

Federal Court



Cour fédérale

Date: 20150922

Docket: IMM-8229-14

Citation: 2015 FC 1099

Ottawa, Ontario, September 22, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

**RAJU POURNAMINIVAS V
(a.k.a. RAJU POURNAMINIVAS
VASUDEVAN)**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Pournaminivas, is a 47 year old citizen of India who alleges he has been persecuted due to his homosexuality. He came to Canada on a business visa in September 2009. In 2014, he sought Canada's protection after meeting Anthony, a gay man of Tamil

ethnicity, who told the Applicant he could apply for refugee protection on the basis of his sexuality.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board rejected the Applicant's claim for protection on the basis of credibility, finding that the Applicant was not credible and is not a homosexual. In addition, the RPD declared pursuant to subsection 107(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], that there was no credible basis for the Applicant's claim. The Minister of Citizenship and Immigration had intervened in the proceeding before the RPD by filing submissions and documentation as to the Applicant's credibility and marital status and the delay in making the claim.

[3] The RPD found the Applicant not to be credible for several reasons: notably, (1) he did not provide a credible or consistent account of his alleged same-sex relationship with Mathew in Chennai; (2) there were inconsistencies around where the Applicant had been living in India prior to his arrival in Canada; (3) there were inconsistencies and discrepancies about his marital status and relationship with his wife; (4) there were discrepancies concerning his same-sex relationships in Canada; (5) there were credibility issues relating to the Applicant's sexual orientation; and (6) the Applicant's delay in filing his refugee claim. Thus, the RPD concluded as follows:

[31] The panel finds that the claimant has not provided consistent or reliable evidence that he has been in two long-term same-sex relationships since arriving in Toronto, in light of the negative inferences taken from the discrepancies and inconsistencies [*sic*] within his evidence and between his testimony and that of Sutharshan, with respect to these alleged relationship [*sic*], as set out above. The panel also gives little weight to the claimant's testimony about other same-sex relationships in India,

as it finds that, on a balance of probabilities, the claimant is not a homosexual, due to the numerous negative inferences taken towards his credibility as a witness, as set out above. Therefore, the panel finds that the claimant would not have a fear of persecution on that basis in India, and has not considered the country condition evidence regarding the situation of homosexuals in India.

II. Issues

[4] The application for judicial review now before the Court, pursuant to subsection 72(1) of the *Act*, raises two noteworthy issues: (1) whether the RPD's findings with respect to the Applicant's credibility and his delay in making the claim are reasonable; and (2) whether the RPD's finding that there is no credible basis for the claim is reasonable.

III. Credibility and Delay

[5] I am satisfied that the RPD's findings as to the Applicant's credibility are reasonable. Credibility findings by the RPD have been described as "the heartland of the Board's jurisdiction", since they are essentially pure findings of fact which are reviewable on a reasonableness standard (*Zhou v Canada (Citizenship and Immigration)*, 2013 FC 619 at paragraph 26, [2013] FCJ No 687; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (QL) at paragraph 4, 160 NR 315 (CA); *Singh v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 486 (QL) at paragraph 3, 169 NR 107 (CA); and *Cetinkaya v Canada (Citizenship and Immigration)*, 2012 FC 8 at paragraph 17, 403 FTR 46). The Court must respect and cannot interfere with a credibility assessment unless it is satisfied that the reasons of the RPD are not justified, transparent or intelligible and that the result does not fall "within a range of possible, acceptable outcomes which are defensible in

respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190).

[6] I am also satisfied that the RPD’s determination with respect to the Applicant’s delay of almost five years in making his claim was reasonable. It is well-established that, absent a satisfactory explanation for the delay, a delay in making a claim for protection can be fatal to the claim even where there is no other reason to doubt a claimant’s credibility (see: *Velez v. Canada (Citizenship and Immigration)*, 2010 FC 923 at paragraph 28; also see: *Guarin Caicedo v. Canada (Citizenship and Immigration)*, 2010 FC 109 at paragraph 21 [*Guarin Caicedo*]). Although delay in making a claim for refugee protection is not, in and of itself, determinative, “delay may, in the right circumstances, constitute sufficient grounds upon which to dismiss a claim. It will ultimately depend upon the facts of each claim.” (*Duarte v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 988 at paragraph 14, 125 A.C.W.S. (3d) 137; also see *Guarin Caicedo*). In this case, it was reasonable for the RPD to make a negative inference towards the Applicant’s credibility and his subjective fear of persecution from the lengthy delay in making his refugee claim.

IV. No Credible Basis Finding

[7] It was not reasonable, however, for the RPD to conclude there was no credible basis for the Applicant’s claim, and for this reason the RPD’s decision should be set aside and the matter returned to the RPD to be re-determined. I agree with the Applicant that the RPD conflated its credibility findings about the Applicant with a no credible basis finding. The RPD failed to

properly consider whether there was any credible evidence, including the testimony of the other witnesses, to support the Applicant's claim.

[8] There were no explicit credibility findings about the two witnesses, namely, Anthony and Sutharshan, the Applicant's current same-sex partner. The lack of any credibility findings against Sutharshan is particularly troublesome because it is the Applicant's homosexuality that was squarely in issue before the RPD. Sutharshan directly testified that he and the Applicant have a sexual and romantic relationship. In order to find that the Applicant is not a homosexual, the RPD must have determined, at least implicitly, that Sutharshan was not credible in this regard. This determination cannot be justified and, hence, it was unreasonable for the RPD not to consider whether Sutharshan's testimony and the documentary evidence were sufficient to establish the Applicant's claim.

[9] The RPD's finding that the Applicant was not credible does not automatically result in a "no credible basis" finding (see: *Foyet v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1591 at paragraphs 23-26 (FC)). The threshold for a no credible basis finding is a high one because it removes the automatic stay of removal pending judicial review for claimants from countries designated under subsection 109.1 (1) of the *Act*. As recently noted by my colleague Madam Justice Cecily Strickland in *Behary v Canada (Citizenship and Immigration)*, 2015 FC 794:

[53] ...The RPD must look to objective documentary evidence before making such a [no credible basis] finding. Only if there is no independent or credible documentary evidence, or if any such evidence cannot support a positive decision, can the RPD make such a finding (*Rahaman v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89 at paras 19, 28, 51 [*Rahaman*]; *Ramón*

Levario v Canada (Citizenship and Immigration), 2012 FC 314 at para 19 [*Levario*]; *Sinko v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 903 at para 21; *Sadeghi v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1083 at para 24).

[10] In this case, there was substantial documentary evidence before the RPD about the persecution of homosexuals in India, in addition to the unchallenged testimony of one of the Applicant's witnesses. This evidence was not assessed by the RPD prior to making its no credible basis finding. Consequently, the RPD's decision is unreasonable and is not a defensible or acceptable outcome in respect of the facts and law.

V. Conclusion

[11] For the reasons stated above, the application for judicial review is allowed and the matter is returned for re-determination by a different panel member of the RPD. Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed and the matter returned for re-determination by a different panel member of the Refugee Protection Division of the Immigration and Refugee Board; and no serious question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8229-14

STYLE OF CAUSE: RAJU POURNAMINIVAS V (a.k.a. RAJU
POURNAMINIVAS VASUDEVAN) v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

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