Federal Court  Cour fédérale

Date: 20130509

Docket: IMM-10560-12

Citation: 2013 FC 488

Ottawa, Ontario, May 9, 2013

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ANDRE LUIS AGGI DE OLIVEIRA

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS OR MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR ORDER AND ORDER

[1] Mr. Aggi de Oliveira is Brazilian. He is a lawyer. He speaks flawless idiomatic English. He is gay.

[2] He has sought protection in Canada because he fears persecution in Brazil based on his sexual orientation. The final event which caused him to leave Brazil was an attack in the early morning hours by two "hoodies" who at knife point threatened to kill him if he did not change his

"faggot" ways. He went to the police to file a complaint. They told him to come back in the morning. Instead, he came here.

[3] The board member of the Refugee Protection Division, of the Immigration and Refugee Board of Canada, who heard his case found him to be credible and to have a genuine subjective fear of persecution should he be returned to Brazil. He analyzed the claim under section 96 of the *Immigration and Refugee Protection Act* (IRPA) on the basis that Mr. Aggi de Oliveira was a member of a "particular social group"; gay men. As a result, the member was only required to find a serious possibility of persecution of similarly situated individuals. Had he considered Mr. Aggi de Oliveira to be simply a victim of crime, the analysis would have been under section 97, which requires an applicant to prove on the higher standard of the balance of probabilities that he would be subjected personally to a danger of torture or to a risk to life or a risk of cruel and unusual treatment or punishment. The board member determined that Mr. Aggi de Oliveira's claim was not objectively well-founded because there was adequate state protection in Brazil, which protection was not sought. In this judicial review, Mr. Aggi de Oliveira, who was self-represented at his refugee hearing, but who is now represented by counsel, alleges not only that the board member's analysis of state protection was unreasonable, and actually incorrect in law, but also that there is a reasonable apprehension of bias in that he did not get a fair hearing because of remarks of the member which he took to be homophobic.

DECISION

[4] I find that there is no basis for alleging bias on the part of the board member. I find further that he applied the correct legal test regarding state protection and that his decision was reasonable. The application shall therefore be dismissed.

BIAS

[5] Natural justice dictates that a party be given a reasonable chance to make his or her case or defence before a neutral decision maker. Bias, real or apprehended, taints the actual or perceived objectivity of the decision maker and violates natural justice. Faced with such a situation, the general rule, as laid down by the Supreme Court in *Cardinal v Kent Institution*, [1985] 2 SCR 643, [1985] SCJ No 78 (QL), is that the reviewing court is not to consider what the decision would have been, had there been a fair hearing. A new hearing is required.

[6] The test to ascertain bias, as set out by Mr. Justice de Grandpré in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369, has universally been followed. He said at page 394:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

He added that the grounds of the apprehension must be substantial and not based on a "very sensitive or scrupulous conscience."

[7] Natural justice, including procedural fairness, is beyond the pale of judicial review. No deference whatsoever is owed to the decision maker (*Canadian Union of Public Employees (C.U.P.E) v Ontario (Minister of Labour),* 2003 SCC 29, [2003] 1 SCR 539, [2003] SCJ No 28 (QL)). The hearing was conducted on 12 June 2012, and the decision rendered 26 September 2012. It was only after that decision that Mr. Aggi de Oliveira complained about the board member's behaviour during the hearing. Indeed, at the conclusion he told the board member:

> Thanks for hearing me… Thanks for especially making me feel comfortable because I thought it would be sort of – I don't know. I read – I was reading yesterday 'cause the nature of this hearing is non-adversarial – adversarial right? Non-adversarial, that's the word I read [...] I thought [...] there would be someone here trying to prove the opposite of what I am seeking.

[8] The Ministers submit that had there been any apprehension of bias on the part of the board member, Mr. Aggi de Oliveira waved same. As I have found that there is no reasonable basis for apprehending bias in the first place, I do not have to consider whether his silence over a three and a half month period constituted a waiver.

[9] The allegations against the board member are that he was disrespectful, too casual and confrontational. In stating that Vancouver was a gay-friendly city, while some of the environs were not, some of his language may have been taken to indicate that he was not gay himself. He also referred to Mr. Aggi de Oliveira's spouse as his "boyfriend" rather than as his "husband" or

"spouse". The reference to his spouse as "boyfriend" is not demeaning. Mr. Aggi de Oliveira himself referred to him as his "partner" not his "spouse". No marriage certificate was produced.

[10] During the hearing, he inquired how he had met his spouse, which was on a website. The board member said "that is kind of romantic". Mr. Aggi de Oliveira said this was stated in a sarcastic tone. However, not only a transcript of the hearing, but a recording thereof was produced as well. There was no sarcasm whatsoever in the statement. Rather, in context, "romantic" means full-hardy, risky, certainly not cool and calculated.

[11] Mr. Aggi de Oliveira has the impression that the board member has a personal bias against or non-impartiality towards homosexual men, in part because he referred to them as "dude".

[12] The board member was commenting upon changes in Vancouver, and identified areas that "are very gay positive parts of town…but you get out to the Valley, Abbotsford, Langley…", at which point Mr. Aggi de Oliveira himself added "New Westminster". The board member continued "I wouldn't hold hands with a dude down there. I wouldn't kiss a dude down there. They're very conservative, so it's just…you know…one hour out of Vancouver, you're going to be in homophobic land."

[13] The word "dude" came up because of the conversational tone of the hearing. This was not a case of an applicant testifying through an interpreter. Mr. Aggi de Oliveira speaks flawless idiomatic English, which lent itself to a more relaxed hearing. Perhaps, "dude" was not the best

word, but any word would do if one is looking to take offence. Nobody enlightened me as to whether "dude" has a meaning other than that set out in the dictionary.

[14] His point was that Canada is not universally accepting, and this led to an analysis of the situation in Brazil, where major cities are gay friendly, at least in specific areas. He may have had an internal flight alternative in mind, but instead decided on state protection.

[15] The alleged confrontation was when the member said that Mr. Aggi de Oliveira may have blown off his chances by declining to return to the police station in the light of day. The member's tone was not aggressive; Mr. Aggi de Oliveira was not intimidated and replied in kind. The member is entitled to cross-examine. The remark fell far short of that and simply was fair comment on the concept of state protection.

[16] It would have been relatively easy for the board member to camouflage any bias on his part. He mentioned, but did not give much weight, to two incidents. The first is that after having been attacked by the "hoodies", even before reporting to the police he prepared and sent a long email to Canadian officials saying he was on his way here. The second is that he had developed an online relationship with a French national and they agreed to meet in Vancouver where they subsequently married. These incidents could have put his subjective fear into question, a fear which the board member nevertheless fully accepted.

STATE PROTECTION

[17] Mr. Aggi de Oliveira recounted a number of incidents over several years, none of which alone, or in the aggregate, could be considered persecution, save and except the incident involving the "hoodies". Being told by a waiter not to kiss his boyfriend in a Brazilian restaurant is hardly a sign of persecution, particularly since no evidence was led that passionate kissing between male and female would have been acceptable.

[18] Mr. Aggi de Oliveira speculates as to why, after the attack by the "hoodies" he was told to come back during the day shift. It may well have been that there was only a skeleton staff in the station. In any event, he was unable to identify his attackers.

[19] The test for state protection is well known. The burden is on the applicant and the more democratic the country the more likely we are to presume that state protection is available. The board member found that state protection for gays and lesbians in Brazil is far from perfect, but applying the decision of the Federal Court of Appeal in *Canada (Minister of Employment and Immigration) v Villafranca* (1992), 18 Imm LR (2d) 130, [1992] FCJ No 1189 (QL), concluded that, based on the review of the country conditions, protection was adequate. That is the test. One cannot insist upon perfection.

[20] Brazil is a democracy. Those who finally caused him to leave Brazil were not state actors. In *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 382 NR 1, [2007] FCJ No 584 (QL), after referring to *Kadenko v Canada (Solicitor General)* (1996), 143 DLR (4th)

532, [1996] FCJ No 1376 (QL) and *Minister of Employment and Immigration v Satiacum* (1989), 99 NR 171 (FCA), [1989] FCJ No 505 (QL), Mr. Justice Sexton, speaking for the Court of Appeal, said at paragraph 57:

> *Kadenko* and *Satiacum* together teach that in the case of a developed democracy, the claimant is faced with the burden of proving that he exhausted all the possible protections available to him and will be exempted from his obligation to seek state protection only in the event of exceptional circumstances: *Kadenko* at page 534, *Satiacum* at page 176. Reading all these authorities together, a claimant coming from a democratic country will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status. In view of the fact that the United States is a democracy that has adopted a comprehensive scheme to ensure those who object to military service are dealt with fairly, I conclude that the appellants have adduced insufficient support to satisfy this high threshold. Therefore, I find that it was objectively unreasonable for the appellants to have failed to take significant steps to attempt to obtain protection in the United States before claiming refugee status in Canada.

[21] So it is in this case.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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