

**Date: 20070829**

**Docket: IMM-4376-06**

**Citation: 2007 FC 862**

**Ottawa, Ontario, August 29, 2007**

**PRESENT: The Honourable Mr. Justice Barnes**

**BETWEEN:**

**WILFREDO GUERRA RIVERA**

**Applicant(s)**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent(s)**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application by Wilfredo Guerra Rivera for judicial review challenging a negative decision by the Refugee Protection Division of the Immigration and Refugee Board (Board) rendered on July 19, 2006.

**Background**

[2] Mr. Rivera claimed that he had fled El Salvador in 2005 to escape harassment and persecution arising from his sexual orientation as a gay cross-dresser. He alleged that he had been victimized on many occasions from about the age of 9. This included rape, police abuse and gang

harassment. During Mr. Rivera's initial Port of Entry (POE) interview he made no mention of his sexual orientation but later claimed that it should have been obvious. He also attributed this failure to the "threatening" and "intimidating" demeanour of the immigration official who conducted the interview. This, he said, caused him to be forgetful, vulnerable and confused. At this stage his claim to protection was based only on an allegation that he had been threatened as a witness to a murder. The issue of Mr. Rivera's sexual orientation as the motivating factor for his protection claim only arose later, in his Personal Information Form (PIF) declaration. His PIF, however, made no mention of risk based on being a witness to a murder. It was not until he amended his PIF a few days before the Board hearing that the incident of the alleged murder was reintroduced into his risk narrative. All of these issues figured prominently in the refugee hearing and formed the basis for the Board's credibility findings.

### **The Board Decision**

[3] The Board was concerned with Mr. Rivera's changing narrative. It did not believe his explanation for the failure to disclose at the POE his alleged history of persecution based on his sexual orientation. He attempted to excuse that failure by accusing the immigration officer of intimidation and by saying that he was not specifically asked about his sexual orientation. He also challenged the accuracy of the interview notes and suggested that the Officer should have intuitively understood that he was gay. The Board did not accept any of these explanations. The Board also identified a supposed inconsistency in Mr. Rivera's evidence as to the frequency with which he dressed as a woman in El Salvador. It is clear from the Board decision that it did not believe any of

Mr. Rivera's evidence as it related to risk and found him not to be a credible witness. It was on that basis that it rejected his claim to protection.

### Issues

- [4] (a) What is the standard of review for the issues raised on this application?
- (b) Did the Board commit any reviewable error in its decision?

### Analysis

[5] The issues raised on this application involve challenges to the Board's credibility and factual determinations, and also relate to the weighing of evidence. These are all issues for which the standard of review is patent unreasonableness: see *Perera v. Canada (Minister of Citizenship)*, 2005 FC 1069, [2005] F.C.J. No. 1337 at para. 14. Although the Applicant has also raised an issue as to the sufficiency of the Board's decision, I can find no error in that regard and it is, therefore, unnecessary to carry out a separate pragmatic and functional analysis for that issue.

[6] Mr. Rivera was clearly not a credible witness and the Board's rejection of his testimony was well-founded. The Board's principal credibility concern arose out of the significant discrepancies in Mr. Rivera's evidence of persecution in El Salvador. When he first arrived in Canada and was interviewed on November 24, 2005, he claimed to be at risk because he had witnessed a gang murder and was threatened with death if he reported what he had seen. In the notes of this interview Mr. Rivera advised the Officer that the assailant had threatened "if you say anything, you'll be next."

[7] When Mr. Rivera completed his initial PIF declaration on December 21, 2005, he made no mention whatsoever about being at risk as a witness to a murder. Instead, his claim to protection was based on a detailed 9-year history of sexual assault and abuse based on his purported orientation as a gay transvestite. A few days before the Board hearing, Mr. Rivera amended his PIF and again reported that he had been a witness to a murder but in this version the threat made against him was stated to have been: “if you talk, you are next, faggots!”

[8] Needless to say, the Board was troubled by these variations in Mr. Rivera’s narrative and he was questioned closely about the obvious inconsistencies and changes. His answers to these questions did nothing to rehabilitate his credibility and the Board had an ample basis for rejecting that testimony. In one particularly telling exchange, Mr. Rivera struggled to explain his failure during the POE interview to inform the Officer of his sexual orientation and its significance to his refugee claim:

**PRESIDING MEMBER:** The reason I’m asking you these questions is I’m wondering why you did not tell Citizenship and Immigration Canada about your homosexual problems and instead told them the story about a bus driver getting shot.

**CLAIMANT:** The thing is that she told me many things. She told me that I was a liar.

**INTERPRETER:** And liar has been said in masculine, Mr. Member.

**CLAIMANT:** She confused me a lot. She screamed at me. She intimidated me a lot, and I forgot things.

**PRESIDING MEMBER:** Including the main reason why you were afraid to go back to El Salvador.

**CLAIMANT:** Yes.

**PRESIDING MEMBER:** Okay.

**COUNSEL:** You said that you forgot things, but earlier you said you didn't forget that you were gay. So, is there any other reason that you didn't tell her that you had problems because you were gay?

**CLAIMANT:** Because she never asked that to me either.

**PRESIDING MEMBER:** You see, we're right back to where I was trying to understand this. Did she ask you if the bus driver had been shot by a gang?

**CLAIMANT:** No. She asked me - - she told me to tell her what were my problems in El Salvador.

[9] When Mr. Rivera was questioned about the PIF omission concerning the incident of witnessing a murder, he again weakly attributed the problem to failed memory. His testimony to that effect was as follows:

**PRESIDING MEMBER:** No mention. No mention of gangs. No mention of threats from a gang, and I'm trying to understand why only a week before your refugee hearing, after signing the first narrative, do you make an amendment or an addition

and add the gang problems to your story.

**CLAIMANT:** I'm sorry, I had forgotten it.

[10] There were many other credibility problems noted by the Board in its decision including its rejection of his evidence that the POE interview notes were inaccurate. The Board's finding on that issue was entirely consistent with the evidentiary record and was as follows:

The claimant initially stated that the SIO's notes were inaccurate, but when taken through the notes line by line, the claimant verified the accuracy of the statement made with only small variations. I thus find the SIO's notes to be a fairly accurate and reliable rendition of the claimant's response when asked by the SIO to describe the claimant's fear in El Salvador. The differences pointed out by the claimant were inconsequential.

[11] There is only one credibility finding in the Board's decision that appears tenuous. The Board found an inconsistency between Mr. Rivera's PIF declaration that he liked dressing as a woman since the age of 14 and his testimony that he ordinarily dressed as a man in El Salvador. I agree with counsel for Mr. Rivera that the PIF statement ("I liked dressing up in woman's clothes since I was 14") merely confirmed his purported interest in dressing as a woman from an early age but said nothing about the frequency with which he acted upon that interest. In the result, this particular finding was perverse and inconsistent with the evidence.

[12] Notwithstanding this error in the Board's factual analysis, it is not sufficient to overcome the overwhelming weight of his remaining testimonial failings. Simply put, the central aspects of

Mr. Rivera's story were either implausible or rife with inconsistencies and his credibility would not have been redeemed had the Board not erred on this point.

[13] It was argued on behalf of Mr. Rivera that the Board erred by failing to consider his testimonial frailty with sufficient sensitivity. While the Board must be alive and sensitive to the reasons why victims of persecution may have problems in testifying, that responsibility does not oblige the Board to abandon reasonable incredulity at the door. Mr. Rivera's problems as a witness went far beyond the kinds of issues that could be explained simply by modesty or vulnerability; and certainly, it was not unreasonable for the Board to attribute those problems to an absence of credibility.

[14] It was also argued on behalf of Mr. Rivera that the Board erred by failing to make clear findings with respect to his sexual orientation – in particular whether the Board believed that he was gay. Even where the Board clearly rejected all of the central aspects of Mr. Rivera's claim, he contends that as a gay cross-dresser the Board would still be obliged to consider the evidence of generalized risk in El Salvador by virtue of that status.

[15] It certainly seems that the Board did not believe Mr. Rivera was a cross-dresser and believed his presentation during the hearing to be a put-on. The decision noted that he "had pulled out no stops" in his appearance before the Board. The Board's scepticism is evident in the following passage from the decision:

While the Board recognizes that appearances can sometimes be deceptive, it is also imperative that decisions be formed on the

totality of the evidence. Visual appearance is, therefore part of the evidence. Having seen the claimant dressed like a woman at his hearing and carefully examining the various photographs (above noted) it is apparent to me that the photographic evidence would not lead me to conclude that I was dealing with either a homosexual or a cross-dresser. Had that been the case, there would have been little point for the claimant to have appeared for his hearing dressed in a bare shouldered and immaculately coifed manner. Thus, I am unable to accept the claimant's statement that the ISO should have immediately recognized the claimant's sexual proclivities.

[16] While it is certainly preferable for the Board to make clear and unequivocal findings on matters such as this, I am satisfied that the Board did not believe that Mr. Rivera was either gay or a cross-dresser and that it did not limit its finding on this issue to how he would be perceived by others. That becomes evident after reviewing the decision in its entirety against the Board's concluding remarks which were:

In *Sheikh*, MacGuigan, J. A. held:

I would add that in my view, even without disbelieving every word an applicant has uttered, a first-level panel may reasonably find him so lacking in credibility that it concludes there is no credible evidence relevant to his claim on which a second-level panel could uphold that claim. In other words, a general finding of a lack of credibility on the part of the applicant may concurrently extend to all relevant information emanating from his testimony.

The above decision is relevant in this claim. The Board finds the claimant so lacking in credibility with respect to central issue of his sexual identification as discussed above that it finds a general lack of credibility with respect to all relevant testimony arising from his testimony. It follows that the panel is left without the necessary credible evidence required in order to reach a positive conclusion with respect to the claim.

[Emphasis added]



[17] Having disbelieved all of the material aspects of Mr. Rivera's story, it was inevitable that the third party evidence tendered to bolster his evidence attesting to his sexual orientation and presentation would also be rejected. The letter from his ESL school which verified his presentation there as a cross-dresser did not add much to his similar presentation to the Board. The Board was clearly unconvinced on that point and it had good reasons for its scepticism. Although it is good practice for the Board to expressly comment on evidence of this sort in its decisions, it is not obliged to do so in cases where the claimant's underlying evidence is reasonably found to be unreliable and is rejected on that basis: see *Castillo Sanvincente v. Canada (Minister of Citizenship)*, 2007 FC 572, [2007] F.C.J. No. 765, at para. 18.

[18] Counsel for Mr. Rivera conceded during argument that in the face of a finding that Mr. Rivera was not gay or a cross-dresser, there was no basis for the Board to go on to consider the issue of generalized risk in El Salvador. In the result, the Board did not err by declining to consider this issue.

[19] In conclusion, I can identify no material deficiencies in the Board's assessment of this protection claim and, accordingly, Mr. Rivera's application is dismissed.

[20] Neither party proposed a certified question and no issue of general importance arises on this record.

**JUDGMENT**

**THIS COURT ADJUDGES that** this application for judicial review is dismissed.

“ R. L. Barnes ”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-4376-06

**STYLE OF CAUSE:** WILFREDO GUERRA RIVERA v. MCI

**PLACE OF HEARING:** TORONTO, ONTARIO

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**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** BARNES, J.

**DATED:** August 29, 2007

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