natural justice while the standard of reasonableness applies to assessment of facts or mixed facts and law.

[10] When the issue involves matters of facts or law applied to facts, a judicial review is not to be granted if the decision falls within the range of reasonable assessments of these facts.

[11] In the present case, the standard of review is reasonableness since it involves the application of law to a situation of fact only.

THE ISSUES

1. Did the officer breach the duty of procedural fairness by not holding an oral hearing because he found the Applicant not credible?
2. Is the decision reasonable or did the officer ignore evidence?

ANALYSIS

1. Did the officer breach the duty of procedural fairness by not holding an oral hearing because he found the Applicant not credible?

The Pertinent Legislation

[12] Section 167:

167. (1) Both a person who is the subject of Board proceedings and the Minister may, at their own expense, be represented by a barrister or solicitor or other counsel.	**167.** (1) L'intéressé peut en tout cas se faire représenter devant la Commission, à ses frais, par un avocat ou un autre conseil.

[13] Section 113:

113. Consideration of an application for protection shall be as follows: (*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection	**113.** Il est disposé de la demande comme il suit : *a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles

or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the

ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

> applicant constitutes to
> the security of Canada.

[14] The Applicant submits that the officer failed to consider all the facts listed in section 167 of *IRPA* to determine whether an oral hearing was required as permitted by section 113 (h) of the *IRPA*.

[15] The Applicant alleges that she affirmed in her statement that she is a lesbian and this "evidence" was uncontradicted, this fact being established on a balance of probabilities and thus became a credibility finding requiring an oral hearing.(*Zokai v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103, 141 A.C.W.S. (3d) 809; *Tekie v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 27, 136 A.C.W.S. (3d) 884; *Kim v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 321, 121 A.C.W.S. (3d) 919; *Shafi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 714, 139 A.C.W.S. (3d) 914)

[16] The Respondent contests this argument based upon the lack of sufficient evidence to support her claim that being a lesbian, she was subject to severe risks if returned to Jamaica.

[17] The Respondent relies heavily on the reasoning of Justice Russel Zinn in *Ferguson*, involving the case of a Jamaican woman, convicted of a criminal offence in Canada in drug trafficking and being ordered deported and claiming to be subject to risk as a lesbian. (*Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067).

[18] Justice Zinn found that there was no requirement to hold an oral hearing because the decision was not based on credibility but rather on a finding that there was insufficient evidence to establish, on the balance of probabilities, that Ms. Ferguson was openly a lesbian (*Ferguson*, above, para. 8).

[19] In my view, Justice Zinn's reasoning is well-founded in law and the near identical facts with the present case supports to the conclusion that the officer was correct in not holding an oral hearing.

2. Is the decision reasonable or did the officer ignore evidence?

[20] The Applicant argues that in her written application, she wrote that she was a lesbian since 1999 and this affirmation was sufficient to establish that fact since it was uncontradicted.

[21] The Respondent answers that the simple unsworn affirmation does not constitute "evidence", or if so, it was not beyond the balance of probabilities.

[22] In my view, the answer lies in the Federal Court of Appeal decision in *Carillo v. Canada (MCI)*, 2008 FCA 94, paras. 14 to 16, where the Court elaborated the distinctions between "*burden of proof, standard of proof and quality of evidence*".

[23] As recalled by Justice Zinn in *Ferguson*, the PRRA officer must engage in two separate assessments of the evidence: *"First, he may assess whether the evidence is credible. When there is*

a finding that the evidence is not credible, it is in truth a finding that the source of the evidence is not credible…" at para. 25:

> *[25] When a PRRA applicant offers evidence, in either oral or documentary form, the officer may engage in two separate assessments of that evidence. First, he may assess whether the evidence is credible. When there is a finding that the evidence is not credible, it is in truth a finding that the source of the evidence is not reliable. Findings of credibility may be made on the basis that previous statements of the witness contradict or are inconsistent with the evidence now being offered (see for example Karimi, above), or because the witness failed to tender this important evidence at an earlier opportunity, thus bringing into question whether it is a recent fabrication (see for example Sidhu v. Canada 2004 FC 39). Documentary evidence may also be found to be unreliable because its author is not credible. Self-serving reports may fall into this category. In either case, the trier of fact may assign little or no weight to the evidence offered based on its reliability, and hold that the legal standard has not been met.*

and at paragraph 26:

> *[26] If the trier of fact finds that the evidence is credible, then an assessment must be made as to the weight that is to be given to it. It is not only evidence that has passed the test of reliability that may be assessed for weight. It is open to the trier of fact, in considering the evidence, to move immediately to an assessment of weight or probative value without considering whether it is credible. Invariably this occurs when the trier of fact is of the view that the answer to the first question is irrelevant because the evidence is to be given little or no weight, even if it is found to be reliable evidence. For example, evidence of third parties who have no means of independently verifying the facts to which they testify is likely to be ascribed little weight, whether it is credible or not.*

[24] In the *Ferguson* case, Justice Zinn took that last step and because the only "evidence" of Ms. Ferguson's sexual orientation was a statement of her former counsel, without supporting evidence,

he confirmed the officer's decision that the former counsel's statement was not probative. (*Ferguson*, above, para. 28)

[25] In my opinion, this reasoning applies exactly on the facts of the present case.

[26] There is no "evidence", except an affirmation of an unsworn and unsupported declaration of the Applicant as to her sexual orientation.

[27] The officer was therefore correct in considering there was no "evidence" of this fact beyond the balance of probabilities.

[28] Besides the fact that the Applicant had a personal interest in the outcome of the case, the fact that she had a criminal record and was facing deportation, the officer had to consider all other factors, including the fact that she was the mother of four children, and notwithstanding the declaration in this application that she would provide corroborative evidence as to her relationship, she had not done so.

[29] The officer did not ignore evidence. The officer correctly decided that the Applicant had not satisfied the burden of proof required, this decision must therefore stand. The decision falls within the range of acceptable stand as directed by the Supreme Court of Canada in *Dunsmuir*, where the following dictum was written: *"In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it*

is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, para. 47).

[30] The decision in this case satisfies this test.

[31] Wherefore all of these reasons, the application must be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is dismissed without costs.

2. No questions are certified.

"Orville Frenette"
Deputy Judge

SOLICITORS OF RECORD

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STYLE OF CAUSE:	**TANIA-SUE MARIE PARCHMENT v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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