

Date: 20091014

Docket: IMM-253-09

Citation: 2009 FC 998

Ottawa, Ontario, October 14, 2009

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

THOMAS VINCENT CRUZE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision (the Decision) of a Pre-Removal Risk Assessment Officer (the Officer) dated December 2, 2008, wherein the Officer rejected the Applicant's Pre-Removal Risk Assessment (PRRA) application.

I. Background

[2] The Applicant is a 37 year old citizen of Sri Lanka. The Applicant entered Canada in September 2005 and made a refugee claim. His refugee claim was denied in September 2006 and this Court dismissed his judicial review of that claim in November 2007. He submitted an application for a PRRA on May 20, 2008 and made submissions in support of that application. The PRRA decision was denied on December 2, 2008. He also made an application for permanent residence in Canada on humanitarian and compassionate grounds (H & C grounds), which was denied. The H & C application is the subject of a separate judicial review proceeding before this Court, although with the agreement of counsel both applications were argued together based on the same factual background. A separate judgment will issue with respect to the H & C application.

[3] The Applicant's PRRA was based on the alleged risk he would face as a homosexual man returning to Sri Lanka because of his sexual orientation and because of alleged threats made by his former partner's family. The Officer found that the Applicant had provided insufficient evidence that the Applicant is a homosexual, that the family wished to harm him, and that the Applicant has a viable Internal Flight Alternative (IFA) to Colombo. The PRRA Officer concluded that there was insufficient evidence to show that the Applicant faced more than a mere possibility of persecution in Sri Lanka and did not find it was more likely than not that the Applicant faced a risk of death or of cruel and unusual punishment or treatment, or a risk of torture in Sri Lanka.

[4] The Applicant states that he is a homosexual who was in a long-term secret relationship with a friend from College, Milroy. When their families found out about the relationship, Milroy's family locked him in the house and later Milroy committed suicide in a car crash. According to the Applicant, Milroy's family blamed him for the death of their son and has threatened his life. The Applicant fled first to Japan and then to Canada. The Applicant states there is no safe place for him in Sri Lanka as hatred for homosexuals is prevalent all over the country and that his hometown is close to Colombo and Kandy, two urban centers identified as possible IFA's.

[5] At his PRRA, the Applicant presented documents from Sri Lanka confirming Milroy's accident and death and letters of support from a Priest, Member of Provincial Council and his friend, Sujeewa.

II. Standard of Review

[6] Prior to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, a PRRA decision was assessed on a standard of reasonableness simpliciter (*Figurado v. Canada (Solicitor General)*, 2005 FC 347, [2005] 4 F.C.R. 387 and *Demirovic v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1284, [2005] F.C.J. No. 1560, 142 A.C.W.S. (3d) 831). It was also held that questions of fact were to be reviewed on a standard of patent unreasonableness, questions of mixed fact and law on a standard of reasonableness, and questions of law on a standard of correctness (*Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 437, 272 F.T.R. 62 at paragraph 19).

[7] Following *Dunsmuir*, above, the review of PRRA decisions should continue to be subject to deference by the Court and are reviewable on the newly articulated standard of reasonableness. As a result, this Court will only intervene to review a PRRA officer's decision if it does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at paragraph 47). For a decision to be reasonable there must be justification, transparency and intelligibility within the decision making process.

III. Issues

[8] The application raises three issues, namely:

- (a) Did the Officer err in law in finding that the Applicant was not homosexual and was not threatened by his ex-lover's family by failing to properly consider the Applicant's supporting documentation?
- (b) Did the Officer err in law in the finding that the Applicant had an internal flight alternative in Colombo or Kandy by ignoring and/or misunderstanding the objective documentary evidence?
- (c) Did the Officer err in law in finding that homosexuals did not face persecution in Sri Lanka?
 - A. *Did the Officer Err in Law in Finding That the Applicant Was Not Homosexual and Was Not Threatened by His Ex-Lover's Family by Failing to Properly Consider the Applicant's Supporting Documentation?*

[9] At his refugee hearing, the Refugee Protection Division (RPD) stated they did not believe that the Applicant was homosexual, that he had been in a relationship with Milroy or that Milroy committed suicide, as there was no corroborative evidence. In addition, the RPD found that the Applicant's evidence was not consistent and at times embellished and implausible. Subsequently the Applicant obtained evidence that purports to adequately address the RPD's credibility and other

concerns. This evidence was the post-mortem report of Milroy's death and letters from a Priest, Member of Provincial Council and his close friend Sujewa, all of which allegedly corroborated the fact that the Applicant was a homosexual man who had a same sex relationship with Milroy and the fact that Milroy died in a car accident.

[10] After reviewing the evidence, the Officer stated that the post-mortem material was reliable evidence that Milroy died of a car accident, but the suggestion that the accident was suicide was speculative. The Officer continued, stating that while he considered the two letters and the affidavit, he gave them little weight. The Officer noted that Sujewa is the Applicant's "best friend" and therefore not disinterested in the outcome, the letter from the Councillor was written at the Applicant's brother's request and restated much of the Applicant's claim, as did the letter from the Priest. The Officer stated that this evidence was not sufficient to address the RPD's credibility findings.

[11] The Applicant argues that the Officer's rejection of the supporting evidence was unreasonable. He cites *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 422, [2008] F.C.J. No. 562 for the position that it is an error of law to discount evidence solely because it contradicts prior conclusions. In *Elezi v. Canada (Minister of Citizenship and Immigration)*, above, Justice Trembley-Lamer found that it had been unreasonable for the PRRA Officer in that case to accord little probative value to the "new evidence" declarations as it discussed facts that the Board had already rejected for lacking credibility.

[12] In this matter, the Officer reviewed the three statements and found that the letter from his best friend Sujeewa provided no new evidence with respect to what was before the RPD. It is also clear that the Officer determined that his friend had a personal interest in the matter and as such accorded this evidence little weight, which the Officer was entitled to do under the circumstances (see *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, [2008] F.C.J. No. 1308 at paragraph 27).

[13] In addition, the Officer reviewed the letter from the provincial councillor and notes that the letter was produced at the request of the Applicant's brother to enable the Applicant to obtain his document to live in Canada. It is also clear from a review of the letter that the councillor did not have first hand knowledge of the Applicant nor does the letter directly refer to the sexual orientation of the Applicant.

[14] Finally, the Officer reviewed the letter from the Priest and considered the statements contained therein. Again, the letter is not a first hand account with respect to this issue and relies upon statements made to the Priest by family members.

[15] The Officer accorded these statements little weight and concluded that there was insufficient new evidence to overcome the finding of lack of credibility on the part of the Applicant by the Board.

[16] I find that the Officer did not reject this evidence solely as a result of the Boards prior determination (see *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1336, [2008] F.C.J. No. 1673). Rather, the Officer assessed whether the evidence was credible and concluded that it was not. In *Ferguson*, above, Justice Zinn at paragraph 25:

Documentary evidence may also be found to be unreliable because its author is not credible. Self-serving reports may fall into this category. In either case, the trier of fact may assign little or no weight to the evidence offered based on its reliability, and hold that the legal standard has not been met.

[17] When as here, the fact asserted is critical to the PRRA application, it was open to the Officer to require more evidence to satisfy the legal burden especially in light of the findings of the Board. As Justice Noël noted in *Zamanibakhsh v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1137, [2002] F.C.J. No. 1525 at paragraph 16:

Homosexuality is an integral part of a human being. In order to prove such a state, the applicant must present factual evidence that demonstrates such a way of being. The Applicant bears the onus of proof, and the CRDD found that he did not satisfy them.

[18] I find that the conclusion reached by the Officer falls within the range of reasonableness and that no error was made.

[19] Given my conclusion with respect to issue (a), there is no need to address issues (b) and (c) as they are both premised upon a determination that the Officer's conclusion with respect to the Applicant's sexual orientation was unreasonable.

[20] Neither party proposed a certified question and no question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-253-09

STYLE OF CAUSE: CRUZE
v.
MCI

PLACE OF HEARING: TORONTO

DATE OF HEARING: SEPTEMBER 23, 2009

**REASONS FOR JUDGEMENT
AND JUDGMENT BY:** JUSTICE NEAR

DATED: OCTOBER 14, 2009

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