

Federal Court



Cour fédérale

Date: 20180907

Docket: IMM-637-18

Citation: 2018 FC 898

Toronto, Ontario, September 7, 2018

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

TIMOTHY KAYIGWA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Timothy Kayigwa (the “Applicant”) seeks judicial review of the decision of an Officer (the “Officer”) who refused his application for protection made pursuant to subsection 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”).

[2] The Applicant is a citizen of Uganda. He sought protection in Canada on the basis of his sexual orientation, that is as a homosexual man in Uganda.

[3] The Applicant applied for protection as a Convention refugee, pursuant to section 96 of the Act. Following a hearing before the Immigration and Refugee Board, Refugee Protection Division (the “RPD”), his claim was dismissed on the grounds that his evidence was not credible. The RPD made a finding, pursuant to subsection 107(2) that the Applicant’s claim had no credible basis.

[4] The Applicant sought leave to commence an application for judicial review but his application for leave was dismissed by Order made on February 23, 2016 in cause number IMM-5086-15.

[5] The Application sought protection pursuant to the PRRA process. He advanced the same basis of risk as he had presented to the RPD, that is his status as a homosexual man in Uganda. He submitted new evidence, consisting of a photograph from the Pride parade; three newspaper articles and two letters, each from support service providers for LGBTQ+ persons in Toronto.

[6] The Officer noted on a check list that new evidence had been submitted with the PRRA application; see page 4 of the decision, page 20 of the Certified Tribunal record (the “CTR”). However, he decided that the photograph was insufficient evidence to overcome the “no credible basis” finding of the RPD. He also suggested that the photograph did not establish sexual orientation.

[7] The Officer assigned little weight to the three newspaper articles, noting that they were not original documents and one article was undated.

[8] The Officer did not find the letters to be “new evidence” since they referred to events that occurred before the RPD hearing.

[9] The Officer concluded that the Applicant had failed to present evidence to overcome the negative credibility findings of the RPD and the RPD had rejected the Applicant’s claim to be a homosexual man, the basis of his claim to be at risk.

[10] The Applicant challenges the manner in which the Officer dealt with the new evidence submitted, as well as with the failure to grant him an oral hearing and the failure to consider his RPD file in determining the PRRA application.

[11] The issues relating to treatment of the evidence and the ultimate conclusions of the Officer raise questions of law and fact, attracting review on the standard of reasonableness; see the decision in *Raza v. Canada (Minister of Citizenship and Immigration)* (2006), 58 Admin. L.R. (4th) 283 (F.C.) at para. 12, aff’d (2007), 370 N.R. 344 (F.C.A.) at para. 3.

[12] According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47, that standard requires that a decision be transparent, justifiable and intelligible, falling within a range of possible acceptable outcomes that is defensible on the law and the facts.

[13] The issue about the lack of an oral hearing is one of procedural fairness, reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 S.C.R. 339.

[14] I have reviewed the materials submitted to the Officer and considered the submissions of Counsel for the parties.

[15] In my opinion, the decision of the Officer cannot stand.

[16] The dispositive issue before the RPD was credibility. The RPD went so far as to make a “no credible basis” finding. Credibility was obviously an issue for the Officer, particularly with respect to the Applicant’s sexual orientation.

[17] In my opinion, the Officer did not reasonably deal with the new evidence that the Applicant provided. The Officer clearly rejected only the two letters; no such clear finding was made about the newspaper articles. Those articles described risks to homosexual persons in Uganda in unambiguous terms.

[18] In my opinion, in his treatment of those articles the Officer made veiled credibility findings about the critical element of the Applicant’s claim for protection, that is his sexual orientation.

[19] Just as an applicant cannot use the PRRA process as an appeal from a decision of the RPD, neither is it open to an Officer, in assessing a PRRA application, to endorse a decision of the RPD when new evidence is submitted, without considering that evidence.

[20] Section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 provides discretion for an oral hearing to be provided when credibility is in play in a PRRA application. Section 167 provides as follows:

Hearing — prescribed factors

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

- (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;
- (b) 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;
- (c) whether the evidence, if accepted, would justify allowing the application for protection.

Facteurs pour la tenue d'une audience

167 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) 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) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
- c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[21] In my opinion, the factors identified in section 167 apply here.

[22] Had the Officer reasonably considered the new evidence and provide the Applicant with the opportunity to answer any concerns, the outcome of the PRRA application may have been different.

[23] I am satisfied that the Applicant has shown that here the Officer made veiled credibility findings and that an oral hearing should have been granted. The failure to do so constitutes a reviewable error.

[24] It is not necessary for me to address the issue about the Officer's use of the RPD file.

[25] In the result, the application for judicial review is allowed, the decision is set aside and the matter remitted to a different Officer for redetermination. There is no question for certification arising.

JUDGMENT in IMM-637-18

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision is set aside and the matter remitted to a different Officer for redetermination. There is no question for certification arising.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-637-18

STYLE OF CAUSE: TIMOTHY KAYIGWA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 6, 2018

JUDGMENT AND REASONS: HENEGHAN J.

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APPEARANCES:

Richard Wazana

FOR THE APPLICANT

Meva Motwani

FOR THE RESPONDENT

SOLICITORS OF RECORD:

WAZANALAW
Barrister & Solicitor
Toronto, Ontario

FOR THE APPLICANT

Attorney General of Canada

FOR THE RESPONDENT