

Federal Court



Cour fédérale

**Date: 20121207**

**Docket: IMM-4563-11**

**Citation: 2012 FC 1449**

**Ottawa, Ontario, December 7, 2012**

**PRESENT: THE CHIEF JUSTICE**

**BETWEEN:**

**GRZEGORZ KOSTRZEWA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Mr. Kostrzewa is a 24 year old gay citizen of Poland who fears persecution for reasons related to his sexual orientation, should he be required to return to that country.

[2] He claims that the Refugee Protection Division of the Immigration and Refugee Board of Canada committed the following reviewable errors in rejecting his claim for protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]:

- i. it misapprehended the evidence available to it in finding the city of Krakow to be a viable internal flight alternative [IFA] within Poland;
- ii. it unreasonably concluded that he does not have a subjective fear of persecution in Poland; and
- iii. it failed to consider the applicability of subsection 108(4) of the IRPA in assessing his application.

[3] I disagree. For the reasons that follow, this application is dismissed.

#### **I. Background**

[4] Mr. Kostrzewa's fears of persecution and personal harm are based on the general mistreatment of gay people in Poland and on three assaults to which he was personally subjected while living in different cities in that country.

[5] The first assault occurred in the city of Lodz in August 2007, when he was threatened and beaten by a friend after disclosing his sexual orientation to him. The second occurred in Konin in November 2007, when his jaw was broken by three men, including a bully from one of his former schools who recognized him as he was walking down the street. The third occurred in Pozan in May 2008, when he was pushed against a wall and slapped by a group of men who saw one of his friends kiss him on the cheek outside a bar.

## **II. Standard of Review**

[6] It is common ground between the parties that the standard of review applicable to the findings made by the Board with respect to the availability of an IFA in Krakow and the Applicant's lack of subjective fear is reasonableness. I agree.

[7] However, Mr. Kostrzewa takes the position that the Board's failure to address s. 108(4) of the IRPA is reviewable on a correctness standard. I disagree. This is a question of mixed fact and law. Accordingly, it is reviewable on a reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51-55, [2008] 1 SCR 190 [*Dunsmuir*]; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paras 46-47; *Echeverri v Canada (Minister of Citizenship and Immigration)* 2011 FC 390 at paras 24-25 [*Echeverri*]).

## **III. Analysis**

### *A. The Board's conclusion regarding the availability of an IFA in Krakow*

[8] In its decision, the Board identified the availability of an IFA in Krakow as being the determinative issue in this case.

[9] Mr. Kostrzewa submitted that the Board erred in reaching its conclusion on this issue by failing to consider information set forth in one of the documents upon which it principally relied, and by reaching a conclusion that was unreasonable, given that information. I disagree.

[10] In reaching its conclusion regarding the availability of an IFA in Krakow, the Board placed significant weight on a document entitled "Krakow for Everyone," which was included in the Board's National Documentation Package for Poland. The Board cited that document in observing that "there are numerous gay rights organizations in Poland and that Krakow has a gay-tolerant area,

as well as being host to an annual gay pride parade.” The Board also noted that the document refers to the existence of gay restaurants, bars and hotels in Krakow, and states that young people in Poland are more tolerant of and friendly towards gay people, especially in that city. In addition, the Board noted that the document states that “gay rights groups are growing in strength and in number every year, and the sheer number of gay-oriented Polish websites is a sign of the coming change.”

[11] However, the Board did not mention that the document also states that “slightly under 20% of homosexuals surveyed had experienced some level of violence, with a slightly larger percentage for men than women,” and that “more than 85% of cases of violence go unreported” because “the police themselves will ridicule or simply ignore the individual.” According to the document, the “majority of physical violence is pushing or kicking, but many have reported being punched or beaten up as well.”

[12] Mr. Kostrzewa submits that the Board erred by failing to consider this additional information in the document. He further asserts that it was unreasonable for the Board to conclude, in the face of this additional information, that he would not face a serious possibility of persecution or a risk contemplated by section 97 of the IRPA. I disagree.

[13] In my view, the additional information that was in the document in question did not so squarely and seriously contradict the Board’s conclusion as to give rise to an obligation on the part of the Board to explicitly address that information in the course of reaching its decision. Among other things, there was no indication whatsoever in the document as to whether the people who reported having experienced “some level of violence” had such experiences in the distant past, as opposed to in the last two or three years. There was also no indication of whether those individuals had experienced more than one such incident.

[14] In the course of reaching its decision on this issue, the Board noted that the majority of documents in the evidentiary record indicated that discrimination continues against gay people in that country. The Board also noted that public figures in Poland have made anti-homosexual comments openly and that the gay pride parade in 2006 in Krakow was marred by stones and eggs being thrown at the participants.

[15] After reviewing the evidentiary record that was before the Board, I am satisfied that the material referred to by the Board in reaching its conclusion regarding the existence of an IFA in Krakow provided a reasonable basis for, and rationally supported, that conclusion (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC 61, [2011] 3 SCR 654 at para 53 [*Alberta Teachers*]; and *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364 at paras 45-49 [*Halifax*]). In the absence of information in the evidentiary record which strongly suggested that its conclusion on this point was unreasonable, the Board's failure to discuss other information, including information which may have been contrary to the conclusion it reached, did not deprive its decision of its rational support, or render that decision devoid of any reasonable basis.

[16] Mr. Kostrzewa also submitted that the Board erred by implicitly finding that the risk he would face in Krakow would be substantially different from the risk that he previously faced in Lodz. In this regard, he observed that the populations and mistreatment of gay people in the two cities is essentially the same. I disagree.

[17] The Board was not under any obligation to compare the situations faced by gay people in the two cities and to explain why it believed that Mr. Kostrzewa would not face a serious risk of persecution or physical harm in Krakow, even though he was assaulted on one occasion in Lodz.

[18] On the contrary, Mr. Kostrzewa bore the burden of establishing, with clear and convincing evidence, why he would face a serious risk of persecution or a likelihood of a risk contemplated by section 97, should he be required to return to Poland and live in Krakow (*Ward v Canada (Attorney General)*, [1993] 2 SCR 689 at 724-725; *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 54; *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 30). Ultimately, he failed to do so.

[19] In oral argument, Mr. Kostrzewa's counsel attempted to impugn the value of the document entitled "Krakow for Everyone" by stating that it had been written for visitors to that city, and did not reflect situation faced by its gay residents. However, this fails to recognize that the material in the document that was referenced by the Board provided a reasonable basis for, and rationally supported, the Board's conclusion regarding the situation that he would face as a resident of Krakow. Moreover, as stated above, it was Mr. Kostrzewa's burden to demonstrate that he would face a serious possibility of persecution, or a likely risk contemplated by section 97, if he were to return to Krakow. It was not the Board's burden to establish the contrary. In his written and oral submissions, Mr. Kostrzewa did not identify anything in the evidentiary record, other than other passages in the above-mentioned document, and his own experiences (which were considered by the Board) that supported his case.

[20] On the evidentiary record that was before the Board, I am satisfied that it was entirely reasonable for the Board to conclude, based on findings discussed above, that he had not met that burden. That conclusion was well "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and was appropriately justified, transparent and intelligible (*Dunsmuir*, above, at para 47).

[21] I would simply add that there was other evidence in the record, including in the document entitled “Krakow for Everyone,” which provided further support for the Board’s conclusion regarding the availability of an IFA in Krakow (*Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 12 and 15, [2011] 3 SCR 708).

[22] Given the foregoing, the other errors that Mr. Kostrzewa identified in the Board’s decision, concerning the location and dates of the three assaults to which he was subjected in Poland, were not material. At paragraphs 5 and 6 of its decision, the Board identified the correct dates of those assaults. It then did so a second time at paragraph 11. While it did not specifically mention that the first assault occurred in Lodz, this was not material to its finding regarding the availability of an IFA in Krakow. In oral argument, counsel to Mr. Kostrzewa conceded that the other factual errors identified in Exhibit D to his affidavit, and not discussed in these reasons for judgment, were not material.

[23] The conclusion reached above regarding the reasonableness of the Board’s IFA finding is a sufficient basis upon which to dismiss this application. However, for completeness, I will address below the two other main issues that Mr. Kostrzewa has raised.

*B. The Board’s findings with respect to subjective fear*

[24] Mr. Kostrzewa submitted that the concerns identified by the Board with respect to his allegations of subjective fear were unreasonable. I disagree.

[25] The Board identified three concerns in this regard, the most important of which concerned Mr. Kostrzewa’s reavailments to Poland. There were two such reavailments. The first was in

January 2008, after his initial visit to Canada in December 2007. That reavailing was prompted by pressure from his family to finish his school year. The second reavailing was in December 2008, when he returned to Poland for three weeks, again at the request of his family. On this occasion, his family, who still did not know that he is gay, promised that he wouldn't be left alone at any time and that he could stay at home and perhaps join them on a trip to Slovakia. Although the Board did not specifically note that there were two reavailments, it observed that it had "difficulty accepting that any reasonable person would place themselves in such a risk of harm or danger as alleged by you for family reunification or fear of losing family support."

[26] In my view, this observation by the Board was entirely reasonable. As has been repeatedly held by this Court, a refugee claimant's reavailing to the jurisdiction in which he or she fears persecution or a type of harm contemplated by section 97 of the IRPA seriously undermines allegations of subjective fear, particularly in the absence of a compelling reason for such reavailing (*Hernandez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 197 at para 21; *Ortiz Garcia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1346 at para 8; *Mughal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1557 at paras 33-35; *Natynczyk v Canada (Minister of Citizenship and Immigration)*, 2004 FC 914 at para 69).

[27] The Board also expressed concern about Mr. Kostrzewa's delay in claiming refugee protection in Canada. In this regard, the Board noted that although he came to Canada in July 2008 and again in January 2009 (after his three-week return to Poland), he did not apply for refugee protection until September 2010. Although Mr. Kostrzewa testified that he had a valid student visa during that period and was unaware of the possibility of applying for refugee protection until shortly before he submitted his application, it was not unreasonable for the Board to draw a negative



inference regarding his subjective fear, based on his failure to apply for protection within a reasonable period of time after his arrival in Canada (*Kaur v Canada (Minister of Citizenship and Immigration)* 2012 FC 1379 at para 20; *Duarte v Canada (Minister of Citizenship and Immigration)*, 2003 FC 988 at paras 14-15; *Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324 at para 17; *Huerta v Canada (Minister of Employment and Immigration)*, [1993] FCJ 271 (CA)).

[28] Given the foregoing, the error made by the Board with respect to Mr. Kostrzewa's delay in leaving Poland after the third assault was not material. The same is true with respect to its erroneous suggestion that Mr. Kostrzewa may not have applied for refugee protection until his student visa expired.

C. *The Board's failure to conduct an assessment under subsection 108(4)*

[29] Mr. Kostrzewa submitted that in cases where a reasonable finding of an IFA would otherwise be determinative, the existence of subjective fear on the part of an applicant for refugee protection triggers an obligation on the Board to consider subsection 108(4) of the IRPA. I disagree.

[30] There is no obligation on the Board to consider subsection 108(4) unless (i) it has specifically found that the applicant has suffered past persecution; or (ii) there is *prima facie* evidence of past persecution that is so exceptional in its severity that it rises to the level of being "appalling" or "atrocious" (*Alharazim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1044 at paras 44-53; *Echeverri*, above, at para 32).

[31] In the case at bar, the Board did not make a finding of past persecution. It proceeded directly to a forward looking assessment of whether Mr. Kostrzewa has a well-founded fear of future

persecution, as it was entitled to do (*Echeverri*, above, at para 31). In addition, in my view, the three assaults that Mr. Kostrzewa alleges he suffered did not constitute *prima facie* evidence of past persecution that is so exceptional in its severity that it rises to the level of being “appalling” or “atrocious,” relative to the typical types of persecution that have been alleged and recognized by the Board or in the jurisprudence.

[32] Accordingly, it was not unreasonable for the Board to have failed to have addressed the potential applicability of subsection 108(4) to Mr. Kostrzewa in its decision.

#### **IV. Conclusion**

[33] For the reasons set forth above, the adverse findings reached by the Board with respect to the availability of an IFA in Krakow and Mr. Kostrzewa’s lack of subjective fear were not unreasonable. Similarly, it was not unreasonable for the Board to have failed to explicitly conduct an assessment under subsection 108(4) of the IRPA.

[34] Accordingly, this application is dismissed.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUGES that:**

1. This application is dismissed.
2. There is no question for certification.

“Paul S. Crampton”  
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Chief Justice

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-4563-11

**STYLE OF CAUSE:** GRZEGORZ KOSTRZEWA v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** August 28, 2012

**REASONS FOR JUDGMENT  
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