Federal Court  Cour fédérale

Date: 20211125

Docket: IMM-6233-20

Citation: 2021 FC 1306

Ottawa, Ontario, November 25, 2021

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

DAVID ONIEL FORBES

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the Applicant's Pre-Removal Risk Assessment [PRRA], dated May 20, 2020. In the decision under review, the PRRA Officer determined that, as a result of his bisexuality, the Applicant would not be subject to a risk of torture, a risk of persecution or face a risk to life or cruel and unusual treatment or punishment if he returned to Jamaica.

[2] The Applicant submits that the PRRA Officer made veiled, disguised or implicit credibility findings concerning his bisexual orientation, which required an oral hearing under section 113(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. The Applicant also argues that the PRRA Officer's decision was neither correct nor reasonable and presented inadequate reasons that did not sufficiently address the key issues, considerations and documentary evidence.

[3] For the reasons that follow, I am satisfied that the PRRA Officer's determination to not hold an oral hearing was correct and that the PRRA Officer's decision was reasonable. Accordingly, the application for judicial review shall be dismissed.

II. Background

[4] The Applicant is a 53-year old citizen of Jamaica. He met his wife in Canada in 2009 (while on a visitor's visa) and they married in 2011. The Applicant stayed in Canada until 2012, at which time he had to leave the country in order to finalize his application for sponsorship by his wife. Unfortunately, the Applicant's wife passed away suddenly on January 2, 2014, a fact that the Applicant did not disclose to the visa office in Kingston, Jamaica, or at the Port of Entry when he arrived in Canada on January 21, 2014.

[5] On June 30, 2015, a report under subsection 44(1) of the IRPA was filed, alleging that the Applicant was inadmissible under paragraph 40(1)(a) of the IRPA for directly or indirectly

misrepresenting or withholding material facts relating to the death of his wife in 2014. An admissibility hearing was held by the Immigration Division [ID], at the conclusion of which an exclusion order was issued, thus stripping the Applicant of his permanent resident status. The Applicant appealed the ID's decision, but his appeal to the Immigration Appeal Decision was denied.

[6] As a person under an effective removal order, the Applicant accepted the opportunity to present a request for protection under the PRRA. The Applicant provided a PRRA application and submissions on November 13, 2019, in which he stated he is at risk if he were to return to Jamaica due to his bisexuality. The Applicant alleges that he has had several same-sex relationships and that, because of his bisexuality, he is subject to threats of harm, harassment, ridicule and physical abuse (including stabbings) in Jamaica. He also notes that there is no state protection for sexual minorities in Jamaica, as most activities and conduct that are associated with these minorities are illegal.

[7] On November 21, 2019, the Applicant's counsel sent a letter, by facsimile, to the CIC Backlog Reduction Office responsible for the PRRA, to request an oral hearing under section 167 of the IRPR. The correspondence stated:

> Further to Mr. Forbes' recent PRRA Application and Submissions filed with your Office on **November 12, 2019**, we are respectfully requesting that an **oral hearing** be convoked pursuant to **section 167** of the **IRP Regulations** and the **Federal Court decision** in **Sayed v. Canada, 2010 FC 796**.

[8] The identical request for a hearing was sent by the Applicant's counsel twice on November 21, 2019, each one to a different fax number and one minute apart.

III. Decision at Issue

[9] In refusing the Applicant's PRRA application, the PRRA Officer determined that, as a result of his bisexuality, the Applicant would not face more than a mere possibility of persecution as described in section 96 of the IRPA and would not likely be at danger of torture or likely to face a risk to life of cruel and unusual treatment or punishment pursuant to section 97 of IRPA if returned to Jamaica.

[10] The PRRA Officer first noted that the Applicant's narrative was the only evidence provided pertaining to his sexual orientation. The PRRA Officer subsequently summarized the Applicant's narrative, including the stigma and consequences he faced due to his bisexuality in Jamaica, his first sexual encounter with another male, his discovery of his bisexuality and his disclosure of his sexual orientation to certain members of his family.

[11] The PRRA Officer concluded that the Applicant did not provide details in his narrative of the significant events in his narrative, such as the identity of any significant partners, the circumstances leading to his first experience and his discovery of his sexual orientation, or of the events surrounding the abuse he suffered. The PRRA Officer also noted that, while the Applicant stated that certain family members were aware of his sexual orientation, the Applicant did not provide any reason as to why he could not have obtained corroborative testimonies from these

family members. Given the general and vague statements that the Applicant offered, and the fact that his narrative is the only evidence that speaks to his sexual orientation, the PRRA Officer found that the narrative in conjunction with the lack of corroborative evidence did not, on a balance of probabilities, establish the Applicant's bisexuality.

[12] The PRRA Officer readily accepted the objective evidence before them as to the poor country conditions for the LGBTQ+ community in Jamaica, notably the continued violence and discrimination and the lack of trust and response from the police to protect them. However, in the absence of sufficient evidence to establish the Applicant's sexual orientation, the PRRA Officer noted that they could not find there was a forward-looking risk that the Applicant would face in returning to Jamaica.

[13] The PRRA Officer assessed the jurisprudence submitted by the Applicant's counsel pertaining to state protection, internal flight alternative and credibility. The PRRA Officer found that this jurisprudence was of no assistance to the Applicant because it did not detail the Applicant's personal circumstances nor did they help to establish the Applicant's sexual orientation.

[14] The PRRA Officer concluded by stating that the PRRA Officer did not find the credibility of the evidence that the Applicant submitted to be at issue. Rather, the issue was the insufficiency of the evidence on record. The PRRA Officer noted that it was the Applicant's responsibility to submit sufficient documentary evidence to establish his claim of risk on a balance of probabilities, which was not done in this case.

[15] On the issue of an oral hearing, the PRRA Officer checked the box indicating that an oral hearing should not be held under section 167 of the IRPR, but no additional reasons were provided.

IV. Issue and Standard of Review

[16] This application raises the following two issues:

A. Did the PRRA Officer breach the Applicant's right to procedural fairness by failing to hold an oral hearing? and

B. Was the PRRA Officer's decision reasonable?

[17] With respect to the first issue, the parties agree that the standard of review is correctness. I note that the jurisprudence of this Court is divided regarding the applicable standard of review. In some decisions, the issue is characterized as a matter of procedural fairness, to be reviewed on the correctness standard [see *Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 at paras 10–13; *Nadarajan v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 403 at paras 12–17; *Nur v Canada (Citizenship and Immigration)*, 2019 FC 951 at para 8]. Other decisions have applied the standard of reasonableness, characterizing the issue as a question of mixed fact and law [see *Nhengu v Canada (Citizenship and Immigration)*, 2018 FC 913 at para 5; *Kioko v Canada (Citizenship and Immigration)*, 2014 FC 717 at paras 17–19; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 12–17; *Hare v Canada (Citizenship and Immigration)*, 2020 FC 763 at paras 11–12]. Given the agreement of the parties as to the applicable standard of review, I am prepared to apply the correctness standard.

[18] In applying the correctness standard, the Court has no margin of appreciation or deference. When evaluating whether there has been a breach of procedural fairness, a reviewing court must determine if the procedure followed by the decision-maker was fair, having regard to all the circumstances [see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 837–841].

[19] With respect to the second issue, the parties agree that the reasonableness standard applies. A court conducting reasonableness review scrutinizes the decision maker's decision in search of the hallmarks of reasonableness – justification, transparency, and intelligibility – to determine whether it is justified in relation to the relevant factual and legal constraints that brought the decision to bear [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 68 at para 99]. Both the outcome and the reasoning process must be reasonable [see *Vavilov, supra* at para 83].

V. Analysis

A. *Preliminary Matter*

[20] Counsel for the Applicant indicated in his further memorandum of argument that the Applicant relies on his submissions found in both the Applicant's initial memorandum of argument and reply, as well as those contained in his further memorandum of argument. As I advised counsel for the Applicant at the hearing, the Court's Order dated August 27, 2021 clearly provides that the Applicant's further memorandum of argument replaces the Applicant's memorandum of argument

filed under Rule 10 of the *Federal Courts Citizenship, Immigration and Refugee Protection Regulations*, SOR/93-22, and his reply filed under Rule 13. As such, those submissions are not properly before the Court and will not be considered.

B. *Did the PRRA Officer breach the Applicant's right to procedural fairness by failing to hold an oral hearing?*

[21] Contrary to the assertion of the Applicant, the Applicant does not have a right to an oral hearing. The decision as to whether to hold an oral hearing is a discretionary one [see section 113(b) of the IRPA]. Section 167 of the IRPR sets out the following three-part test to be considered in determining whether an oral hearing is required:

For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	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.

[22] Therefore, an oral hearing is generally required if there is a credibility issue regarding evidence that is central to the decision and which, if accepted, would justify allowing the application [see *Huang v Canada (Citizenship and Immigration)*, 2019 FC 1439 at para 41].

[23] The Applicant asserts that the PRRA Officer erred by making unsupported, veiled credibility findings that were central to the Applicant's PPRA application and improperly cloaked such findings as insufficiency concerns. The Applicant asserts that these veiled credibility concerns should have been addressed at an oral hearing.

[24] As has been recognized in the case law, it can be difficult to distinguish between a finding of insufficient evidence and a finding of credibility, only the latter triggering a need to consider whether an oral hearing should be held. In *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, a PRRA officer found that the applicant therein had provided insufficient evidence to establish that she was a lesbian. The only evidence was a written submission by her counsel and the officer found that this was not probative evidence. The applicant argued that the officer had really made a credibility finding. Justice Zinn disagreed, finding that the PRRA officer's reasoning simply suggested that he neither believed nor disbelieved the Applicant but was left unconvinced:

> 34. It is also my view that there is nothing in the officer's decision under review which would indicate that any part of it was based on the Applicant's credibility. The officer neither believes nor disbelieves that the Applicant is lesbian - he is unconvinced. He states that there is insufficient objective evidence to establish that she is lesbian. In short, he found that there was some evidence - the statement of counsel - but that it was insufficient to prove, on the balance of probabilities, that Ms. Ferguson was lesbian. In my view,

> that determination does not bring into question the Applicant's credibility.

[25] In *Ferguson*, Justice Zinn held that there was no requirement to hold an oral hearing because the decision was not based on credibility, but rather on a finding that there was insufficient evidence to establish, on the balance of probabilities, that the applicant was a lesbian.

[26] I agree with the reasoning of Justice Zinn in *Ferguson* and find that it applies equally to the circumstances of this case, which is also factually similar. I reject the Applicant's assertion that the PRRA Officer's decision was based on a veiled credibility finding. Rather, I find that the true basis for the decision was as expressly stated by the PRRA Officer – namely, the PRRA Officer was not satisfied that the Applicant had met his burden of proof. As the PRRA Officer's decision was based on an insufficiency of evidence, the possible need for an oral hearing was not triggered.

[27] The Applicant also relies on *Zokai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103 at paras 7, 12, to assert that there was no acknowledgment of receipt of the Applicant's requests for an oral hearing, no evidence that the PRRA Officer even considered the requests and if the PRRA Officer did receive the requests, the PRRA Officer failed to provide any reasons or explanation for refusing to hold an oral hearing, all of which constitutes a breach of procedural fairness owed to the Applicant.

[28] However, this case is distinguishable from *Zokai*. In *Zokai*, the Applicant was found to have made "a detailed request in his PRRA application for an oral hearing, with specific reference

to the factors set out in section 167". In this case, the Applicant did no such thing. While the Applicant asserts that he made two separate faxed requests for a hearing, a careful review of the evidence demonstrates that the Applicant sent the same faxed letter to the CIC Backlog Reduction Office twice, one minute apart, to two different fax numbers. Moreover and more importantly, the Applicant's request for an oral hearing contained no details as to why the request was being made and the basis upon which the Applicant asserted a hearing should be held. The Applicant referred in his request for an oral hearing to the decision in *Sayed*, but pointed to no specific portion of the decision on which he relied and if one reviews that decision, the Court held in that case that procedural fairness did not require the officer to convoke an oral hearing.

[29] I find that the circumstances of this case are more akin to those in *Aivani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1231, where this Court held that the applicant's cursory request for an oral hearing failed to identify any circumstances identified in section 167 of the IRPR that could have justified the holding of an oral hearing. In such circumstances and given that none of the circumstances identified in section 167 existed, the Court held that there was no obligation on the officer to anything more in relation to her request for an oral hearing beyond marking the box indicating "no" as to whether an oral hearing had been held.

[30] This Court similarly held in *Csoka v Canada (Citizenship and Immigration)*, 2016 FC 653 at para 14, that a PRRA officer is not required to explain why an oral hearing has not been provided if credibility is not in issue.

[31] I am satisfied that, in the circumstances of this matter, there was no breach of procedural fairness in not holding an oral hearing and in not providing an explanation as to why an oral hearing was not held, given that the PRRA Officer did not make any credibility findings, veiled or otherwise. I am satisfied that the determinative issue was the sufficiency of the Applicant's evidence, which would not trigger the need for an oral hearing.

C. *Was the PRRA Officer's decision reasonable?*

[32] The Applicant asserts that PRRA Officer's overall approach and reasoning is fundamentally flawed and therefore patently unreasonable, as the PRRA Officer indicates that they do not challenge the credibility of the Applicant's evidence, while also concluding that this unchallenged evidence does not establish his bisexuality. The Applicant asserts that the PRRA Officer's statements and findings constitute a disguised expression of unsupported disbelief and simply stating that credibility is not an issue does not make it so.

[33] The Applicant further asserts that the PRRA Officer unfairly imposed their own unreasonable expectations and standards in relying on the Applicant's alleged failure to present detailed corroborative evidence. The Applicant argues that it was unreasonable for the PRRA Officer to expect the Applicant to provide further evidence, given "all of the relevant circumstances".

[34] Moreover, the Applicant asserts that the PRRA Officer's findings were inaccurate, as the Applicant did provide detailed, extensive, well-supported and compelling evidence in his narrative and application.

[35] As was stated by Justice Zinn in *Ferguson*, *supra* at paras 22-24, the standard of proof in administrative processes is the balance of probabilities. On a PRRA application, an applicant must prove, on a balance of probabilities, that they would be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to the country at issue. That is proved by presenting evidence to the PRRA Officer. However, an applicant also has an evidentiary burden – that is, as applicant has a burden of presenting evidence on each of the facts that has to be proved. While an applicant may have met their evidentiary burden because evidence of each essential fact has been presented, they may not have met the legal burden because the evidence presented does not prove the facts required on the balance of probabilities.

[36] In considering issues of sufficiency, this Court has recognized that sexual orientation can be difficult to establish when it is the basis for a claim for protection, as one cannot expect sexual orientation to be as readily established with corroborating evidence as other factors, such as employment or education [see *Osikoya v Canada*, 2018 FC 720 at para 60].

[37] In this case, the Applicant relies solely on his narrative to establish his sexual orientation. In considering this evidence, the PRRA Officer found the narrative to be general and vague in nature. While the Applicant referred in his narrative to several significant experiences that he had as a bisexual man, the narrative provides very few details regarding any such experiences. For

example, the Applicant states that he "faced frequent threats of harm, harassment, ridicule and physical abuse, including stabbings, before leaving Jamaica". However, no details are provided about any specific threats of harm, an occasion where the Applicant was harassed due to his sexual orientation, an occasion where the Applicant was ridiculed due to his sexual orientation or any specific abuse suffered by the Applicant, yet alone particulars of the multiple stabbings to which the Applicants was victim.

[38] Similarly, the Applicant states in his narrative that he disclosed his sexual identity to some close members of his family, yet no letters or statements were provided from such family members, nor did the Applicant provide an explanation as to why such letters or statements were not provided.

[39] All of the aforementioned additional details, explanations and supporting documents were within the control of the Applicant, yet he chose not to provide them. It must be kept in mind that the onus was on the Applicant to provide the PRRA Officer with all of the evidence necessary to establish that he is a person in need of protection and thus it was up to the Applicant to put his "best foot forward" [see *Nhengu v Canada (Minister of Citizenship and Immigration)*, 2018 FC 913 at para. 6]. While the Applicant now asserts that the evidence that he provided is sufficient "in all the relevant circumstances", no explanation has been provided as to what those "relevant circumstances" were such that they constrained his ability to put the necessary evidence before the PRRA Officer.

[40] While the Applicant asserts that he provided "detailed, extensive, well-supported and compelling evidence" in PRRA narrative and application such that the PRRA Officer erred in his determination of insufficiency, it is readily apparent from a review of his narrative that this simply is not an accurate characterization of the evidence before the PRRA Officer.

[41] Contrary to the Applicant's assertion, I find that the PRRA Officer's reasons are not fundamentally flawed for, on the one hand, finding that the Applicant had not established his bisexuality, yet, on the other hand, not challenging the credibility of the Applicant's evidence. As recognized in *Ferguson*, the Applicant's evidentiary burden and legal burden are distinct and the Applicant's assertion fails to recognize this distinction. While the Applicant did provide evidence of his bisexuality for which the PRRA Officer made no adverse credibility finding, the PRRA Officer was not satisfied that the Applicant met his legal burden of proving to the PRRA Officer, on a balance of probabilities, that the Applicant is bisexual.

[42] At the hearing, the Applicant raised for the first time this Court's decision in *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1207 at para 31, in which Justice Norris addressed the distinction between credibility and insufficiency. Justice Norris stated:

> One useful test in the present context is for the reviewing court to ask whether the factual propositions the evidence is tendered to establish, assuming them to be true, would likely justify granting the application for protection. If they would not, then the PRRA application failed, not because of any sort of credibility finding, but simply because of the insufficiency of the evidence. On the other hand, if the factual propositions the evidence is tendered to establish, assuming them to be true, would likely justify granting the application and, despite this, the application was rejected, this suggests that the decision maker had doubts about the veracity of the evidence. See *Liban v Canada (Citizenship and Immigration)*, 2008

> FC 1252 at paras 13-14; *Haji v Canada (Citizenship and Immigration)*, 2009 FC 889 at para 16; *Horvath v Canada (Citizenship and Immigration)*, 2018 CF 147 (CanLII), 2018 FC 147 at paras 23-25 [*Horvath*].

[43] I do not find that the decision in *Ahmed* assists the Applicant. The Applicant provided no evidence regarding his specific experiences as a bisexual man and the events of discrimination and acts of violence or threats upon which he asserts he is in need of protection. In the absence of this evidence, there was no basis upon which to grant the application.

[44] In light of the above-mentioned shortcomings in the Applicant's evidence, I find that it was reasonable for the PRRA Officer to find that the Applicant's evidence was insufficient to meet his burden of proof.

[45] Accordingly, I find that the PRRA Officer's decision was reasonable and falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The application for judicial review shall therefore be dismissed.

JUDGMENT in IMM-6233-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6233-20
STYLE OF CAUSE:	DAVID ONIEL FORBES v. THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 25, 2021
JUDGMENT AND REASONS:	AYLEN J.
DATED:	NOVEMBER 25, 2021

APPEARANCES:

Marc Herman	FOR THE APPLICANT
Samina Essajee	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Herman & Herman Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT