

Federal Court



Cour fédérale

**Date: 20120906**

**Docket: IMM-8275-11**

**Citation: 2012 FC 1058**

**Ottawa, Ontario, September 6, 2012**

**PRESENT: The Honourable Mr. Justice Near**

**BETWEEN:**

**RUMALDO ANTONIO RINCON FERRER**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Applicant, Rumaldo Antonio Rincon Ferrer, seeks judicial review of a negative decision by the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated October 17, 2011. The Board found he was not a Convention refugee or person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

I. Facts

[2] The Applicant is a citizen of Venezuela who alleged persecution because he is a homosexual and HIV positive. He was abused by family members of two of his former partners. One former partner extorted money from him following their relationship. He has been hospitalized twice as a result of related abuse, including once after being shot. The Applicant also claimed he was forced to resign from his job on two occasions when his employer discovered his homosexuality.

[3] On January 23, 2010, the Applicant became involved with Juan Carlos Ballesteros. Fearing persecution due to their relationship, they decided to come to Canada. They arrived on April 26, 2010 and claimed refugee protection that same day. Both first learned of their HIV status through the immigration medical examination process.

[4] The refugee claims were initially joined, but at the hearing on August 8, 2011, the Board decided to separate them. As well, their representative advised at the hearing that she had only recently learned about the Applicant's HIV status so the Board held that she could make written submissions after the hearing regarding the possibility of persecution on that basis.

II. Decision under Review

[5] The Board found that there was adequate state protection and the Applicant had an internal flight alternative (IFA).

[6] Despite accepting the many serious allegations made by the Applicant, the Board noted that the he never reported any of the attacks, threats, or extortion to the police. Although he filed a lawsuit after the first time he was forced to resign from his job, the Board noted that he never informed his lawyer or the presiding judge that he is gay and therefore rejected the allegation that he had been forced to resign because of his sexuality.

[7] The Board also rejected the claim that he could not go to police because they would not help him and he was afraid his sexuality would become public. Considering documentary evidence as to the state's efforts in addressing police corruption and human rights violations, the Board found there was adequate state protection.

[8] The Board further concluded that the Applicant had an IFA in Caracas, which documentary evidence showed was relatively liberal and had an established gay community.

### III. Issue

[9] The Applicant raises three interrelated issues as to whether the Board failed to consider persecution based on HIV status and was reasonable in its findings of an IFA and the availability of state protection.

IV. Standard of Review

[10] The Board's findings related to state protection and the IFA must be reviewed according to the reasonableness standard (see for example *Mejia v Canada (Citizenship and Immigration)*, 2010 FC 530, [2010] FCJ no 631 at para 10). This Court will therefore consider whether the decision demonstrates sufficient justification, transparency, and intelligibility or represents an acceptable outcome defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

V. Analysis

[11] The Applicant's primary concern with the decision is whether the Board erred in its treatment of his being HIV positive as leading to discrimination, particularly in the area of employment. He asserts that the Board failed to conduct an independent analysis or specifically address evidence related to practices of Venezuelan employers in screening for the disease. According to the Applicant, the Board committed a similar error to that identified by this Court in *Dias v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1243, [2008] FCJ No 1543 at para 33 in not giving sufficient consideration to employment-related barriers associated with a claimant's HIV status in Mexico.

[12] Despite the Applicant's claims, I am prepared to accept that the Board's determinative findings regarding state protection and the availability of an IFA fell within the range of possible, acceptable outcomes (*Dunsmuir*, above). In my view, this Court need not adopt a formulistic

approach in reviewing the Board's decision. Rather, the Supreme Court's recent statements in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 reinforce that reasons must be read as a whole. The critical question becomes whether, on considering the decision as a whole, the Board's conclusion are reasonable based on the particular circumstances of the case.

[13] It is clear in reading the decision and supporting record that the Board was alive to the Applicant's alleged discrimination as a member of the gay community and as an individual who is HIV positive. As a consequence, the Board proceeded to consider whether state protection or an IFA was available to him. The Board directs attention to the issue of the Applicant's HIV status in the determination with respect to state protection and with even more clarity in addressing the availability of an IFA. This is evident in paragraphs 34 to 35 of the decision where the Board considers issues related to obtaining treatment and employment. The Board is not required to refer to each and every piece of documentary evidence (*Hassan v Canada (Minister of Employment and Immigration)* (1992), 147 NR 317, [1992] FCJ no 946 (CA); *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ no 598 (CA)).

[14] In the judicial review involving the decision of the Applicant's partner (*Romero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 709, [2012] FCJ No 699), Justice Donald Rennie found that a lack of determination regarding his HIV status amounted to an error based on the case of *Dias*, above. Regardless, he also stressed that each case, and in particular that of the Applicant given his relationship to *Romero*, was required to be decided based on the particular facts of the case. The Board's more extensive reasons regarding the issue in the Applicant's case is

sufficient to distinguish *Romero*, above on the facts presented. I also note that *Dias* was decided prior to the clarity provided regarding reasons in *Newfoundland Nurses*, above.

[15] On the determinative issues of state protection and the IFA, it is readily apparent why the tribunal made its overall decision and the Court is able to determine that its conclusion is within the range of acceptable outcomes (*Newfoundland Nurses*, above). Sufficient consideration was given to the Applicant's HIV status in this particular instance when the reasons are understood in their entirety.

VI. Conclusion

[16] Accordingly, I consider the Board's decision reasonable and dismiss the application for judicial review.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is dismissed.

“ D. G. Near ”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-8275-11

**STYLE OF CAUSE:** RUMALDO ANTONIO RINCON FERRER v MCI

**PLACE OF HEARING:** TORONTO

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**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** NEAR J.

**DATED:** SEPTEMBER 6, 2012

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