

Federal Court



Cour fédérale

Date: 20110519

Docket: IMM-2492-10

Citation: 2011 FC 585

Ottawa, Ontario, May 19, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

DWAYNE BROWN

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated March 30, 2010, wherein the applicant was determined not to be a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

[2] The applicant requests that the decision of the Board be set aside and the claim remitted for redetermination by a different member of the Board. The applicant also requests costs for this judicial review.

Background

[3] Dwayne Brown (the applicant) was born on March 1, 1981 and is a citizen of Jamaica.

[4] The applicant identifies as a bisexual man. He lived a predominately straight life in Jamaica, hiding his sexual relationships with men.

[5] In February 2005, the applicant was photographed having sex with his male partner. Rumours about the incident spread in his community. Around August 2005, a man arrived at the applicant's home with a copy of the photograph. The man requested one million Jamaican dollars (JMD) or he would reveal the picture to the police and public. The applicant paid 50,000 JMD and agreed to pay the remainder two weeks later.

[6] The applicant fled to Canada later in August 2005 following this incident.

[7] Upon realizing that that applicant had left Jamaica, the man showed the photograph of the applicant to the police and public. The applicant's girlfriend in Jamaica was visited by the police on

several occasions and her home was vandalized. She closed the taxi business that she shared with the applicant and moved to live with her parents in another town.

[8] The applicant married a Canadian citizen in May 2006 and his wife submitted a spousal sponsorship application. The applicant's marriage broke down because, he states, he wanted to be honest about his sexual orientation as a bisexual.

[9] The applicant was arrested in November 2008 and detained until June 2009 for possession of cocaine for the purpose of trafficking. At this time, he states that he learned about the Canadian refugee process from other inmates.

[10] The applicant filed for refugee protection in July 2009.

Board's Decision

[11] The Board found that the applicant's four year delay in claiming refugee status was inconsistent with a person living in fear of persecution. The Board drew an adverse inference from the delay and found that it affected the credibility of the applicant's claim.

[12] The Board found that the applicant did not rebut the presumption of state protection. Jamaica is a democratic state which is attempting to combat police corruption and gang violence. The Board acknowledged that gays and lesbians face violence and discrimination in Jamaica, but found that the Prime Minister, although not willing to make homosexuality legal, has stated that Jamaica does not condone acts of violence or threats against person due to their sexual orientation.

[13] The Board found that the applicant did not approach the police at any time and had failed to provide clear and convincing evidence of Jamaica's inability to protect him.

Issues

[14] The applicant submitted the following issue for consideration:

Did the Board commit a reviewable error in light of the standard of review set out in such cases like *Dumsuir* and *Khosa*?

[15] The issues are as follows:

1. What is the appropriate standard of review?
2. Did the Board err in its state protection findings?
3. Did the Board err in its findings regarding delay in claiming refugee protection?
4. Should costs be awarded to the applicant?

Applicant's Written Submissions

[16] The applicant submits that the Board violated the principles of natural justice by stating that the applicant did not have to make submissions about state protection and then making findings on state protection in its decision.

[17] The applicant further submits that the Board erred in its state protection analysis. The Board accepted that the applicant was bisexual. The documentary evidence demonstrated that homosexuality is illegal in Jamaica and that the police persecute homosexuals. Yet, the Board found that the applicant had not rebutted the presumption of state protection as he had not approached the police for protection.

[18] Finally, the applicant submits that the Board erred in the finding that the delay in claiming refugee status showed a lack of subjective fear. The applicant presented reasonable explanations for the delay, including lack of knowledge about the refugee process and at no time did the Board state that it did not believe these explanations.

[19] The applicant submits that special reasons exist to award costs as the Board did not follow the established principles or common sense in reaching its conclusions.

Respondent's Written Submissions

[20] The respondent submits that there was no breach of natural justice as state protection was clearly an issue in the claim. The applicant understood this and submitted documentary and oral evidence about the inability of the police to protect him. The onus was on the applicant to present clear and convincing evidence to rebut the presumption of state protection, which he failed to do.

[21] Even if the Board did not make a finding on state protection, the respondent submits that the findings on delay are sufficient to dismiss the judicial review. The applicant's delay of four years in

claiming refugee protection belied his credibility. The Board weighed his explanations for delay but reasonably found that his conduct was inconsistent with a person fearing persecution in their country.

[22] The respondent submits that the applicant has not demonstrated special reasons for awarding costs.

Analysis and Decision

[23] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[24] Recent jurisprudence from this Court confirms that the applicable standard of review in determining whether an applicant has established a subjective fear of persecution is reasonableness (see *Cornejo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 261).

[25] Assessments of the adequacy of state protection raise questions of mixed fact and law and are also reviewable against a standard of reasonableness (see *Hinzman Re* 2007 FCA 171 at paragraph 38).

[26] In reviewing the Board's decision using a standard of reasonableness, this Court will not intervene unless the Board has come to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47).

[27] **Issue 2**

Did the Board err in its state protection findings?

The Board's state protection analysis contains several errors. First, during the oral hearing, the Board specifically told the applicant's counsel not to make submissions concerning state protection (see page 200 of the certified tribunal record):

COUNSEL: ... I am going to talk about state protection at this point.

MEMBER: You do not need to...I know it is a law against, so you do not need to deal with that...

COUNSEL: Okay, but you had asked me...okay, so do not deal with state protection?

MEMBER: Well, I think it all comes down to well foundedness of the fear, credibility, which is all to do with delay, it is to do with intentions, it is to do with whether or not he is bi-sexual, it is...you know, we know there is a law on the books in Jamaica...

Despite these assertions to counsel, the Board then found that state protection was a key issue in the applicant's claim.

[28] The respondent submits that the Board was simply acknowledging that there is a law against homosexuality in Jamaica, not that there was not available state protection, and, in addition, the applicant did present oral and documentary evidence regarding state protection.

[29] This Court, along with the Federal Court of Appeal, have held that where the Board indicates on what issues submissions should be made, it is a denial of natural justice to render a decision on issues other than those which it mentioned. This behaviour prevents an applicant from fully answering the case against him (see *Velauthar v Canada (Minister of Employment and Immigration)* (1992), 141 NR 239 and *Butt v Canada (Minister of Citizenship and Immigration)* (1998), 145 FTR 122, [1998] FCJ No. 325 (QL) (FCTD) at paragraphs 9 and 10).

[30] The Board made clear that it did not find state protection to be a central issue in the hearing and because of this, the applicant did not make full submissions regarding state protection. This was an error. The Board also erred in its analysis of state protection.

[31] The Board acknowledged that “the claimant was in two significant homosexual relationships in Jamaica.” The Board found that the applicant did not approach the Jamaican authorities for protection, but did not address the reasonableness of this decision given that homosexuality is illegal.

[32] Despite not approaching the police himself, the applicant had the opportunity to rebut the presumption of state protection with evidence of similarly situated individuals let down by the state protection arrangement in Jamaica (see *Ward v Canada (Minister of Employment and Immigration)*, [1993] 2 SCR 689, [1993] SCJ No. 74 (QL) at paragraph 50). The applicant presented extensive documentary evidence of gay and bisexual people persecuted by the police in Jamaica.

[33] The Board reviewed this evidence and itself recognized the violence faced by the lesbian, gay, bisexual and transgendered (LGBT) community in Jamaica. At paragraph 24 of its reasons, the Board stated:

With respect to treatment of homosexuals by society and government authorities, documentary evidence indicates that homosexual men and women in Jamaica face violence and discrimination on a daily basis. Members of the lesbian, gay, bisexual and transgendered community endure horrific assaults and have been beaten, cut burned, raped and shot, threatened with death and murdered on the basis of their sexual orientation. Persons who are suspected or found out to be homosexual are frequently driven from their homes and communities, sometimes violently, rendering them homeless and without support. They are also harmed by their own families, where relatives may pursue violence to uphold traditional gender and sexual roles.

[34] In addition, the Board's own Response to Information Request (RIR) *Research Directorate, Immigration and Refugee Board of Canada* "Jamaica: Treatment of homosexuals by society and government authorities; availability of support services (2004-2006)", which was before the Board, highlights the failure of state protection for the LGBT community. This RIR, found at page 91 of the certified tribunal record, states that:

...members of the police force shared homophobic attitudes common in the general community....

HRW [Human Rights Watch] found that victims of homophobic violence were often frightened of the police, who were known to "harass and attack" men they perceive to be gay....

Police in Jamaica stop vehicles carrying male passengers at night and use homophobic insults against them....

...police protection for gay men and lesbians was not forthcoming and that police "routinely" fail to investigate complaints brought to them....

Police were documented to be arresting, detaining, and blackmailing persons that they suspected to be homosexual....

According to AI [Amnesty International], police in Jamaica have in some cases tortured and mistreated LGBT victims of hate crimes....

HRW has documented cases of police attacking and inciting violence against men they perceive to be gay....

[35] Despite the Board's acceptance that the applicant engaged in homosexual relationships in Jamaica which are now public knowledge, and despite the documentary evidence before it concerning the intense violence and discrimination faced by the LGBT community in Jamaica, including by the Jamaican police force, the Board concluded that the applicant had not rebutted the issue of state protection.

[36] This conclusion cannot follow from the evidence before the Board and consequently does not fall within the range of possible, acceptable outcomes which are defensible on the facts and law (see *Dunsmuir* above, at paragraph 47).

[37] **Issue 3**

Did the Board err in its findings regarding delay in claiming refugee protection?

The respondent submits that, the state protection finding aside, it was open to the Board to find that the applicant's delay of over four years in claiming refugee protection belied his credibility and showed a lack of well founded fear.

[38] It is well settled that the Board may consider delay in assessing the credibility of a refugee claimant's subjective fear. However, delay is not usually determinative of a refugee claim (see *Nelson v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1167 at paragraph 15).

[39] The Board itself noted that while there was a lengthy delay in the applicant claiming refugee protection, it is "insufficient to cause his claim to fail."

[40] I, too, believe that the Board's rejection of the refugee claim cannot rest alone on the applicant's delay in seeking refugee protection.

[41] For the above reasons, the application for judicial review must be allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

[42] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

[43] **Issue 4**

Should costs be awarded to the applicant?

Under Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, costs are only to be awarded in immigration cases where "special reasons" exist. Special reasons may exist where one party acts in a manner that is unfair, oppressive, improper, or in bad faith, or, where there is conduct that unnecessarily or unreasonably prolongs the proceedings (see *Huot v Canada (Minister of Citizenship and Immigration)*, 2009 FC 917). This Court has held that the

“threshold for ‘special reasons’ within the meaning of Rule 22 is high” (see *Yadav v Canada (Minister of Citizenship and Immigration)*, 2010 FC 140 at paragraph 39).

[44] In this case, the applicant has failed to establish the type of behaviour which would qualify as special reasons. As such, costs will not be awarded.

[45] Finally, I am not prepared to declare that the applicant is a Convention refugee as that shall be the task of the Board.

JUDGMENT

[46] **IT IS ORDERED that:**

1. The application for judicial review is allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.
2. There shall be no order for costs.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions*Immigration and Refugee Protection Act, SC 2001, c 27*

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97.(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

108.(1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances: . . .

(e) the reasons for which the person sought refugee protection have ceased to exist.

. . .

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

108.(1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants : . . .

e) les raisons qui lui ont fait demander l'asile n'existent plus.

. . .

(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

FEDERAL COURT
SOLICITORS OF RECORD

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- and -
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**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

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