Federal Court  Cour fédérale

Date: 20090520

Docket: IMM-4188-08

Citation: 2009 FC 525

Ottawa, Ontario, May 20, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MANUEL RAMOS CONTRERAS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Mr. Manuel Ramos Contreras (the "Applicant") seeks judicial review of the decision of Pre-Removal Risk Assessment Officer Thierry N'kombe (the "PRRA Officer"). In that decision dated

August 19, 2008, the PRRA Officer rejected the Applicant's Pre-Removal Risk Assessment ("PRRA") application.

Background

[2] The Applicant was born on November 19, 1970 in Guatemala City, Guatemala and is a citizen of Guatemala. He entered the United States of America as a visitor on January 29, 2001. His visitor status subsequently expired but he remained in the United States, without status, until July 1, 2005.

[3] While in the United States, the Applicant met Mr. Keith Smith, an American citizen, in 2003. They began cohabiting in August 2003. Mr. Smith accompanied the Applicant when he came to Canada on July 2, 2005. The Applicant claimed refugee protection status based on his fear of the police, the military, friends, neighbours and family, all in Guatemala, as the result of his membership in a particular social group, that is HIV positive, gay men.

[4] The Board rejected his claim for Convention refugee status on the grounds that the Applicant does not have a well-founded fear of persecution on a Convention ground in Guatemala. It found that the Applicant lacked a subjective fear of persecution in Guatemala, relying in this regard on the history of the Applicant's life in Guatemala and his prior travels outside his country of birth. The Board observed that the Applicant had lived in Guatemala without suffering any

incidents. He had travelled to Canada in 1996 and to the United States in 1996 and 2000. He did not seek refugee protection on those occasions.

[5] The Board further considered the issue of an Internal Flight Alternative ("IFA") for the Applicant in Guatemala and found that it would not have been unreasonable for the Applicant to pursue an IFA in Guatemala City.

[6] The Applicant relied upon the same ground of risk, that is a member of a particular social group, when he made his PRRA application. He submitted new evidence, including a Declaration from Dusty Aráujo, (the "Aráujo Declaration") representing the International Gay and Lesbian Human Rights Commission. This document addresses the reasons why gay and lesbian asylum seekers are reluctant to reveal their sexual orientation in pursuit of claims for refugee protection.

[7] As well, the Applicant submitted, as new evidence, extracts from the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 and of the International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) ("ICCPR"), the U.S. Department of State Reports on Human Rights in Guatemala for 2003 and 2007, a letter from a medical doctor in Guatemala addressing the effect that homophobia has on the ability of HIV positive homosexuals to obtain proper treatment and a letter from a medical doctor in Toronto stating that the Applicant had begun treatment for HIV.

[8] Finally, the Applicant submitted a report from Dr. Pilowsky in Toronto who had formed the diagnosis that the Applicant was suffering from a major depressive disorder arising from the possibility of separation from his partner, Mr. Smith, with whom he is living in Canada.

[9] The PRRA Officer concluded that the Applicant had failed to overcome the Board's finding that an IFA was available in Guatemala City. The Officer considered the new evidence and found that the documentary evidence by itself could not establish that the Applicant would be at risk in Guatemala; his individual circumstances also had to be considered and these did not support a conclusion that he was entitled to protection pursuant to section 97 of the Act.

Submissions

[10] The Applicant argues that the PRRA Officer erred in failing to fully address the issue of separation from his partner which will lead to disruption of his family unit, contrary to one of the purposes of the Act.

[11] He also submits that the PRRA Officer erred in his treatment of the factors identified in the Aráujo Declaration and misinterpreted the evidence relating to the treatment of homosexual men in Guatemala.

[12] The Applicant further argues that the PRRA Officer erred in applying the test for persecution, failing to take into account that his status as an HIV positive gay man will negatively impact on the quality of medical care that he will receive in Guatemala.

[13] The Ministers of Public Safety and Emergency Preparedness and of Citizenship and Immigration (collectively "the Respondents") submit that the Applicant has failed to show that the Board committed a reviewable error either in its assessment of the evidence or its interpretation and application of the Act.

Discussion

[14] Further to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, findings of fact made by an administrative tribunal are reviewable on the standard of reasonableness and questions of law are reviewable on the standard of correctness. Guidance regarding the appropriate standard applicable to a particular issue may be found in the prior jurisprudence.

[15] The first issue to be addressed is whether the PRRA Officer committed a reviewable error by failing to find, on the basis of the factors identified in the Aráujo Declaration, that the Applicant lacked a subjective basis for his fear of persecution. This is a question of mixed fact and law, as it involves the application of the evidence to a statutory provision in assessing whether the Applicant met the definition of a Convention refugee. Such questions within the PRRA context attract a standard of reasonableness: *Kim v. Canada (Minister of Citizenship and Immigration) et al.* (2005), 272 F.T.R. 62 at para. 19. The Aráujo Declaration was submitted by the Applicant for the purpose

of showing that there are identifiable reasons why homosexual persons often delay seeking protection and further, as a response to the finding of the Board about his lack of subjective fear.

[16] I am not persuaded that the PRRA Officer ignored the Aráujo Declaration. This documentary evidence cannot, by itself, establish the subjective element of persecution for the Applicant. That burden lies on him. The PRRA Officer was not satisfied that he had provided new evidence in that regard, sufficient to overcome the findings of the Board, as to the lack of a subjective element.

[17] Next, did the PRRA Officer commit a reviewable error by ignoring relevant evidence as to how homosexual men are treated in Guatemala? This is a question of fact, assessed on the standard of reasonableness: *Kim, supra* at paras. 15 and 19.

[18] This argument by the Applicant goes to the manner in which the PRRA Officer weighed the evidence. I am not persuaded that the Applicant has shown that the PRRA Officer ignored any relevant evidence. I am not persuaded that the weighing of the evidence led to an unreasonable conclusion.

[19] Third, did the PRRA Officer err in law in his interpretation of section 97 of the Act? This is a question of law, assessed on the standard of correctness: *Kim, supra* at para. 19. In this regard, the Applicant argues that the PRRA Officer erred by excluding the non-availability of medical treatment for HIV positive homosexual men from the idea of risk, as contemplated by section 97 of the Act. The Applicant relies upon the decision of the Federal Court of Appeal in *Salibian v.*

Canada (Minister of Employment and Immigration) (1990), 113 N.R. 123 (F.C.A.), to argue that once he has shown that a group of similarly situated people are at risk of persecution, his claim to be at risk of persecution is established. The group of similarly situated persons, according to the Applicant, is the group of homosexual men who are HIV positive who are at risk of being denied access to medical treatment in Guatemala.

[20] The Applicant's argument is flawed, in my opinion. He has not shown that medical treatment for HIV positive homosexual men in Guatemala is unavailable or denied on grounds of persecution. The Applicant must do more than present a legal argument; he must establish a factual context and he has not done so. The PRRA Officer had evidence before him concerning the availability of medical care in Guatemala and the Applicant has not shown that this evidence was ignored.

[21] Finally, I refer to the Applicant's submissions concerning a breach of procedural fairness, allegedly arising from the failure of the PRRA Officer to address the issue of his separation from Mr. Smith as a basis of persecution. Deference need not be shown by this Court when reviewing a decision on the grounds of procedural fairness and accordingly, the appropriate standard of review is correctness: *Sketchley v. Canada (Attorney General),* [2006] 3 F.C.R. 392 (F.C.A.) at para. 53.

[22] In my opinion, there is no breach of procedural fairness here. The separation of family members is not an independent ground of persecution for the purposes of the Act. Rather, the separation of family members is recognized as an inevitable consequence of the application of the

Act. In *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, the Supreme Court of Canada said that non-citizens have no right to enter Canada. See also *Chieu v. Canada (Minister of Citizenship and Immigration)* (2002), 208 D.L.R. (4th) 107.

[23] Separation of family members is a consequence of the application of the Act. Non-citizens do not have a right to enter Canada. The Act allows for the entry of persons as immigrants, as refugees or as persons in need of protection. The Applicant was found neither to be a Convention refugee nor a person in need of protection. The fact that he faces separation from his partner is a consequence of the application of the statutory scheme but separation *per se* is not a ground for finding him to be a person in need of protection.

[24] In conclusion, I am satisfied that the PRRA Officer committed no reviewable error and this application for judicial review is dismissed.

[25] Counsel for the Applicant submitted the following question for certification:

> Can the risks described in sections 96 and 97 of the *Immigration and Refugee Protection Act* include harm from the forcible separation of a same sex couple resulting from Canada's return of one of the parties to the relationship to a country which refuses to recognize same sex relationships?

[26] Counsel for the Respondents opposes certification of this question on the basis that the proposed question does not satisfy the criteria for certification, that is a serious question of general

importance that is dispositive of the case, as discussed in *Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 36 Imm. L.R. (3d) 167.

[27] I agree with the arguments advanced by the Respondents and no question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed, no question for certification arising.

"E. Heneghan"
Judge

SOLICITORS OF RECORD

DOCKET:	IMM-4188-08
STYLE OF CAUSE:	MANUEL RAMOS CONTRERAS v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	March 2, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	HENEGHAN J.
DATED:	May 20, 2009

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