Federal Court  Cour fédérale

Date: 20170829

Docket: IMM-548-17

Citation: 2017 FC 780

St. John's, Newfoundland and Labrador, August 29, 2017

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

KENRICK KIRK HOWARD

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] Mr. Kenrick Kirk Howard (the "Applicant") seeks judicial review of the decision of a Pre-Removal Risk Assessment Officer (the "Officer") dismissing his application to be found a person in need of protection pursuant to subsection 97 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the " Act").

[2] The Applicant is a citizen of Barbados. He has a chequered history of residence in Canada, punctuated by deportations and re-entries. He first arrived in Canada in 1978 as a permanent resident. He was convicted of criminal offences in Canada which led to his first deportation from Canada in 1989.

[3] The Applicant returned and was again deported from Canada in April 2011.

[4] The Applicant re-entered the country, at an unknown port of entry, on an unknown date. He came to the attention of the Canada Border Services Agency (the "CBSA") in February 2016 and was detained. He remains in detention.

[5] In 2016, the Applicant submitted a Pre Removal Risk Assessment ("PRRA"), claiming to be at risk of persecution in Barbados on the basis of his status as a bisexual man with AIDS/HIV who will not get adequate medical treatment in his country of origin due to his health status. The submissions filed by Counsel requested an oral hearing.

[6] The Applicant submitted an affidavit with his PRRA application in which he deposed that he had begun dating and living with a man in Barbados in 2010. He deposed that his companion died of AIDS in 2012. After the death of his friend, the Applicant was required to move. A woman told other people in the house about the Applicant's sexual orientation and status as a person with AIDS. The Applicant deposed that he was attacked and threatened with being thrown into the sea. According to the Applicant, the threat was made because he was bisexual and suffered from AIDS.

[7] The Applicant deposed that the day after receiving this threat, a friend drove him to the airport and he left Barbados.

[8] The Applicant did not provide information about his intended destination at that time.

[9] The Applicant did not seek police protection while in Barbados; he said that since "bi-sexual acts are illegal in Barbados", police protection would not be forthcoming. He expressed a fear, in his affidavit, that he would be at risk from the police force in Barbados if returned to that country.

[10] The Officer determined that the Applicant had failed to establish that he is bi-sexual or afflicted with AIDS/HIV. Accordingly, the Officer did not give much weight to the documentary evidence submitted about discrimination and violence in Barbados against LGBT individuals nor those persons suffering from AIDS/HIV.

[11] The Officer noted a discrepancy in the dates of the Applicant's bi-sexual relationship with a man in Barbados, said to begin in 2010. The Officer recorded that when questioned by the CBSA in February 2016, the Applicant had said he had returned to Canada in 2014. The record shows that the Applicant was deported from Canada in April 2011. The Officer concluded that the Applicant had failed to provide "sufficient evidence to establish, on a balance of probabilities, that he is a bisexual and I afford his submission to that effect little weight".

[12] The Officer considered the country condition documents and concluded that Barbados is a functioning, if imperfect, democracy and that the state tries to protect its citizens.

[13] The Applicant argues in this application for judicial review that the Officer breached his right to procedural fairness by failing to hold an oral hearing to allow him to address issues of credibility, as allowed by section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations"). He submits that the Officer made veiled credibility findings when using the language of insufficiency of evidence.

[14] The Applicant further argues that the Officer unreasonably assessed the country condition documents and unreasonably concluded that state protection is available to him in Barbados.

[15] The Minister of Immigration, Refugees and Citizenship (the "Respondent") submits that the Officer reasonably determined that credibility was not an issue and reasonably decided that no oral hearing was required. As well, he submits that the Officer reasonably concluded that the Applicant is not a person in need of protection. Finally, he argues that the state protection finding is reasonable.

[16] In short, the Respondent submits that the Officer committed no reviewable error.

[17] The first question to be addressed is the applicable standard of review.

[18] The Applicant characterized the lack of an oral hearing, where credibility was in issue, as an issue of procedural fairness, reviewable on the standard of correctness. The Respondent submits that this issue of procedural fairness can be reviewed on the standard of reasonableness, relying on the decision in *Majali v. Canada (Minister of Citizenship and Immigration)*, 2017 FC 275.

[19] I prefer the orthodox view that issues of procedural fairness are reviewable on the standard of correctness, as discussed by the Supreme Court of Canada in *Mission Institution v. Khela*, [2014] 1 S.C.R. 537 at paragraph 79.

[20] The conclusion of the Officer on the issue of state protection is reviewable on the standard of reasonableness; see the decision in *Omid v. Canada (Citizenship and Immigration)*, 2016 FC 202 at paragraph 3.

[21] The next question for determination is whether the Officer made a "veiled" credibility finding when using the language of insufficient evidence in concluding that the Applicant had failed to establish the basis of his claim for protection.

[22] The Applicant focuses on the Officer's remarks about the discrepancy in the timeline for his bisexual relationship in Barbados that supposedly began in 2010, when the Applicant was in Canada. The Certified Tribunal record contains a "Certificate of Departure" signed by the Applicant on April 15, 2011, referencing his deportation from Canada.

[23] The Officer found the evidence of the Applicant, as set out in his affidavit that he submitted with his PRRA application, to be inconsistent with other evidence available about the presence of the Applicant in Canada up to April 15, 2011. On the basis of this discrepancy, the Officer rejected the Applicant's claim to be bisexual, the root of his claim for protection in Canada against Barbados.

[24] The Officer also found that the Applicant had failed to provide sufficient evidence about his status as a person with HIV/AIDS, noting that letters submitted from the College of Physicians and Surgeons of Ontario spoke only of "immunity related concerns" and "chronic immune deficiency condition". The Officer was "not satisfied that the applicant (sic) has provided sufficient evidence to establish , on a balance of probabilities, that he has HIV/AIDS and I afford his submissions to that effect little weight."

[25] Section 167 of the Regulations provides as follows:

167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	167 Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise:
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;

(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[26] Relying on the decision in *Zmari v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 132, the Applicant submits that the Officer should have given him an opportunity to answer concerns about the discrepancy between his affidavit evidence and the record of his deportation on April 15, 2011. He argues that he should have been given an oral hearing.

[27] In light of the decision in *Zmari*, *supra*, I am satisfied that the Applicant has shown that the Officer made a "veiled" credibility finding and this application for judicial review will be allowed. It is not necessary to address the other issues that were raised.

[28] In the result, this application for judicial review is granted, the decision of the Officer is set aside and the matter remitted to a different officer for re-determination. There is no question for certification arising.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is granted, the decision of the Officer is set aside and the matter remitted to a different officer for re-determination. There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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