

Federal Court



Cour fédérale

Date: 20121109

Docket: IMM-2212-12

Citation: 2012 FC 1310

Ottawa, Ontario, November 9, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

JACKSON KAZONDUNGE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant seeks judicial review of the February 3, 2012, decision of the Refugee Protection Division of the Immigration and Refugee Board (“the Board”) in which the Board determined that the Applicant was neither a Convention refugee nor a person in need of protection under sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] For the reasons that follow, the application for judicial review is dismissed.

I. Facts

[3] The Applicant is a citizen of Namibia, who arrived in Canada on December 4, 2009. He filed an application for refugee protection on December 6, 2009, on dual bases: his particular fear of his ex-same-sex partner in Namibia, by whose hand the Applicant alleges he was the victim of domestic violence; and his general fear of persecution by Namibian society on the grounds of his homosexuality.

[4] The Applicant obtained medical assistance in Namibia on one occasion following an assault he suffered on July 5, 2008, though he did not disclose the source of the injuries to the medical professionals assisting him.

[5] The Applicant maintains that he currently lives with a new same-sex partner in Canada. The latter testified as a witness at the Applicant's hearing before the Board on December 16, 2011.

II. Decision under Review

[6] The Board rejected the Applicant's claim because of the presence of "unreliable evidence in areas central and material to the claim." The Board found that discrepancies in the evidence submitted with respect to the Applicant's identity as a homosexual male had not been overcome.

[7] Specifically, the Board pointed to the Applicant's inconsistent declaration of the number of years in which he had a relationship with his same-sex partner in Namibia. In his original application for refugee protection, the Applicant declared that he lived with the man whom he feared for three years. At the hearing, however, the Applicant stated that they lived together for only one year and six months. The Board found that, "if the claimant had the sexual orientation alleged and any relationship with a same sex partner in Namibia, then more likely than not, clear, consistent and reasonably accurate information about the length of their cohabitation would have been supplied to the Board" (Application Record at page 13).

[8] The Board pointed further to inconsistencies in the Applicant's stated first language. In his Personal Information Form (PIF), the Applicant asserted, with the assistance of counsel, that his first language was English, and that he would not need the services of an interpreter. At the hearing, the Applicant stated that his first language was not English, but Otjiherero. The Board preferred the Applicant's PIF statement.

[9] Finally, the Board found that the witness's testimony conflicted "materially and significantly" with the Applicant's evidence. Particularly, the witness testified that he and the Applicant had moved in together in the year of the hearing (meaning 2011), though he could not remember the month. The Applicant claimed that they had lived together for one year and six months. When questioned on this point, the witness stated that the two had lived in the same building before moving in together, but did not give any additional details.

III. Issues

[10] The determinative issues in this case can be framed as follows:

- (a) whether the Board erred by failing to consider all of the evidence before it; and
- (b) whether the Board's determination was reasonable.

IV. Standard of Review

[11] The treatment of evidence is within the Board's specialized expertise, and is thus owed significant deference. The Board's decisions on such matters are reviewable on the reasonableness standard (see *A.M. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 964, [2011] FCJ No 1187 at para 20).

[12] 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 v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

V. Analysis

[13] The Applicant submits that the Board overlooked the affidavit the Applicant submitted in support of his current partner's claim for refugee protection, and the Applicant's health passport that corroborates his narrative.

[14] However, it is clear from the transcript that the Board did indeed consider the two documents referred to by the Applicant. Indeed, the Board admitted them as evidence after its original reluctance to include them on the basis of their late submission and in the absence of an explanation as to the delay. The Board further asked questions directly related to the contents of these two documents. The Applicant's primary contention is thus that the Board did not attribute sufficient weight to these documents. The weighing of evidence is squarely within the expertise of the Board, and it is not for this Court to substitute its own assessment of the evidence for that of the Board.

[15] The Applicant contends that the Board based its conclusions on minor contradictions that resulted from its misinterpretation of the Applicant's testimony. Based on the record before it, I am satisfied that the Board's decision was reasonable.

[16] Contrary to the Applicant's submissions, the Board did not misinterpret the Applicant's testimony with respect to the length of time he had lived with his partner in Namibia. The transcript is clear that the Applicant's answers were inconsistent. While the point about the Applicant's language may not be central to his claim, it does go to credibility, an area within the Board's

specialized expertise. As already mentioned, the Board is entitled to weigh the evidence before it. I am satisfied that the Board did so in a reasonable manner in this case.

[17] Finally, as the Respondent rightly points out, this Court has held that, where the Applicant has failed to establish his identity, in this case as a gay man, the Board is not obligated to consider the application further (*Pak v Canada (Minister of Citizenship and Immigration)*, 2011 FC 381, [2011] FCJ No 490 at para 42; *Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 296, [2006] FCJ No 368 at para 8; *Husein v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 726 at para 13). The Board's purported failure to consider the documentary evidence pertaining to the treatment of gay men in Namibia is thus not reviewable.

VI. Conclusion

[18] The Board's decision is defensible in respect of the law and of the facts of this case, and falls within the range of possible, acceptable outcomes.

JUDGMENT

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

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2212-12

STYLE OF CAUSE: JACKSON KAZONDUNGE v MCI

PLACE OF HEARING: TORONTO

DATE OF HEARING: OCTOBER 29, 2012

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

DATED: NOVEMBER 9, 2012

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