Federal Court  Cour fédérale

Date: 20090617

Docket: IMM-4371-07

Citation: 2009 FC 640

Ottawa, Ontario, June 17, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

A. B.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

[1] This is an application for judicial review of a Pre-Removal Risk Assessment (PRRA) determination, dated September 12, 2007, which found that the applicant would not be at risk of persecution, torture, death, or cruel and unusual treatment or punishment if returned to Guyana, his country of nationality. For the reasons that follow, his application is allowed.

Preliminary Motion

[2] Prior to the hearing, the applicant filed a motion for an Order deleting his name from these reasons and the Court's judgment, along with other specific allegations he has made, on the basis that the disclosure of this information may result in harm to the applicant if he is returned to Guyana. The respondent took no position on this request.

[3] The specific allegations the applicant sought to have excluded from these reasons are not relevant to the issue before the Court and thus no such order is required in that regard. There will be no reference herein to that information.

[4] Justice Gibson in *A.B. v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 325, recently canvassed the law regarding confidentiality orders. I am in agreement with him that they should issue only when necessary to prevent a serious risk and where alternative measures will not prevent the risk and when the salutary effects of the order outweigh its deleterious effects, including the impact of a confidentiality order on the public interest in open and accessible court proceedings.

[5] At the commencement of the hearing I indicated that I was satisfied that the salutary effects of modifying these reasons to delete the applicant’s name outweigh the deleterious effects, notwithstanding the public interest in open and accessible court proceedings. Thus, as Justice Gibson did, I will simply identify the applicant as “A. B.” throughout these reasons, and in the judgment itself, without issuing a formal order. The style of cause will also be modified

accordingly. This will allay the applicant's concern that his identity may become known through publication of these reasons on the internet, resulting in harm to him if he is returned to Guyana.

Background

[6] The applicant was born in Guyana in 1965 and came to Canada on March 18, 1976, acquiring landed immigrant status three years later, on November 29, 1979, as the dependent child of a couple who adopted him on May 18, 1978.

[7] In submissions filed in support of his PRRA application, the applicant relates an appalling history of childhood sexual abuse at the hands of various adult men who came in and out of his life, after his adoption. He says that his adoptive father was physically and emotionally abusive. When he was 13 or 14, his adoptive father put him into the "care" of a male friend who sexually abused him and shared him with other pedophiles for several years. Afterwards, A. B. lived with another middle-aged man who also sexually exploited him. At the age of 16, A. B. stole some of this man's possessions; this was the start of his history of criminal offences.

[8] The more serious of A. B.'s criminal offences involve sexual assaults on men and robbery. A. B. came to the attention of immigration authorities in 1998, towards the end of a prison sentence he was serving in connection with a 1991 sexual assault conviction. He was duly reported as inadmissible to Canada for serious criminality. In October of 1998, a delegate of the Minister of Citizenship and Immigration issued opinions under subsection 70(5) and subparagraph

46.01(1)(e)(iv) of the former *Immigration Act*, to the effect that the applicant constitutes a danger to the Canadian public.

[9] The deportation order against A. B. issued on January 24, 2001. Under subsection 70(5) of the former *Immigration Act*, inadmissibility for serious criminality was not subject to appeal; hence A. B.'s appeal of the order before the Immigration Appeal Division was dismissed for lack of jurisdiction.

[10] In January of 2002, the applicant began serving a seven year sentence in connection with a fresh conviction for robbery and other offences. In May 2007, the Canada Border Services Agency advised him that he would be deported upon completion of his sentence. On June 14, 2007, the applicant filed the PRRA application which is the subject of this proceeding.

[11] The applicant raised three grounds in his submissions to the PRRA Officer. Only one has been pursued in this application, namely that he would face a risk in Guyana on account of his homosexuality. It was accepted by the PRRA Officer that the applicant is a homosexual. His other allegations were not pursued before this Court and as noted, they reveal information that he does not wish to become known, and they need not be discussed here.

[12] The impugned PRRA deals with the applicant's allegations concerning the risks he would face if removed to Guyana. The risk assessment was conducted only with respect to the risks listed

in section 97 of the Act as the applicant is barred from consideration as a Convention refugee under section 96 of the Act on account of his criminal inadmissibility.

[13] The PRRA Officer found that the applicant had not established that he faces a personalized risk to his life or of cruel and unusual treatment or punishment, or a danger of torture, within the meaning of section 97 of the Act and accordingly, that he is not a person in need of protection.

Issues

[14] The applicant raised the following issues:

a. Whether the PRRA Officer misconstrued the law with respect to the meaning of "cruel and unusual treatment" in section 97 of the Act, failed to properly apply the law to the evidence, and failed to provide adequate reasons; and

b. Whether the PRRA Officer's decision is unreasonable on the evidence.

Analysis

[15] The applicant in his submissions to the PRRA Officer alleged that he faced a risk of cruel and unusual treatment or punishment if returned to Guyana because he faced the risk of

a. being jailed or persecuted by a state agent for his sexual orientation; and

b. being physically abused, threatened or killed by state agents or by a homophobic public.

[16] The evidence on the record is that in Guyana, sexual activity between adult men is punishable by imprisonment for a term of between two and ten years and the Guyanese criminal code further provides that those convicted of buggery are liable to imprisonment for life.

[17] The PRRA Officer found that there was very little mention in the record before him of actual prosecutions under these criminal code provisions. I have reviewed the record and have concluded that this assessment was reasonable as was the resulting conclusion that there was no evidence that the applicant would face "cruel and unusual punishment" because of his sexual orientation.

[18] In *Birsan* v. *Canada (Minister of Citizenship and Immigration),* [1998] F.C.J. No. 1861, Justice Pinard held that "it is certainly not unreasonable to conclude that the mere existence of a law prohibiting homosexuality in public cannot prove, if it is not enforced, that homosexuals are persecuted." In my view, the same observation applies equally when examining cruel and unusual punishment.

[19] There are two possible reasons why there may be few reports of the criminal prosecution of homosexuality: it may be that the law is not enforced, or it may be that homosexuals in Guyana are not open and public about their sexual orientation. Based on the country reports summarized by the PRRA Officer, the latter appears to be a likely reason.

[20] In his assessment, the PRRA Officer writes: "[c]ountry reports agree that homosexuality is illegal in Guyana, and that homosexuals there face almost universal discrimination, stigma, and condemnation" and that "it is rare and risky for homosexuals to reveal their orientation publicly"; however, he then observed that there are "few reports" of actual violence against homosexuals. Although there were in fact two reports of violent incidents in the evidence before the PRRA Officer, he did not see the applicant as similarly situated to either of the men implicated in these incidents, one of whom was convicted for cross-dressing, and the other of whom was shot for participating in a gay wedding.

[21] The PRRA Officer did note that there was a documentary reference to the "large incidence of unreported physical harassment and violence perpetrated on men perceived to be openly gay" but he discounted this by remarking that if the incidents are unreported, it is unclear how their incidence can be described as large. The reference the PRRA Officer cites is found in a Press Release issued December 11, 2005 by the Society Against Sexual Orientation Discrimination (SASOD), with reference to International Human Rights Day 2005.

[22] Although the PRRA Officer reviewed and commented upon the Country of Origin Research of the Immigration and Refugee Board of Canada, he did not make mention of passages in it that add credence to the claim that homosexuals face a risk of physical and psychological harassment in Guyana and that crimes against them are under-reported due to fears of police violence against homosexuals. The following passages from the Country of Origin Research are germane:

> In correspondence sent to the Research Directorate, a co-chair of the Society Against Sexual Orientation Discrimination (SASOD) stated

> that homophobia is widespread in Guyana (4 Sept. 2006). In October 2006, a representative of the Guyana Human Rights Association (GHRA) sent correspondence stating that it was "both rare and dangerous for gay/lesbian individuals to publicise their sexual status."
>
> Amnesty International USA notes that it is difficult for members of the LGBT [lesbian, gay, bisexual and transgender] community to reveal their sexuality, even to friends and family, and that discrimination against homosexuals is common practice (10 Feb. 2006).
>
> In an interview with the *Guyana Chronicle*, the SASOD co-chair indicated that two homosexuals cannot cohabitate and that those who show public displays of affection are verbally or physically abused (31 May 2006).
> …
> SASOD states that crimes against homosexuals are under-reported and that there are no statistics on homophobic crimes or on the legal procedures undertaken as a result of those crimes (4 Sept. 2006). SASOD has received complaints of police brutality and of sexual violence against homosexuals, who do not file complaints mainly out of fear (ibid.). The GHRA has also investigated police brutality against homosexuals (ibid.). No information on such investigations could be found among the sources consulted by the Research Directorate.
>
> (emphasis added)

[23] In light of the evidence before him that “crimes against homosexuals are under-reported and that there are no statistics on homophobic crimes”, and that SASOD has received “complaints of police brutality and of sexual violence against homosexuals, who do not file complaints mainly out of fear”, I am of the view that the PRRA Officer erred in discounting reports of violence against homosexuals on the basis that conduct of this sort was unreported when there was evidence as to why that was so; namely, fear of police brutality and sexual violence.

[24] In light of the above, the Court can only conclude that the PRRA Officer's decision ignores or fails to consider relevant evidence.

[25] Although this would be sufficient reason to grant this application on its own, there is another finding which further undermines the reasonableness of the PRRA Officer's decision. Notwithstanding A. B.'s exclusion from consideration under section 96 of the IRPA on account of his criminality, the PRRA Officer nonetheless comments that homosexuals in Guyana face "pervasive discrimination which could cumulatively amount to persecution [and] this could potentially result in a successful application under section 96 of IRPA." Yet he goes on to find that this pervasive discrimination does not amount to cruel and unusual treatment.

[26] From the PRRA Officer's findings that the applicant's treatment as a gay man in Guyana could cumulatively amount to persecution, but fails to meet the threshold of cruel and unusual treatment, one can only conclude that he was of the view that "cruel and unusual treatment" refers to something more severe than "persecution", as that term is used in relation to section 96 of the Act and the definition of a Convention refugee. It is hardly obvious that this is so, and such a proposition does not appear to have ever been endorsed by this Court.

[27] The Federal Court of Appeal in *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 128 (F.C.A.), looked to definitions from the Living Webster Encyclopedic Dictionary and the Shorter Oxford English Dictionary to define "persecution", where the term is explained as follows:

> To harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently, to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship. ... A particular course or period of systematic infliction of punishment directed against those holding a particular (religious belief); persistent injury or annoyance from any source.

[28] Justice Mosley of this Court more recently reviewed the jurisprudence on the meaning of "persecution" in *Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration,* [2004] F.C.J. No. 316, 2004 FC 282, and summarized it at para. 29 as follows:

> 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.

[29] It has been held that harassment and discrimination may amount to persecution. In *Sagharichi v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 796 (F.C.A.), Justice Marceau wrote:

> It is true that the dividing line between persecution and discrimination or harassment is difficult to establish, the more so since, in the refugee law context, it has been found that discrimination may very well be seen as amounting to persecution. It is true also that the identification of persecution behind incidents of discrimination or harassment is not purely a question of fact but a mixed question of law and fact, legal concepts being involved.

The Court of Appeal did indicate, however, that discrimination will only amount to persecution when it is "serious or systematic enough to be characterized as persecution": See also *Ramirez v. Canada (Minister of Citizenship and Immigration),* [1994] F.C.J. No. 1888, 88 F.T.R. 208 at para 8.

[30] The words “cruel and unusual” in section 97 have not been defined in the case law. Justice Marceau in *Kindler v. Canada (Minister of Justice)*, [1989] 2 F.C. 492 (F.C.A.), aff’d [1991] 2 S.C.R. 779, stated that these words have “not been attributed a literal and frozen meaning” but are to be “interpreted in a flexible and dynamic manner to accord with evolving standards of decency”.

[31] In this case, the PRRA Officer found that the harassment and discrimination of homosexuals in Guyana could amount to persecution. He specifically found that the discrimination, harassment and disdain from the general public that the applicant would experience, if he is open about his sexual orientation, is “serious”. In my view, if the harassing and discriminatory treatment he would receive is serious and could amount to persecution, it is unreasonable to conclude, as the PRRA Officer did, that the applicant is not likely to experience cruel and unusual treatment in Guyana because of his homosexuality. If anything, cruel and unusual treatment on account of sexual orientation may be established in circumstances where persecution cannot be established. In light of the PRRA Officer’s finding that persecution could be established, his conclusion that the same treatment was not cruel and unusual is unreasonable.

[32] Accordingly, the decision will be set aside and referred back to another officer for a new determination.

[33] In the unique circumstances of this case, counsel asked for and will be given an opportunity to propose a question for certification following the issuance of these reasons. Both counsel are to serve and file their submissions, if any, within seven days of receipt of these Reasons for Judgment.

Each shall have a further period of three days to serve and file any reply to the submissions of the opposite party. The Court shall issue a Judgment following consideration of these submissions.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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