Federal Court  Cour fédérale

Date: 20211102

Docket: IMM-6590-20

Citation: 2021 FC 1166

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 2, 2021

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

JKL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] The applicant, a citizen of Rwanda, is 22 years old and applied for a Pre-Removal Risk Assessment [PRRA] on the basis of her sexual orientation as a lesbian. I agree with the applicant that this is an unreasonable decision for the following reasons.

[2] As a preliminary matter, at the very beginning of the hearing, counsel for the applicant requested that the style of cause of this decision remain anonymous in order to better protect the identity of his client. The respondent did not object. As this request can be made informally, I granted it.

II. Facts

[3] In 2012, at the age of 12, the applicant came to Canada to live with her father, who made a refugee protection claim on her behalf. In 2014, she allegedly withdrew her claim to be reunited with her mother in Rwanda.

[4] In March 2019, she left Rwanda for the United States, and approximately one month later she presented herself at the Canadian border where she made a refugee claim. The claim was declared ineligible under paragraph 101(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] because of the withdrawn claim for refugee protection referred to above, and a removal order was issued against her.

[5] The applicant subsequently submitted her PRRA application, in which she stated that she feared returning to Rwanda because of her sexual orientation. In support of her application, she submitted an affidavit, four photographs of herself with her first lover [A], a letter of support from an organization named *kind, and three articles reporting on the conditions faced by homosexuals in Rwanda.

[6] In her affidavit, the applicant told the story of her gradual discovery of her sexual orientation as a lesbian, the details of her secret love life with A, and her personal experiences as a victim of intolerance, violence, and discrimination from her family and community members in Rwanda because of her homosexuality. This included being beaten with a stick when a security guard found her kissing A behind a building in her neighbourhood in 2018, and she was also warned by her mother and her teacher of the serious consequences of her homosexuality being discovered, since it is considered a perversion in their community.

III. Decision under review

[7] The PRRA officer dismissed the application, finding that the applicant had not provided sufficient objective evidence to demonstrate more than a mere possibility that she would be persecuted for her sexual orientation if she returned to Rwanda.

[8] In his reasons, the officer summarized the procedural history of the case and the evidence in support of the application before turning to the applicant's affidavit. The officer recited the relevant details of the affidavit and, in doing so, did not observe or identify any elements of the applicant's story that seemed contradictory or implausible, nor did he comment on his assessment of its credibility or the evidentiary weight to be given to it.

[9] The officer also considered the photos with A that had been submitted by the applicant. The officer noted that A's identity could be confirmed by the documents in the file and that, although the applicant appears to know her and be comfortable around her, the photos do not constitute objective evidence of her sexual orientation as a lesbian. The officer attributed little

probative value to the photos, believing that they merely reflected a friendly relationship between women.

[10] Next, the officer considered the May 15, 2019 letter from the executive director of *kind, a charitable organization that provides resources, organizes events, and offers social and educational programs to support people of all sexual orientations and gender identities. The officer observed that the letter was limited to information regarding the applicant's reason for joining the group, and stated that she had approached the group as she had questions and concerns regarding the persecution she had experienced in Rwanda because of her sexual orientation, and that she was participating in activities and beginning to feel comfortable expressing her feelings without fear.

[11] The officer noted that, other than the applicant disclosing her sexual orientation to the director, the director did not state that she was in fact aware of the applicant's sexual orientation, nor did she allude to it in her letter. Further, the director did not elaborate on the specific details or the frequency with which the applicant participated in group activities. Nor did the director provide any specific information about what the applicant shared with the group.

[12] The officer agreed that *kind has offered services to people of all sexual orientations and that the applicant participated in the activities, but that the letter did not help to objectively establish the applicant's sexual orientation as a lesbian, as people of all sexual orientations were free to participate.

[13] Finally, the officer considered the three articles reporting on the conditions faced by homosexuals in Rwanda and accepted their description of the discrimination and violence faced by members of the LGBTQ community in Rwanda. The officer acknowledged and accepted the problems of marginalization and stigmatization in Rwanda but found that because the applicant had failed to meet her burden of proof to provide objective documentary evidence of her own homosexuality, the documentary evidence submitted about the situation in Rwanda was of little probative value.

[14] The officer concluded by stating that the evidence, taken as a whole, was insufficient to establish a risk of persecution, torture, cruel and unusual treatment or risk to life. The applicant therefore did not meet the requirements of section 96 or 97 of the IRPA, and the PRRA application was dismissed.

[15] In the officer's PRRA decision form, the box for question 8, which asks whether a hearing should be held under section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], is not checked, while all other boxes in the decision form were duly completed.

IV. Standard of review

[16] A PRRA decision, which raises questions of fact and law that fall within the ambit of the tribunal's home statute, must be reviewed by this Court against the standard of reasonableness, with some exceptions (*Subramaniam v Canada (Citizenship and Immigration)*, 2020 FCA 202

para 17; *Jystina v Canada (Citizenship and Immigration)*, 2020 FC 912 para 16 [*Jystina*]; *Arif v Canada (Citizenship and Immigration)*, 2021 FC 1048 para 24 [*Arif*]).

[17] The standard of reasonableness entails examining the decision maker's decision for the characteristics of reasonableness—justification, transparency and intelligibility—to determine whether the decision is justified in light of the relevant factual and legal constraints that affect it (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 para 99 [*Vavilov*]). Both the chain of analysis and the outcome must be reasonable (*Vavilov* para 83).

[18] However, the applicant argued that where the decision of a PRRA officer under review involves the issue of whether to hold a hearing, the standard of review becomes one of correctness, as issues of procedural fairness are implicated. In support of her position, the applicant cited *AB v Canada (Citizenship and Immigration)*, 2020 FC 498 at paragraph 69, where Justice Boswell adopted the standard of correctness after noting the divergent approach taken by the Court in framing the issue, which has at times been considered "a question of mixed law and fact involving interpretation of paragraph 113(b) of the IRPA and section 167 of the [Regulations]".

[19] For my part, while I recognize that there is a difference of opinion among some members of the Court, and as I have previously stated (see *Jystina* at paras 18–20), the issue should be analyzed under a standard of reasonableness.

V. Analysis

[20] The applicant argued that, having failed to identify any problems or inconsistencies, or even to comment on the probative value of her affidavit, the officer made disguised credibility findings under the guise of insufficient evidence. She argued that the disguised credibility findings are also evidenced by how *kind's letter was treated by the officer, who had noted that, other than the applicant's statement to the director, the latter had no direct knowledge of her sexual orientation, which calls her credibility into question, even if only tacitly.

[21] The respondent submitted that the burden of proof was on the applicant and that the officer simply concluded, on the basis of a detailed analysis, that the evidence was insufficient to support the allegations in her application. The officer therefore did not question the credibility of the applicant, and her decision not to hold a hearing was reasonable. I disagree.

[22] Nowhere does the PRRA officer address the probative value or credibility of the applicant's affidavit, which is the central piece of evidence in support of the application. The applicant's statement was detailed and explicit, and the officer's complete silence on the weight to be given to it is highly indicative of his analysis, particularly given the conclusion, which does not appear until near the end of the decision, that the applicant provided insufficient evidence to establish her sexual orientation.

[23] In fact, the applicant's stated sexual orientation is corroborated by *kind's letter, even if only to show that the applicant told the organization of her sexual orientation, expressed

concerns about her persecution, and has since used their services. In the absence of any credibility finding, it was unreasonable to devalue *kind's letter, as there was no reason to doubt the applicant's truthfulness when she disclosed her sexual orientation to the organization.

[24] In a very similar case, Justice Strickland overturned a PRRA officer's decision in which he stated that there was insufficient evidence to establish the applicant's sexual orientation, without explaining why the applicant's affidavit was insufficient to prove it, particularly in the absence of inconsistencies or contradictory evidence (*Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 738 para 68 [*Chekroun*]). Instead, Justice Strickland opined that the finding of insufficient evidence was in fact a disguised finding of credibility, and that the applicant should have been entitled to a hearing, since if his evidence had been accepted and believed, it would have justified granting his application (*Chekroun* paras 70–71).

[25] The same is true in this case, and I agree entirely with the reasoning of Justice Strickland in *Chekroun*. In the absence of any comment by the officer on the probative value to be attributed to the applicant's affidavit, I must conclude that the officer simply did not believe her story and tacitly discounted her credibility. This is particularly significant because the officer appears to have accepted the evidence of the discriminatory conditions in Rwanda, giving it little probative value solely because of the finding of insufficient evidence of the applicant's sexual orientation. In other words, if the evidence of her sexual orientation had not been insufficient, her application would have been accepted.

[26] In support of his argument, the respondent cited *Mosavat v Canada (Citizenship and Immigration)*, 2011 FC 647 [*Mosavat*], a case with similar facts to the decision under review, in which a PRRA officer found that the evidence presented by the applicant, including an affidavit, was not sufficient to prove his homosexuality. Justice Snider explained, at paragraph 13, that "[w]here the PRRA officer is simply saying that the evidence that has been tendered does not have sufficient probative value, the officer is not making a determination about the credibility of the person providing the evidence and, therefore, no interview is required".

[27] This principle is well known. I have upheld it myself in the PRRA context, noting that where an affiant provides insufficient detail, or where there is a lack of corroboration, this may give rise to a finding of insufficient evidence, without the need for a finding of credibility (*Haji v Canada (Citizenship and Immigration)*, 2018 FC 474 para 20). I have also recently ruled in the same manner regarding an application based entirely on a documentary record composed of third-party statements and where the applicant had not provided a statement herself (*Arif* paras 42 to 48).

[28] However, in *Mosavat*, the applicant had already been heard at a hearing before the Refugee Protection Division, which had found that the applicant's allegations of sexual orientation were not credible (para 16). The Court therefore found that only the applicant's arguments in support of his PRRA application that he was homosexual were insufficient to discharge his burden of proof in the circumstances. In addition, the PRRA officer in that case had found that a letter from the director of a charitable organization that supported Iranian homosexuals in Toronto attesting to the applicant's membership in that organization contained

information from the applicant, not from the director (para 19). The Court agreed that the letter was therefore not helpful in meeting the applicant's burden of proof in *Mosavat*.

[29] In contrast, in this case, the applicant has not yet had any opportunity to be heard and, furthermore, the officer has not commented on the probative value of her affidavit, which was corroborated in part by the letter from *kind. Further, the discretionary decision on whether to hold a hearing on a PRRA application may be affected by the fact that an applicant has not yet had a hearing (*AB v Canada (Citizenship and Immigration)*, 2017 FC 629 para 19; *Abusaninah v Canada (Citizenship and Immigration)*, 2015 FC 234 para 57).

[30] Here, the applicant's affidavit was called into question, without explanation and in the absence of any evidence to contradict it. Therefore, it was incumbent upon the officer to give her an opportunity to be heard, particularly as the applicant had requested it (in paragraph 8 of her written submissions for the PRRA), or else to explain why he would not grant her request.

[31] In contrast, the officer did not even address or raise the request in response. As mentioned above, the PRRA officer simply processed the application without even checking the box on the form—the only box on the decision form that was not checked. To refuse to grant an interview in a situation of disguised credibility may be unreasonable. To ignore a request without a single word of explanation for denying such a hearing leaves no doubt.

[32] In fact, the failure to give reasons for refusing to grant a hearing, particularly where credibility is an issue, has been recognized in several previous decisions as a breach of

procedural fairness (*Rana v Canada (Citizenship and Immigration)*, 2010 FC 36 para 40; *Zokai v Canada (Citizenship and Immigration)*, 2005 FC 1103 para 12; *Shafi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 714 paras 19–23). Having tacitly set aside the applicant's statement, without giving reasons or even considering the need to grant or deny her request for a hearing, the officer's decision was patently unreasonable on this point.

[33] In *Ikeme v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 21 at paragraph 21, Justice McDonald explained:

> Significantly for this case, . . . a lack of corroborating evidence of one's sexual orientation, absent negative rational credibility or plausibility findings related to that issue, is not enough to rebut the presumption of truthfulness which extends to all applicants (*Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282 at para 38; *Hohol*, at para 21)

[34] It should be kept in mind that sexual orientation, when it must be established, does not lend itself easily to being proven by objective evidence in the same way as a contract, a diagnosis or nationality. It is internal to the person and deeply subjective by its very nature. This can, and indeed does, give rise to misrepresentations, for which immigration officials must be vigilant.

[35] However, the mere existence of false claims cannot be allowed to raise the evidentiary threshold for these issues so high as to put them beyond the reach of deserving applicants, particularly when the result, the removal of individuals to an environment where they will be exposed to serious risks of discrimination and violence, may be catastrophic.

[36] If an affidavit is insufficient and needs to be tested, so be it; there are established ways to do this. But to reject it out of hand in the absence of contradictory evidence, inconsistencies or lack of detail, without giving the person concerned a single opportunity to be heard, is not reasonable in the circumstances of this case.

VI. Conclusion

[37] The officer's decision was unreasonable. For the reasons set out above, I will allow the judicial review and refer the matter to another officer for redetermination.

JUDGMENT in IMM-6590-20

THIS COURT ORDERS as follows:

1. The style of cause is amended to identify the applicant as “JKL”.

2. This application for judicial review is allowed.

3. This case is referred back to another officer for reconsideration.

4. No questions have been submitted for certification, nor does the case raise any.

5. No costs are awarded.

“Alan S. Diner”
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6590-20
STYLE OF CAUSE:	JKL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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