

Federal Court



Cour fédérale

Date: 20181108

Docket: IMM-1511-18

Citation: 2018 FC 1126

Ottawa, Ontario, November 8, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

JERSEY MOLINA GONZALEZ

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application, under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA], for judicial review of the decision of a Senior Immigration Officer [the Officer] dated March 8, 2018, refusing the Applicant's application for permanent residence from within Canada based on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the IRPA.

II. Background

[2] The Applicant, Jersey Molina Gonzalez, is a Colombia citizen born on June 13, 1971, in Bogota, Colombia. He has two half-brothers, Jorge Hernando Escobar Gonzalez and John Jairo Escobar Gonzalez [John], who are both permanent residents of Canada and reside in London, Ontario with their spouses and children. The Applicant has visited his brothers on several occasions in recent years, entering Canada most recently on November 24, 2017.

[3] On January 31, 2017, he filed an application for permanent residence from within Canada on the basis of H&C grounds, citing establishment, hardship associated with adverse country conditions, and the best interest of the child [the Application]. The Applicant made his claim of adverse country conditions given the difficulties associated with being an openly gay man in Colombia.

[4] The Officer interviewed the Applicant by way of a Spanish interpreter on February 28, 2018 [the Hearing]. In a decision dated March 8, 2018, the Officer refused the Application, concluding that the Applicant's circumstances did not justify an exemption under subsection 25(1) of the IRPA [the Decision]. The Applicant now seeks judicial review.

III. Issue

[5] The issue is whether the Officer's Decision is reasonable, based on the totality of the evidence.

IV. Standard of Review

[6] The standard of review is reasonableness.

V. Analysis

[7] At issue before the Officer was whether the Applicant is a gay man and the alleged adverse country conditions that would befall the Applicant if he were to return to Colombia.

[8] To prove his sexual orientation, the Applicant submitted several pieces of evidence, including: photographs of the Applicant with alleged boyfriends, letters from friends, letters from family members, and photographs of the Applicant's accounts from online dating websites Grindr and Manhunt. The Applicant also gave information, in his Application and in his testimony at the Hearing, about his sexual orientation and his past relationships with both men and women.

[9] The Officer reviewed this evidence and concluded that the Applicant had not shown on a balance of probabilities that he is a gay man. As a result, the Officer found no associated hardship that could result from being a gay man in Colombia. The Officer went on to conclude

that the Applicant had failed to show how he personally would face hardship to the generalized country conditions of Colombia, and therefore found little evidence of a direct negative impact on the Applicant resulting from a return to Colombia.

[10] The Applicant challenges the reasonableness of the Officer's conclusion on several grounds.

A. *Relationship with Ms. Arbelaez*

[11] The Officer concluded that the Applicant gave evasive testimony about the nature of a common-law relationship he had with a woman, Constansa Arbelaez, that his Application omitted an address for the time he lived with Ms. Arbelaez, and that his Application did not disclose an unsuccessful permanent residence application he filed with Ms. Arbelaez. The Officer found that those actions adversely affected the Applicant's general credibility.

[12] The Applicant submits that this inference was unreasonable, because the Applicant did not disclose the existence of his relationship with Ms. Arbelaez in his Application, as well as in his testimony at the hearing. I find that the Officer's conclusion is reasonable, giving the combined effect of the evasive testimony with the omissions from the Application.

[13] The Applicant's testimony appears to have been evasive at several points, including attempting to explain his omission to mention his time living with Ms. Arbelaez as a "vacation". The Officer's conclusion is well within the range of acceptable outcomes.

[14] Additionally, the Applicant submits that the Officer made an impermissible assumption that the Applicant's relationship with Ms. Arbelaez meant that the Applicant was not gay. I find that no part of the Decision suggests that an impermissible assumption was made with respect to the Applicant's relationship with Ms. Arbelaez.

B. *Realization that Applicant is gay*

[15] The Applicant also challenges a negative credibility inference drawn by the Officer with respect to the Applicant's realization that he is gay.

[16] In his Application, the Applicant wrote:

When I was 11 or 12 years of age I started to become aware of my attraction to other boys. Other classmates thought that I was somewhat feminine and they started to become very cruel towards me. This was the situation that I had to ensure [*sic*] during all of the time that I was in high school until 1990 when I completed my high school. I had realized sometime when I was in high school that I was Gay.

[Emphasis added]

[17] At the Hearing, the Applicant was asked about this realization:

O) When did you realize you were gay?

A) *Wide hand movements* I believe I knew since I was very young but it was 10 or 11 years when I felt the need for physical needs.

O) Prior to 10 or 11 you thought you might have male attractions but at 10 or 11 you knew you were attracted to men. Is this correct?

A) I think I always knew but at later age is when one truly begins to feel the necessity.

O) Your application narrative indicates you realized you were gay sometime in high school. Explain, why do the ages seem to be different now?

A) I don't understand question.

...

O) Please explain the changes in timeframes between January 2017 [the Application] and your statements made today.

A) They have not changed. Finally I know I am homosexual at 10 or 11...

[Emphasis in transcript]

[18] The Officer drew a negative credibility inference from these supposed discrepancies, stating:

I acknowledge that the self-realization of one's sexuality among members of the LGBT community is often a complicated process, especially in societies where heterosexuality and inflated notions of masculinity are entrenched. Nevertheless, it would be reasonable to expect someone who self-identifies as homosexual for more than 30 years to clearly describe the moment they accepted their sexual orientation. I noted time discrepancies in his story in this regard. The discrepancies span several years. When asked to respond to these inconsistencies, the applicant was unable to provide an acceptable explanation. Thus, I draw a negative inference.

[19] The Applicant argues that the Applicant's answers are not reasonably capable of impugning the Applicant's credibility. I agree. There is no meaningful inconsistency between the Application and the Applicant's testimony at the hearing. The Officer acknowledges that the self-realization of one's sexuality is often a complicated process, but then fails to appreciate the distinction the Applicant makes between having sexual feelings towards men and conclusively realizing one's sexual orientation.

[20] The Officer impugns the Applicant for stating in the Application that he was 11-12 when his realization process began and in high school when he realized he was gay, yet stating at the Hearing that he was 10 or 11 years old when he “felt the need for physical needs.” I note that the Applicant did not state at the Hearing that he knew he was gay at 10 or 11 – that was the Officer’s implication. The Applicant’s words were that he was 10 or 11 years old when he “felt the need for physical needs.” I also note that the Applicant was 12 years old when he began high school in January of 1984. Finally, I would note that this realization process took place well over 30 years ago, and some ambiguities in recollection are to be expected.

[21] I find that the Officer’s failure to appreciate the nuances of sexual realization render this negative credibility inference unreasonable.

C. *Letter from Brother*

[22] The Officer drew a negative credibility inference because of an inconsistency regarding when the Applicant came out as a gay man to his brothers. The Applicant’s brother John submitted a letter, written on January 23, 2017, in which he states that the Applicant came out “about 4 years ago” [John’s Letter]. The Applicant stated in his testimony that he came out to his brother in December 2014, and provided details of the events surrounding his coming out. The Officer drew a negative inference due to the discrepancy between the January 2013 date suggested by John’s Letter and the December 2014 date suggested by the Applicant. The Officer also noted that the Applicant was not in Canada in January of 2013, so the event could not have taken place in Canada as the Applicant described.

[23] The Respondent argues that there is a significant difference between December 2014 and the January 2013 date suggested by John's Letter, and that this negative credibility inference is reasonable. I disagree. John's Letter gave an approximate date, and it was unreasonable for the Officer to draw an adverse credibility inference from this minor inconsistency. The discrepancy is indicative of John making a mistake in his letter, and nothing more.

D. *Physical Evidence*

[24] The Applicant takes issue with the Officer's conclusions regarding several pieces of evidence submitted to support that the Applicant is gay.

(1) Social Media Accounts

[25] The Applicant provided photographs of his Grindr and Manhunt accounts. The Applicant also provided a photograph evidencing that he had joined a Facebook group related to an LGBT organization.

[26] In reference to the Grindr and Manhunt accounts, the Officer wrote:

I recognize that the applicant has provided online accounts that he states he uses to meet men. Nonetheless, I am cognizant that these accounts use alias [*sic*] (name, date of birth, etc.), are said to be unconnected to his everyday social media accounts, and were provided to me in Spanish. For these reasons I find them to be of low probative value.

[27] The Officer wrote in reference to the Facebook photograph:

...while I do not have access to the applicant's everyday social media accounts, I note that liking and/or joining a facebook page is

highly unlikely to cause someone to perceive him as a homosexual male.

[28] The Applicant makes no mention of the Officer's reference to the Grindr and Manhunt accounts and argues, on the basis of the Officer's mention of the Facebook account, that the Officer had misunderstood the evidence regarding the Grindr and Manhunt accounts. The Respondent argues that the Officer clearly understood the extent and character of the evidence, and was reasonable in their treatment of this evidence.

(2) Pictures

[29] The Applicant provided photos allegedly depicting the Applicant with boyfriends that he had in Colombia. The Officer wrote:

...despite the fact that there are pictures on file, I find that there is very little that signifies that the applicant and the other men in the pictures were in a sexual relationship rather than were merely friends.

[30] The Applicant takes issue with this statement, arguing that as the Applicant was afraid to have an openly gay relationship in Colombia, it would be extremely unlikely that photographs would exist which could document the existence of a gay relationship. The Respondent submits that the Officer did not expect the photos to prove the Applicant's sexuality, but rather was simply noting that the photos had not proven the Applicant's sexuality.

(3) Emails from coworkers in Colombia

[31] The Officer also considered two emails written by two coworkers of the Applicant from Colombia, writing:

Whereas I am aware that there are letters two coworkers [*sic*], I note that the letters do not directly state he is gay/homosexual man and they provide few details as to when they found out about his sexual orientation or what negative experiences he had in Colombia. Consequently, I place very little weight on the letters.

[32] The Applicant takes issue with the lack of weight assigned to these emails, arguing that the Officer inappropriately assumed that the writers would have known about negative experiences suffered by the Applicant in Colombia. The Respondent states that the Officer was simply noting the lack of any mention of mistreatment.

[33] The Applicant also argues that the Officer should not have expected the email writers to state directly that the Applicant is gay, because this can be inferred from reading their emails as a whole. The Respondent agrees that it can be inferred from the emails that the Applicant is gay, but submits that this does not render the Officer's observation perverse.

[34] Based on the totality of the evidence above set out in paragraphs 24 to 33, I find that the Officer was unreasonable in concluding that the Applicant had not proven he is a gay man. While it may be possible, examining each piece of evidence in isolation, to proffer a justification for why the piece of evidence does not prove the Applicant is gay, examining the evidence contextually and purposively, I find that the Applicant put forward clear and convincing evidence that he is a gay man.

[35] The Applicant's Grindr and Manhunt accounts, while using pseudonyms, appear to show his face and use the same picture as the Applicant's Facebook account. The photographs of the Applicant with alleged boyfriends in Colombia, while not explicit in nature as the Officer imply they should be, also support that the Applicant is gay.

[36] The emails from coworkers in Colombia, while not directly stating that the Applicant is gay, speak of his sexual orientation and of coming out of the closet. They clearly imply that he is a gay man. I particularly note that the letter from the gay couple, Jorge Enrique Roa Gomez and Gustavo Enrique Rodriguez Parra, dated February 22, 2018, to which the Officer did give some weight, does state directly that the Applicant is a gay man.

[37] When one purposively considers the evidence, I find that the Applicant put forward convincing evidence that he is a gay man. The Officer was unreasonable to conclude otherwise, erroneously relying on a piecemeal approach, which failed to consider the evidence as a whole. The Officer also erred by making adverse credibility inferences from the Applicant's testimony regarding his sexual realization and from the minor discrepancy regarding the date at which he came out to his brothers in Canada. While significant deference is owed to an immigration officer's decision under subsection 25(1) of the IRPA, in this case the Decision falls outside the range of reasonable, justifiable outcomes.

[38] An error must change the outcome of the decision for it to be unreasonable (*Castillo Mendoza v Canada (Citizenship and Immigration)*, 2010 FC 648 at para 24).

[39] There was significant evidence before the Officer of the adversities faced by LGBT individuals in Colombia. The Applicant testified to the prevalence of violence against LGBT individuals, as well as murders committed against individuals because of their sexual orientation. This testimony is supported by documentary evidence outlining the targeting of LGBT individuals by criminal groups resulting in violence and death, as well as numerous instances of police violence against LGBT individuals.

[40] The Applicant also testified to the discrimination that he suffered as a gay man in Colombia - being denied access to restaurants, being passed over for promotions at his employment, and being rejected by members of his social circle. The emails from coworkers in Colombia support the Applicant's testimony and allude to the discrimination suffered by the Applicant as a gay man in Colombia.

[41] Therefore the potential exists that the Officer's error could have changed the outcome.

[42] I find that the Decision is unreasonable.

JUDGMENT IN IMM-1511-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is remitted to a different officer for reconsideration;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1511-18

STYLE OF CAUSE: JERSEY MOLINA GONZALEZ v THE MINISTER OF
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