Federal Court Cour fédérale

Date: 20140707

Docket: IMM-6752-13

Citation: 2014 FC 659

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 7, 2014

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

WALEED KANDEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of a decision rendered on October 17, 2013, by Angela Papadakis, Senior Immigration Officer (the Officer) of Citizenship and Immigration Canada (CIC), rejecting the applicant’s pre-removal risk assessment (PRRA application).

II. **Facts**

[2] The applicant, a citizen of Egypt and originally a Muslim, was born on January 5, 1975.

[3] In February 2013, the applicant left Egypt for Russia. He made a claim for refugee protection in that country, which was refused, and he converted to Christianity in June 2013.

[4] Upon being ordered to leave Russia in August 2013, the applicant arrived in Canada on September 11, 2013, using false documents. An exclusion order was issued against him on the same day.

[5] The applicant submitted his PRRA application on September 16, 2013. Upon reviewing the evidence presented and noting significant discrepancies, the Officer summoned the applicant to a hearing, which was held on October 1, 2013. In addition to interviewing the applicant, the Officer telephoned Inna Kharlamova-Grigoryeva (Inna), a friend of the applicant, to ask her questions regarding the applicant's file and an affidavit submitted by her.

[6] Among the applicant's allegations in his PRRA application, note, *inter alia*, that he has been a homosexual since his teens and that, more recently, he was apparently in a homosexual relationship with a man named Hany and that they were both allegedly attacked on December 24, 2012, by the Muslim Brotherhood. Hany allegedly died as a result of this attack. He also claimed that his conversion to Christianity exposed him to danger in Egypt, owing primarily to the

influence of his sister, an allegedly well-known Egyptian actress, and of her husband, who is a judge.

[7] The PRRA application was refused on October 17, 2013.

[8] The applicant was under a deportation order, but the United Nations Human Rights Committee, called upon by the applicant to intervene, asked Canada not to effect that deportation order while awaiting the final disposition of his file.

III. **Impugned decision**

[9] The Officer was of the view that the applicant's testimony was replete with inconsistencies and contradictions and that the applicant had adduced insufficient credible evidence in support of his application. The application was based on two grounds: the applicant's sexual orientation and his conversion to Christianity. Thus, the Officer concluded that the applicant had not established, on a balance of probabilities, that he was in a homosexual relationship with Hany and that he was attacked on December 24, 2012, by Muslim Brotherhood. In addition, the Officer concluded that the applicant was unable to establish that his conversion to Christianity exposes him to any risk at the hands of his family. In short, the Officer concluded that the applicant did not produce sufficient evidence—testimonial or other—to support his claims and that, accordingly, he failed to discharge his burden of proof under sections 96 and 97 of the IRPA.

IV. **Issue**

[10] The applicant is asking the Court to address two issues in addition to considering the reasonableness of the decision as a whole. The applicant therefore submitted the following issues:

A. Did the Officer fail to undertake an analysis and make a finding regarding one of the bases for the claim for protection, namely, the applicant's sexual orientation?

B. Did the Officer fail to consider the objective risk to the applicant as an apostate, considering that his conversion was proven on a balance of probabilities?

[11] For his part, the respondent submits that the Court should limit its consideration to the reasonableness of the decision. I do not agree: the alleged problems are sufficiently specific for attention to be focused not only on the reasonableness of the decision, but also on the various disputed items.

[12] That said, I am of the view that the applicant's issues should be rephrased so as to better reflect the procedures undertaken by him. Indeed, the issue is whether the Officer erred in rejecting the applicant's PRRA application, which contained two grounds: "[TRANSLATION] my sexual orientation; my religion (I converted from Islam to Christianity in Russia in June 2013)" (PRRA application, Applicant's Record, at page 43).

[13] With sexual orientation being indeed at the heart of the PRRA application, the Officer could not ignore it, and that is why this will have to be considered distinctly in this case. Furthermore, although the applicant refers to his apostate status in his affidavit in support of his PRRA application, this Court cannot conclude that it is a ground for the application; the second ground in support of the PRRA application is the applicant's religion/conversion. The applicant is of the view that the Officer failed to address the applicant's apostasy, but she was correct to limit herself to the grounds relied on. Therefore, I do not believe that it is necessary to address the specific issue of apostasy and that the analysis of this judicial review should focus on the religion/conversion. Thus, I would rephrase the applicant's issues as follows:

A. Did the Officer fail to undertake an analysis and make a finding regarding one of the bases for the PRRA application, namely, the applicant's sexual orientation?

B. Did the Officer err in finding that the applicant did not face a risk because of his conversion to Christianity?

C. Is the Officer's decision for the most part reasonable?

For the reasons set out below, it will not be necessary to address the last two issues.

V. **Standard of review**

[14] Just as they disagreed over the issues to be decided in this case, the parties disagree over the standard of review to be applied. Although we are not addressing the last two issues, it is important to comment on them.

[15] My colleague, Mr. Justice Zinn, addressed the first issue in this case, which concerns the applicant's sexual orientation, in *Fosu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1135, [2008] FCJ No 1418. In that same decision, according to Justice Zinn, the issue of the refusal to address the applicant's sexual orientation could open the door to two standards of review; this refusal on the part of the decision-maker to make any findings can actually be perceived as a failure to exercise jurisdiction (standard of correctness) or as a perverse and capricious decision (reasonableness standard):

> **[13]** . . . In light of the findings that follow I need not address whether the failure to address the issue of the Applicant's sexual orientation is a failure to exercise jurisdiction. It is very exceptional that a Member would explicitly make no findings on whether the claimant is a member of the social group on which he or she bases the claim for protection. It may be that the failure to make such a finding is an error of law, being as it is the ultimate grounding of the claim. As such, the standard might be seen to be correctness. However, it could be equally argued that the refusal to make this factual finding is perverse and capricious and would fail against the reasonableness standard.

[16] I am of the view that the fact that a decision-maker's fails to make a determination with respect to a ground, if any, is a failure to exercise jurisdiction. Such an issue inevitably results in

the standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paragraph 59, [2008] SCJ No 9 (*Dunsmuir*)). Accordingly, the Court must show no deference to the Officer's decision as far as it relates to the applicant's sexual orientation (*Dunsmuir*, *supra*, at paragraph 50).

[17] The two other issues relate to the findings of fact made in a PRRA application and will therefore be assessed on the standard of reasonableness (see for example *Martinez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 31, at paragraph 18, [2010] FCJ No 41; *Pareja v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1333, at paragraph 12, [2008] FCJ No 1705). Under this standard, the Court ought not to interfere where the Officer's findings is justified, transparent and intelligible and where it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, *supra*, at paragraph 47).

VI. **Applicant's arguments**

[18] The applicant submits that the Officer's decision is unreasonable as a whole, but that two errors in particular are damaging to the decision. On the one hand, the Officer failed to analyze one of the bases for the application, namely, the applicant's sexual orientation, and she made no explicit finding in that regard, preferring to confine her analysis to the applicant's relationship with Hany and to the attack of December 24, 2012. The applicant's documentary and testimonial evidence in that regard was, however, ample and clear with respect to the risk to the LGBTQ community in Egypt.

[19] On the other hand, while she accepted the applicant's conversion to Christianity, the Officer did not consider the objective risk associated with said conversion. Membership in a persecuted group is, however, a ground for protection, and the applicant is not simply a Christian in Egypt, he is, in addition, an apostate. This situation puts him at a higher risk than other Christians and the Officer should have taken into account the evidence relating to apostasy.

[20] Alternatively, the applicant submits that the determination made against him is for the most past unreasonable because it relied on a microscopic analysis of certain elements and that some of the findings underlying it were made without regard to the evidence. With respect to the applicant's sexual orientation, the Officer failed to consider numerous elements regarding his relationship with Hany. The applicant states that the contradiction as to the telephone call between him and Inna at the time of the attack of December 24, 2012, is the only contradiction regarding the attack and that it is not sufficient to disbelieve that the event did not occur. As for the location of the applicant's head injury, notwithstanding the contradictions raised, the applicant was actually injured, which the Officer herself acknowledged. The applicant also states that the Officer's conclusion regarding his conversion is not reasonable. Indeed, in coming to this conclusion, the Officer ignored the applicant's particular circumstances and failed to consider testimony corroborating his account of his religious practice in Canada. Furthermore, the Officer's conclusion regarding the fact that it is not plausible that he told his friends about his conversion does not meet the strict jurisprudential tests for a finding of implausibility. And, finally, the applicant claims to have submitted documentary evidence regarding his famous sister and her judge husband and the influence they could have in Egypt, but that said evidence was ignored.

VII. **Respondent's argument**

[21] The respondent submits that the Officer's decision is reasonable and must be upheld.

[22] First, concerning the applicant's sexual orientation, his homosexual relationship with Hany was at the heart of his application, and it was therefore reasonable that it also be at the heart of the decision. Moreover, the applicant's contradictions and explanations in that regard are irreconcilable given the importance placed on this point in the interview. The Officer did not believe the applicant's alleged sexual orientation because he did not submit any evidence that he was in a homosexual relationship. This conclusion is all the more reasonable considering the contradictions between the applicant's testimony and Inna's answers, particularly with respect to the phone call of December 24, 2012, and the fact that she allegedly met the applicant's little brother in 2012, whereas the applicant claims that he has not seen him since 2010. Furthermore, the interview revealed contradictions with respect to the applicant's head injuries, and the photographic evidence in this regard did not show where the applicant had been attacked.

[23] Second, with respect to the applicant's conversion to Christianity, the respondent notes that the applicant contradicted himself with regard to the manner in which his sister found out and that he did not submit any evidence of the possible difficulties that could be caused to him by his sister and her husband in Egypt. Furthermore, it was perfectly reasonable for the Officer to conclude that it was not plausible that the applicant told his friends in Egypt of his conversion considering his fears about being in that country.

VIII. **Applicant’s reply**

[24] Regarding his conversion, the applicant replies that it makes perfect sense that an individual would confide in his close friends about such a deep issue, such an important event in one’s life, and that this was part of his spiritual process.

[25] The applicant also reiterates that the Officer simply failed to make a finding regarding the applicant’s sexual orientation.

IX. **Analysis**

A. *Did the Officer fail to undertake an analysis and make a finding regarding one of the bases for the PRRA application, namely, the applicant’s sexual orientation?*

[26] As stated above, the first issue in this case is sufficient to conclude that the impugned decision is not valid and that the matter will have to be referred back to another CIC officer for reconsideration.

[27] Indeed, the Officer’s decision regarding the applicant’s PRRA application, and in particular regarding one of the two grounds relied on, does not withstand scrutiny on the basis of a standard of correctness. In reading the decision, it is clear that the Officer did not make any explicit finding as to the applicant’s sexual orientation, an element central to his PRRA application.

[28] Although her decision includes the subtitle *Sexual Orientation*, the Officer limits her analysis to the applicant's claim of a relationship with Hany and to the attack of December 24, 2012, of which both were victims. Indeed, the Officer made the following finding regarding the applicant's sexual orientation: "Consequently, the applicant has not established that, on a balance of probabilities, he was in a homosexual relationship, that he was attacked on Christmas Eve 2012 by the Muslin Brotherhood".

[29] To disbelieve the relationship between the applicant and Hany and the fact that the two were allegedly attacked is one thing, to disbelieve the applicant's sexual orientation is another. A specific finding in that regard was required. Arguably, the Officer's findings had the potential to undermine the applicant's credibility, but she had to nonetheless make a decision in respect of the grounds for the application. In that regard, my colleague, Justice Martineau, wrote as follows in *Odetoyinbo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 501, at paragraphs 5 to 8 (*Odetoyinbo*):

> **[5]** At the hearing, the applicant was questioned at length both about his bisexuality and the facts which led him to flee Nigeria. With respect to the first matter, the applicant was asked about the moment at which he initially realized that he was bisexual, the number of partners he had, if and when he had revealed his bisexuality to the members of his family, if his partners disclosed their sexual orientation to their families, the existence in Nigeria of organizations devoted to homosexual rights advocacy, his personal knowledge of the law condemning homosexuality in Nigeria and of people having been tried or arrested pursuant to this law, his current partner since his arrival in Canada and his knowledge of the gay community in Canada.
>
> **[6]** Unfortunately, despite extensive questioning at the hearing on the identity of the applicant as a bisexual person, the Board's reasons are totally silent on this key issue of the applicant's claim. Having closely reviewed the tribunal's record, including the

transcripts and documentary evidence, overall, I find the Board's conclusion unreasonable. Notwithstanding the Board's negative credibility findings with regards to the events causing the applicant to flee Nigeria, an assessment of the applicant's sexual orientation both in Nigeria and in Canada was nevertheless necessary considering the documentary evidence on record pertaining to the persecution of homosexuals in Nigeria, and the elaborate testimony of the applicant on this very central issue of his claim (which incidentally was corroborated by the letters produced by the applicant). Accordingly, the Board's failure to make an explicit determination as to the applicant's bisexuality constitutes a reviewable error and justifies a redetermination of the applicant's claim (*Burgos-Rojas v. Canada (Minister of Citizenship and Immigration)*, 162 F.T.R. 157, [1999] F.C.J. No. 88); *Alemu v. Canada (Minister of Citizenship and Immigration).,* 2004 FC 997 at paras. 45 and 46, [2004] F.C.J. No. 1210).

[7] It is well settled that an adverse credibility finding, though it may be conclusive of a refugee claim under section 96 of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (the Act), is not necessarily conclusive of a claim under subsection 97(1). The reason for this is that the evidence necessary to establish a claim under section 97 differs from that required under section 96 (*Jarada v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 409, [2005] F.C. J. No. 506). When considering section 97, the Board must decide whether the claimant's removal would subject him personally to the dangers and risks stipulated in paragraphs 97(1)(*a*) and (*b*) of the Act (*Bouaouni v. Canada (Minister of Citizenship and* Immigration), 2003 FC 1211, [2003] F.C.J. No. 1540). Further, there are objective and subjective components to section 96, which is not the case for paragraph 97(1)(*a*): a person relying on this paragraph must show on a balance of probabilities that he or she is more likely than not to be persecuted (*Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, [1995] S.C.J. No. 78; *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] F.C.J. No. 1).

[8] It must be stressed that the claimant's fear of persecution or individualised risk must be evaluated in light of or take into account what is generally known about conditions and the laws in the claimant's country of origin, as well as the experiences of similarly situated persons in that country. In the case at bar the Board did not explicitly state in its reasons that it did not believe that the applicant was bisexual. Accordingly, it could not ignore compelling objective evidence on record demonstrating the abuses which gay men are subjected to in Nigeria. Therefore, even if the

> Board rejected the applicant's account of what happened to him in Nigeria, it still had a duty to consider whether the applicant's sexual orientation would put him personally at risk in his country.

[30] The present case is similar to that considered by Justice Martineau in *Odetoyinbo*. It can be seen from the Officer's notes that the applicant's testimony about his homosexuality went well beyond his relationship with Hany (see the applicant's affidavit, at paragraphs 16-19, Applicant's Record, at pages 28 and 29; see also the affidavits in the certified tribunal record submitted by the applicant, at paragraph 6 of page 245 and at pages 355 et seq. in their entirety, and by Inna, at paragraph 7 of page 276; see also, the Officer's notes taken at the hearing, certified tribunal record, at pages 117 and 118). However, the Officer did not in any way explicitly conclude that the applicant was not homosexual. A court on judicial review may be called upon to consult the record to supplement seemingly failed reasons, but it cannot substitute its finding for that of the decision-maker. In noting this fatal error, the Court is mindful that to make a determination as to a person's homosexuality is a difficult task. In order to do so, however, the decision-maker must at least consider all of the evidence submitted in that regard and either way make a decision with reasons. This is essential.

[31] This error is sufficient to invalidate the Officer's decision and refer the matter back to another CIC officer for reconsideration and decision in accordance with the grounds raised by the applicant.

[32] Such a finding to refer the matter back is all the more necessary since the Officer, who failed to make a finding regarding the applicant's sexual orientation, recognized that the

documentary evidence establishing that homosexuals are at risk in Egypt and that they are subject to some level of violence and discrimination.

[33] In view of my finding with respect to the first issue, it is not necessary to address the other issues.

[34] The parties were invited to submit a question for certification but none was submitted.

ORDER

THE COURT ORDERS that:

1. The application for judicial review is allowed.

2. The matter is referred back to another CIC officer for reconsideration.

3. No question is certified.

"Simon Noël"

Judge

Certified true translation
Daniela Guglietta, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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