Federal Court  Cour fédérale

Date: 20221125

Docket: IMM-5892-20

Citation: 2022 FC 1616

Ottawa, Ontario, November 25, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

TAMBI BENICE NKWO AND
NALEAH-DAPHINE MESAME ALOBWEDE
BY HER LITIGATION GUARDIAN
TAMBI BENICE NKWO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicants, Tambi Benice Nkwo [Principal Applicant or PA] and her child [Minor Applicant], seek judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a Senior Immigration Officer's [Officer] March 19,

2020 decision rejecting the Applicants' Pre-Removal Risk Assessment [PRRA] application [Decision].

[2] Both parties agree that the Decision is unreasonable. The only issue in this application relates to the appropriate remedy. The Applicants seek a directed verdict that they are Convention refugees and/or persons in need of protection. In the alternative, the Applicants request that the Court remit the matter to a different officer with the direction that the only remaining issue is whether the Applicants face a risk of persecution in Cameroon as persons similarly situated to the LGBTQ community based on the Principal Applicant being a bisexual woman. The Respondent submits that the matter should simply be sent back to a different officer for re-determination.

[3] The application for judicial review is granted. The matter is remitted to a different officer for re-determination.

II. Background

[4] The PA, a 27-year-old female, and the Minor Applicant are citizens of Cameroon.

[5] On November 26, 2015, as a dependant child, the PA was granted a permanent resident visa to Canada. Prior to the issuance of the permanent resident visa, the PA got married. The PA only informed Canadian authorities about her marital status upon her arrival in Canada in February 2016.

[6] On October 17, 2016, the Immigration Division [ID] found the PA inadmissible to Canada on the ground of misrepresentation and issued an exclusion order. On September 6, 2018, the Immigration Appeal Division [IAD] refused the PA's appeal.

[7] The PA submitted her PRRA on June 18, 2019. The PA fears persecution in Cameroon based on her bisexuality. She claims that her husband has threatened to inform Cameroonian authorities about her sexual orientation. The PA also fears an unknown individual who, through social media, threatened to kill her if she returned to Cameroon.

[8] In refusing the PRRA, the Officer accepted that the PA is bisexual and recognized that the country condition documents report serious violations of LGBTQ individuals' human rights. However, the Officer concluded that the PA had not demonstrated a personalized, forward-facing risk of torture, a risk to life, or a risk of cruel and unusual treatment or punishment in Cameroon. The Officer indicated that only evidence dated after the IAD decision could be assessed.

[9] The parties agree that the Decision is unreasonable and should be quashed. The Officer applied the incorrect legal test for risk by requiring that the Applicants establish personalized risk of persecution, rather than assessing the persecution experienced by similarly situated persons in Cameroon. The Officer also applied the incorrect test for new evidence under paragraph 113(a) of *IRPA*.

[10] The parties were unable to agree on the appropriate remedy. On January 28, 2021, the Respondent served and filed a Motion for Judgment, submitting that the appropriate remedy was

to remit the matter to a different officer for redetermination. The Applicants disagreed. On February 17, 2021, Justice Southcott dismissed the Respondent's motion on the grounds that the appropriate remedy remained a live issue between the parties that is best addressed on judicial review.

III. Issues and Standard of Review

[11] The only issue in the present matter is whether the Court should exercise its discretion to grant either of the Applicants' requested remedies, namely:

1. A directed verdict that they are Convention refugees and/or persons in need of protection; or alternatively;

2. An Order remitting the matter to a different officer with the direction that the only remaining issue is whether the Applicants face a risk of persecution in Cameroon as persons similarly situated to the LGBTQ community based on the PA being a bisexual woman.

[12] Given the nature of the issue, no standard of review is applicable.

IV. Analysis

A. *Should the Court issue a directed verdict that the Applicants are Convention refugees and/or persons in need of protection?*

(1) Applicants' Submissions

[13] A reviewing court has the discretion to issue a directed verdict in cases where, as here, remitting the matter back to a different officer for re-determination would serve no useful purpose (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 142 [*Vavilov*]). In reasonably applying the facts as established by the evidence to the law of refugee protection, the only possible outcome for this Court to arrive at is that the Applicants meet the definitions of both sections 96 and 97 of *IRPA* (C*anada (Citizenship and Immigration) v Tennant*, 2019 FCA 206 at para 72 [*Tennant*].

[14] The Officer accepted that the PA is bisexual, that her home country is Cameroon, that same-sex acts are criminalized in Cameroon, and that LGTBQ individuals face serious human rights violations in Cameroon. Given these findings, the PA meets the definition of a Convention refugee (*Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250 at 256-58, [1990] FCJ No 454 (CA)). As such, remitting the case back to another PRRA officer for re-determination would serve no useful purpose, nor would it meet the goal of expedient and cost-efficient decision making that administrative tribunals exist to carry out.

[15] There is sufficient evidence available to address the aspects of a PRRA that the Officer did not explicitly address in the Decision, such as state protection, the viability of an internal flight alternative [IFA], or the Minor Applicant's risk of persecution. The evidence that the Officer erroneously excluded from the PRRA based on a misunderstanding of paragraph 113(a) of *IRPA* is not sufficiently material to require the re-determination of the entire application.

[16] The Applicants acknowledge that this Court has declined to grant directed verdicts in cases involving credibility. However, no credibility concerns were raised as to the PA's sexual orientation and national identity, or the evidence of objective risk to the LGBTQ community.

[17] Lastly, certain additional factors support the Court's exercise of discretion to issue a directed verdict. These factors include concern for delay, fairness to the parties, the nature of the particular regulatory regime, the administrative decision-maker's genuine opportunity to weigh in on the issue, and the efficient use of public resources (*Vavilov* at para 142).

(2) Respondent's Submissions

[18] A re-determination is required. There is much evidence to be weighed and assessed, and the result is not inevitable. A directed verdict is an exceptional remedy that is generally discouraged, as it "gives rise to concerns about the Court accomplishing indirectly what it is not authorized to do directly…" (*Li v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 548 at paras 36-37 [*Li*]).

[19] A PRRA assessment is an inherently discretionary exercise requiring the weighing of evidence. There is no self-evident outcome in this assessment, especially where an officer bases their assessment on incorrect legal tests. This Court has been reluctant to issue directed verdicts in the PRRA context (*Cheema v Canada (Citizenship and Immigration)*, 2020 FC 1055 at paras 57-59).

[20] Due to a misunderstanding of two legal tests, the Officer failed to consider potentially relevant evidence. While the Applicants assert that there is no evidence to question the finding that the PA is bisexual, this will be a determination for the new officer to make.

[21] Furthermore, a directed verdict is not appropriate in cases involving factual determinations, not only credibility determinations (*Freeman v Canada (Citizenship and Immigration)*, 2013 FC 1065 at paras 78-81). Accordingly, a directed verdict is not appropriate in the present matter, as both personal and documentary evidence must be assessed in its totality by a PRRA officer. Additionally, the Officer outlined numerous credibility concerns with the Applicants' evidence, reinforcing the unsuitability of a directed verdict in the circumstances.

[22] The Applicants' assertion that there is sufficient evidence to address state protection, the viability of an IFA, or other aspects of a PRRA that the Officer did not explicitly address is for the new officer to consider.

[23] The Applicants' reliance on *Tennant* is misplaced. *Tennant* concerns whether the decision of this Court to substitute a decision and direct a remedy that the applicant was a Canadian citizen was a jurisdictional error. The Federal Court of Appeal found that the substituted decision was within the Court's jurisdiction, and therefore not appealable. The Court specifically remarked that directed verdicts "remain appropriate only in exceptional cases" (at para 90).

[24] Lastly, the factors of "concern for delay" and "the decision-maker's genuine opportunity to weigh in on the issue" do not favour the granting of a directed verdict. There is no undue delay

in this proceeding. This Court has declined to issue a directed verdict on judicial review of a third re-determination of a PRRA application (*Cekaj v Canada (Citizenship and Immigration)*, 2014 FC 661). Moreover, the Officer specifically did not have a genuine opportunity to weigh in on the issue of whether the PA faces a risk of persecution, as the Officer assessed the evidence in accordance with the wrong legal test.

(3) Conclusion

[25] I agree with the Respondent. A directed verdict is not appropriate in the circumstances.

[26] This Court's authority to issue directed verdicts arises from paragraph 18.1(3)(b) of the *Federal Courts Act*, RSC 1985, c F-7 (*Li* at para 36). The parties have correctly set out the general principles governing when the Court may order the extraordinary remedy of a directed verdict. My review of the jurisprudence turns on the facts and circumstances of each case, and in my view, the facts and circumstances in the present matter do not point the Court to only one reasonable outcome (*Canada (AG) v Allard*, 2018 FCA 85 at para 45; *Nosistel v Canada (AG)*, 2018 FC 618 at para 57 [*Nosistel*]).

[27] PRRA assessments "are fact-driven exercises that involve weighing evidence and which engage an officer's expertise in risk assessment" (*Yang v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 496 at para 14). The Court has been very reluctant to issue directed verdicts in cases involving factual determinations and weighing of evidence (*Nosistel* at para 56; *McIlvenna v Bank of Nova Scotia (Scotiabank)*, 2017 FC 699 at para 62; *Singh v Canada (Citizenship and Immigration)*, 2010 FC 757 at para 53; *Xin v Canada (Citizenship and*

Immigration), 2007 FC 1339 at para 6; *Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48 at para 18 [*Yansane*]). I see no reason to depart from this jurisprudence. This is especially so given that the Officer erroneously excluded potentially relevant evidence from its assessment, and weighed the Applicants' evidence through the lens of the incorrect legal test for risk of persecution. A new officer must consider the totality of evidence, assess its credibility and weight, and determine whether the Applicants have established their risk in Cameroon within the parameters of the correct legal tests.

[28] Moreover, there are several factors relevant to a determination of whether an individual is a Convention refugee or a person in need of protection that the Officer failed to assess, including state protection, the viability of an IFA, and the existence of a forward-looking risk. The Officer made no determination as to whether the Minor Applicant would be at risk of persecution from the PA's claim. While the Applicants submit that there is nothing in the record to prevent a positive PRRA decision and that there is enough evidence to address the aspects of the PRRA that the Officer did not explicitly address, it is not the role of the Court to weigh the evidence and to determine whether the Applicants meet the definition of Convention refugees or persons in need of protection.

[29] This aforementioned discussion is particularly relevant to the Applicants' reliance on the Officer's acceptance that the PA is bisexual to assert that there is no state protection or viable IFA available in Cameroon. On re-determination, it is entirely possible that a reasonable weighing of the evidence on record, including evidence that was erroneously excluded by the Officer, gives rise to a finding that the PA's bisexuality claim is not credibly established.

Furthermore, the evidence is not as straightforward as the Applicants suggest. The Officer's decision outlined numerous concerns with the Applicants' evidence, some of which directly relate to the credibility of the PA's sexual orientation. However, so as not to influence the new decision-maker, I will not delve into these issues. Suffice it to say that the circumstances of this matter are such that no particular result is inevitable.

[30] A re-determination of the Applicants' PRRA will necessarily involve the weighing of the totality of the evidence and the consideration of many factors that the Officer failed to analyse. Moreover, the Officer's acceptance of certain facts do not preclude an officer from arriving at a different conclusion on re-determination. This case involves factual and credibility determinations as well as weighing of evidence. Such an exercise must be done by a PRRA officer who has the necessary expertise in risk assessment, as Parliament intended. Accordingly, it would be inappropriate for this Court to issue a directed verdict that the Applicants are Convention refugees or persons in need of protection.

B. *Should the Court remit the matter to a different officer with the direction that the only remaining issue is whether the Applicants face a risk of persecution in Cameroon as persons similarly situated to the LGBTQ community based on the PA being a bisexual woman?*

(1) Applicants' Submissions

[31] In the alternative, the Applicants request an instruction from the Court, to the new officer on re-determination, that the only remaining issue is whether the Applicants face a risk of persecution in Cameroon as persons similarly situated to the LGBTQ community based on the PA being a bisexual woman. The new officer need not re-address the question of the PA's sexual

orientation, as the Officer accepted her bisexuality. No credibility findings were made on this issue, and there is no evidence that raises concerns of the reasonableness of the Officer's finding.

(2) Respondent's Submissions

[32] Although the Officer accepted that the PA is bisexual, this determination was made from the weighing of only some evidence. A new officer is best placed to consider this question, taking into consideration both improperly excluded evidence as well as any new evidence provided upon redetermination. There is often more than one reasonable way to interpret evidence (*Yansane* at paras 18, 22).

(3) Conclusion

[33] My remarks at paragraphs 27 to 30 are dispositive of this issue. It is not because the Officer accepted that the PA is bisexual that a new officer, in weighing the totality of the evidence and applying the facts to the law, will find that the PA's bisexuality has been credibly established. Contrary to the Applicants' assertions, the Officer outlined inconsistencies and omissions that raise doubts as to the credibility of the PA's claim. Accordingly, the appropriate course of action in the circumstances is to remit the matter to a different officer for re-determination.

V. Conclusion

[34] The parties agree that the Decision is unreasonable, as it is not justified in light of the legal constraints that bear on it (*Vavilov* at para 105). The Officer applied the incorrect legal test

for new evidence and the incorrect legal test for risk under section 96 of *IRPA*. Accordingly, the Decision should be quashed.

[35] The appropriate remedy in the circumstances is to remit the matter to a different officer for re-determination.

[36] Neither party proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-5892-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The matter is remitted to a different officer for re-determination.
2. There is no question for certification.
3. There is no order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5892-20
STYLE OF CAUSE:	TAMBI BENICE NKWO AND NALEAH-DAPHINE MESAME ALOBWEDE BY HER LITIGATION GUARDIAN TAMBI BENICE NKWO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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