

Federal Court



Cour fédérale

Date: 20101015

Docket: IMM-546-10

Citation: 2010 FC 1014

Ottawa, Ontario, October 15, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

FABIAN BRYAN JEAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is a citizen of St. Lucia who applies for judicial review of the decision of the Refugee Protection Division dated January 12, 2010 refusing his application for refugee status.

[2] On consent of the parties the Applicant's name is stated as Fabian Bryan Jean.

[3] I have concluded that the judicial review should be dismissed for the reasons that follow.

Background

[4] The Applicant is a bisexual man who entered into a homosexual relationship with another man. He was assaulted by the older brother of his sexual partner when the two were found in a motel in 2002. The assailant was aided by three other individuals, one of whom wielded a machete causing significant injury to the Applicant. He was hospitalized for ten days as a result of injuries which included multiple cutlass injuries.

[5] Both the Applicant's sexual partner and the assailant left St. Lucia for some time. When his sexual partner returned in 2005 the Applicant resumed the homosexual relationship resulting in the breakup of the Applicant's marriage. In March 2007, the Applicant came to Canada. He filed a refugee claim because he said he learned his assailant had returned to St. Lucia and was looking for him.

Decision Under Review

[6] The Refugee Protection Division member (the RPD) held the Applicant was not credible because of discrepancies in his account about when he decided to make a refugee claim and also because his statement that the assailant had also beaten his former sexual partner was not supported in a letter from the former. The RPD also gave little weight to affidavits from the Applicant's sister and mother claiming that the assailant was back in St. Lucia looking for the Applicant, and, after assaulting the sister, threatened serious harm against the Applicant.

[7] The RPD found as a fact that the assailant had no further interest in the Applicant since 2002. It found that the Applicant did not have a well-founded fear of persecution. It reviewed country documentation and concluded that while there was discrimination against homosexuals and some violence, police did investigate such offences. Finally, the RPD decided that a s. 97 analysis was not required.

Legislation

[8] *Immigration and Refugee Protection Act, 2001, c.27 (IRPA)*

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
 (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
 (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
 a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
 b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle,

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country...

exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

Standard of Review

[9] The standard of review with respect to questions of mixed fact and law is assessed on the standard of reasonableness. The standard of review for whether there is a well-founded fear of persecution is reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, *Mendoza v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 387.

Analysis

[10] The Applicant submits that the RPD misconstrued the evidence and made a perverse finding of fact when it decided to give little weight to the sister's affidavit on the basis that the police would not have refused to investigate her complaint because she herself was not gay. The Respondent submits the RPD's reasons taken as a whole cannot be said to have no line of

analysis that does not support the RPD's decision to refuse refugee status or that the decision evinces a marked departure from what is rational.

[11] The Applicant who submits the RPD erred in failing to conduct a section 97 *IRPA* analysis since the RPD did not reject the Applicant's sexual orientation and the country documentation supported a finding that treatment of homosexuals went beyond social discrimination and included acts of violence against homosexuals. The Respondent says there is insufficient credible evidence before the RPD to support a s. 97 claim.

[12] The RPD noted several substantial inconsistencies in the Applicant's evidence and found the Applicant not credible. The RPD noted discrepancies between the Applicant's evidence and testimony about the timing of his decision to apply for refugee status. It had the opportunity to observe the Applicant when he offered an explanation for the discrepancies. Applying the test in *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, the RPD's finding that the Applicant himself was not credible is within the range of reasonable outcomes given the evidence before it.

[13] The RPD gave little weight to the affidavit of the sister who declared that the assailant also attacked her and that the police refused to investigate. She had stated: "I tried to report the matter to the police but they said they were not interested in protecting gays." The RPD stated:

There is evidence such as affidavits from ... the claimant's sister and mother that supports the claimant's allegation that Seika continues today to make threats. ... His sister states that she was physically attacked by

Seika and that the police refused to help gays. Once against, the claimant's sister is not gay and this statement lacks a ring of truth. I assigned little probative weight to this affidavit.

[14] The sister does not say whether what she reported to the police was the assault on her or an account of the entire history of the matter. Nor does she substantiate her affidavit evidence by a medical report of her injuries or a copy of the police report. Since the sister only says she reported "the matter" to the police, I cannot say that the RPD's rationale for giving her affidavit little weight falls outside the realm of reasonable outcomes. The onus is on the Applicant to prove his claim and the affidavits of his sister and mother he provided are mere generalized declarations lacking in detail or corroboration.

[15] In *Odetoyinbo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 501, Justice Martineau stated that an adverse credibility finding, conclusive of a refugee claim under s. 96 of IRPA, is not necessarily conclusive of a refugee claim under s. 97 since the evidence necessary to establish a claim differs from s. 96. There are subjective and objective components to s. 96 which is not the case in s. 97.

[16] The RPD does not dispute the Applicant is bisexual and engaged in homosexual activity. Nor does the RPD dispute the Applicant was seriously injured and hospitalized for engaging in that activity in 2002. The RPD came to a negative s.96 conclusion stating;

Although he stopped for some time, he re-entered a homosexual relationship and conducted his affairs discretely for several years. It is

reasonable to conclude the claimant could return to St. Lucia and live as he was living without a serious possibility of being persecuted by society.

[17] The RPD reviewed country documentation that indicated attitudes in St. Lucia against homosexuals go beyond social discrimination and included acts of violence against homosexuals. The 2008 U.S. Department of State reports that there are few openly gay people in the country and at least two cases of violence against homosexuals including one homosexual who was killed after being hung from a tree because he was openly gay. The RPD noted the police were investigating the crime but also observed that police do not always investigate complaints of homophobic violence.

[18] The RPD found that, despite a negative environment for homosexuals in St. Lucia, the Applicant had not reported any harassment by St. Lucian society at large. The Applicant has to establish a connection between his claim and the objective situation in St. Lucia. He has not made any allegations of persecution other than the 2002 attack by the assailant whom the RPD found was no longer interested in the Applicant. The Applicant has not shown he was or would be persecuted by the St. Lucian public at large. *Nejad v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1444.

[19] A negative credibility finding under s. 96 may be determinative of a s. 97 claim. In *Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, the Federal Court of Appeal stated at para. 29:

However, as MacGuigan J.A. acknowledged in *Sheikh*, supra, in fact the claimant's oral testimony will often be the only evidence linking the claimant to the alleged persecution and, in such cases, if the claimant is not to be found credible, there will be no credible or trustworthy evidence to support the claim. Because they are not claimant-specific, country reports alone are normally not a sufficient basis on which the Board can uphold a claim.

[20] This principle is restated in *Mbanga v Canada (Minister of Citizenship and Immigration)*, 2008 FC 738 at para. 21:

That being said, the failure to proceed to a separate section 97 analysis is not fatal in every case. Where, as here, there is no evidence supporting a finding of a person in need of protection, the analysis will not be required.

[21] The RPD decided, after its review of the country documentation, both positive and negative, the Applicant could return to St. Lucia and live as he did without a serious possibility of being persecuted by society. I conclude that the RPD did not err in not giving consideration to a separate s. 97 analysis on the same evidence already reviewed.

Conclusion

[22] The application for judicial review is dismissed.

[23] The Parties have not proposed a general question of importance for certification and I do not certify any question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The style of cause is amended to reflect the Applicant's name as Fabian Bryan Jean.
2. The application for judicial review is dismissed.
3. I do not certify any question of general importance.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-546-10

STYLE OF CAUSE: FABIAN BRYAN JEAN and THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 14, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** MANDAMIN, J.

DATED: OCTOBER 15, 2010

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