Federal Court  Cour fédérale

Date: 20141119

Docket: IMM-5640-13

Citation: 2014 FC 1094

Toronto, Ontario, November 19, 2014

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

RAPHAEL ELLER DE MELO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Raphael Eller De Melo, the Applicant, is a citizen of Brazil applying for judicial review of a decision of a senior immigration officer at Citizenship and Immigration Canada [CIC] who conducted a pre-removal risk assessment [PRRA] and found that he was not a person in need of protection according to the criteria specified in section 97 of the *Immigration and Refugee*

Protection Act (SC 2001, c 27) [*IRPA, Act*]. The application was commenced pursuant to section 72(1) of *IRPA*.

[2] The Applicant contends that CIC misapprehended the evidence before it in determining that Mr. De Melo was precluded from section 97 protection due to his failure to access state protection in Brazil. In the alternative, he argues that section 7 of the *Canadian Charter of Rights and Freedoms* [*Charter*] mandates CIC assess more than the risk to his life or the risk of cruel and unusual treatment or punishment that section 97 proscribes – it requires an analysis balancing his interests upon removal against that of Canadians.

[3] Having found CIC's decision on state protection to be a reasonable one, and for the reasons below, I find it unnecessary in this case to address the submissions on the precise parameters of section 7 as it applies to section 97.

II. Facts

[4] Mr. Eller De Melo is a homosexual man who fears being returned to his country due to the persecution he would face in Brazil as a consequence of his sexual orientation.

[5] Originally from Belo Horizonte, Brazil, the Applicant moved to the United States as a student when he was 20. He overstayed his visa, and in an effort to visit his mother and friends after four years, he returned to Brazil. He was unsuccessful in his attempt to return to the United States, as immigration officials caught him trying to re-enter the country using a fraudulent

passport. He eventually entered the United States from Mexico without authorization, and with the assistance of smuggling agents.

[6] While in the United States, he began working as an escort, and then a booker and manager for an escort agency called *La Bella Girls*. In August 2006, he was arrested for his involvement in the agency and pled guilty to the following offences before the Federal Court of the United States, district of Massachusetts, in June 2007: (i) criminal conspiracy; (ii) inducing travel in interstate commerce for prostitution; (iii) inducing illegal aliens to reside in the United States and (iv) illegal re-entry to the United States after deportation. After spending 14 months in jail, he was deported back to Brazil in October 2007.

[7] In 2009, Mr. Eller De Melo obtained a student visa to enter Canada. He did not disclose his criminal history in his visa application. On July 20, 2010, he applied for refugee protection. On June 18, 2012, the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] found that the Applicant was excluded from refugee protection under Article 1(F)(b) of the *Convention relating to the Status of Refugees* [Convention] for having committed a serious non-political crime. The Applicant challenged this decision in the Federal Court, but leave was denied. His two motions seeking re-consideration of the Order dismissing leave were also dismissed.

[8] The Applicant subsequently filed a PRRA on April 10, 2013. In its June 5, 2013 PRRA decision, CIC found that the Applicant would not be subject to risk of torture, risk to life or risk of cruel and unusual punishment if returned to Brazil because of his failure to establish a

personalized risk and rebut the presumption of state protection. While further evidence was filed by the Applicant on July 4, 2013 and July 27, 2013, CIC confirmed its decision in letters dated July 22, 2013 and July 31, 2013.

III. Decision

[9] CIC based its conclusions on the following analysis:

a. While CIC received letters from the Applicant's friends and family describing homophobic attitudes in Brazil and incidents of violence, none of them had witnessed any incidents or targeted attacks involving the Applicant firsthand, and no supplementary evidence such as a police report was provided. The support letters were found unreliable in establishing that the Applicant had suffered homophobic attacks in Brazil. The writers' fear that the Applicant would be victimized amounted to supposition.

b. While the Applicant cited an experience involving a violent robbery and attempted kidnapping in Brazil as evidence of his risk, there was little to demonstrate the criminals were motivated by homophobia and no objective or reliable evidence verifying the event was submitted.

c. While there is much progress to be made, Brazil is widely recognized for its openness to the LGBT community. High level politicians have come out against homophobia and the country recognizes civil unions of same sex-couples. The Applicant did not demonstrate reasonable attempts to obtain protection during his

time in Brazil, and could not provide clear and convincing evidence that state protection would not be forthcoming.

IV. Submissions of the Parties

[10] The Applicant contends that CIC did not properly assess all the risks captured by section 7 of the *Charter*, basing its decision entirely on the factors set out in section 97 of *IRPA*. He submits that since the PRRA is the vehicle through which section 7 is given effect in the removals process, pursuant to the Federal Court of Appeal's judgment in *Hernandez Febles v Canada (MCI)*, 2012 FCA 324 at para 69 [Febles FCA][1], all rights captured by section 7 (as opposed to merely the risk of torture, to life or to cruel and unusual treatment or punishment) must be assessed prior to the removal of refugee claimants who are excluded pursuant to Article 1(F)(b). The state protection findings in this case are not determinative because they were gauged relative to the risks laid out in section 97, and not to the full range of risks the Applicant was entitled to have assessed in accordance with section 7.

[11] According to subsection 172(4) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) [Regulations], CIC officers do not have the jurisdiction to consider factors outside of those enumerated in section 97 of *IRPA*. The Applicant argues that the provision should be declared inoperative pursuant to section 52 of the *Constitution Act, 1982* to the extent the regulation impedes an evaluation of all rights and interests protected by section 7 of the *Charter*.

[1] At the time of the hearing in this matter, the Supreme Court Judgment in the Febles Appeal had not been released. As discussed below, this Judgment considers the impact of both the FCA and SCC decisions.

[12] Second, by commenting on whether "specific persons" are pursuing the Applicant, CIC took an unduly restrictive approach to the requirement of personalization under section 97. A proper analysis, according to the Applicant, should have determined whether the nature and degree of risk was different than that faced by the population at large.

[13] Third, CIC's state protection findings are flawed, contends the Applicant - while there may be efforts underway to provide protection to homosexuals, this has not resulted in actual, effective protection. The evidence demonstrates that homophobic violence in Brazil has deteriorated in recent years. As the Supreme Court held in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, where state protection would not be "reasonably forthcoming", the failure to approach the state will not defeat a claim.

[14] Fourth, while the Applicant invoked the "compelling reasons" exception pursuant to s. 108(4) of the *Act*, the officer did not address whether, notwithstanding that there may not be a further prospective risk, the conduct faced by the Applicant in the past was so "appalling or atrocious" so as to give rise to compelling reasons for a grant of protection.

[15] The Respondent counters by submitting that state protection is determinative of the disposition of the application. Adequate state protection is presumed and deference is owed to this finding. The officer acknowledged that Brazil struggles with homophobic attitudes and violence, but weighed these elements against contrary evidence of protection, support services and Brazil's openness to the LGBT community. This Court has held that where there is a reasonable state protection finding, there is no need to address any other issue, *Rosas Maldonado*

v Canada (MCI), 2011 FC 1183 at para 19. The Applicant cannot rebut the presumption above merely on a subjective reluctance to engage the state.

[16] The Respondent further asserts that by referring to "specific persons" in its reasons, CIC was simply assessing whether the Applicant was being targeted, not making a finding that the perpetrators of the violence needed to be individually identified. In any event, the findings on state protection would be determinative of the application.

[17] The "compelling reasons" exception argument submitted by the Applicant fails because the exception only applies in the context of cessation of Convention refugee status, according to the Respondent. In other words, it applies when circumstances abroad have changed, but there are compelling reasons to allow the refugee claimant to stay in Canada. The Applicant in this case was excluded from refugee protection and therefore not eligible for such an assessment.

[18] Finally, the Respondent submits that section 7 protection would only be engaged if there was a finding of inadequate state protection in Brazil. Alternatively, an inquiry conducted under section 97 of *IRPA* is sufficient to fulfill the requirements of section 7 in this case. The case at bar can be distinguished from *Suresh v MCI*, 2002 SCC 1, because the broader section 7 interests engaged in that case were in the context of a right to non-refoulement under international law. As demonstrated by the Federal Court of Appeal in *Covarrubias v MCI*, 2006 FCA 365, where the applicant claimed a violation of section 7 on the basis of inadequate medical care in the country of origin, a section 7 assessment should not be divorced from principles of non-refoulement.

[19] The Respondent underlines that the decision in *Febles FCA* confirmed that the removal of persons facing risks to life or torture requires a balancing of personal and societal interests, and that nothing in *Febles FCA* expanded the duty to assess risk in a PRRA application beyond what is outlined in sections 96 and 97 of *IRPA*. Since the applicant in this case does not require surrogate international protection, the balancing mentioned above is not required.

V. Issues

[20] In my view, the substance of this matter turns on the following issues:

1. Was CIC unreasonable in rejecting the PRRA on the grounds of adequate state protection?

   No.

2. Does section 7 of the *Charter* require a more comprehensive analysis upon removal than that mandated by the text of section 97 of *IRPA*?

   This issue need not be decided in light of the reasonable finding on state protection.

VI. Analysis

A. *The Legislative Framework*

[21] The right of citizens and permanent residents to enter Canada is entrenched in section 6 of the *Charter*. For foreign nationals, the *Act* remains the primary source of immigration and

refugee law in Canada. To those fleeing persecution and danger in their country of origin, sections 96 and 97 of *IRPA* are of vital significance.

[22] Section 96 of *IRPA* incorporates the 1951 *Convention Relating to the Status of Refugees*, to which Canada is a signatory, into Canada's domestic legislation. Section 97 offers what is known in international parlance as "complimentary" or "subsidiary" protection in incorporating Canada's treaty obligations under the *Convention Against Torture* [CAT] and *International Covenant on Civil and Political Rights*: Martin Jones and Sasha Baglay, *Refugee Law* (2007), at p. 166. In other words, even though they are not Convention refugees, s. 97 can accord persons in need of protection refugee protection.

[23] At the heart of the refugee protection accorded to protected persons is the principle of non-refoulement, articulated in Article 33 of the Convention and section 115 of *IRPA*. In essence, non-refoulement seeks to prevent the direct or indirect removal of protected persons to a territory where they run a risk of being subjected to human rights violations: *Németh v Canada (Justice)*, 2010 SCC 56 at para 19.

[24] As noted above, Mr. De Melo was found not to be a Convention refugee by the RPD. The validity of that decision is not at issue in this judicial review. What is at issue is whether CIC was unreasonable in its conclusion that Mr. De Melo is not a person in need of protection as per the requirements of s. 97, and if not, whether such a finding is sufficient to engage removal without further analysis.

B. *Standard of Review*

[25] PRRA decisions are reviewed deferentially, on a standard of reasonableness. In deciding whether a particular risk assessment is reasonable, the Court looks to see whether there is "justification, transparency and intelligibility within the decision-making process" and that the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47. This means that I cannot interfere with a PRRA decision merely because I disagree with it, or would have come to a different conclusion: *Burton v Canada (Citizenship and Immigration)*, 2014 FC 910 at para 35.

C. *State Protection*

[26] The starting point in an analysis of state protection is that absent a breakdown of the state, nations are presumed capable of protecting their citizens. The more democratic the country is, the greater the onus on the applicant to seek out the protection of his or her home state: *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at paras 43-45.

[27] CIC acknowledged in its decision that although Brazil is a democratic country, its "…government has not been perfect in curbing homophobic violence and discrimination in the population." Violent crimes have been committed against sexual minorities and discriminatory attitudes continue among some members of the public, police, judiciary and military. However, as also noted by the officer and found in the documentary evidence on record, it is a country widely recognized for its openness to the LGBT community. Its largest city, San Paulo, holds the world's largest pride parade; unions of same-sex couples are recognized and high level

politicians, including a former President, have denounced homophobia; a "Brazil without Homophobia Program" was created to provide legal, psychological and social services to sexual minorities; and security projects such as "System of Goals and Results Tracking", "Pacifying Police Units", "Stay Alive" and "Pact for Life", have been implemented to curb the criminal violence that plagues the country.

[28] It is clear from the record that there is evidence for and against the proposition that Brazil adequately protects its homosexual citizens. As noted above, it is CIC's role to consider all of this information, and deference must be accorded to the decision-maker if the conclusion is within a range of reasonable options. The officer, in coming to a conclusion, is not required to address every aspect of evidence that contradicts the findings in the decision: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at para 16.

[29] The reasons and record in this case provide a sufficient basis for the conclusion that state protection would be forthcoming to the Applicant. This Court recently came to a similar conclusion regarding Brazil's state protection apparatus in *Aggi de Oliveira v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 488. It is trite law that the test for state protection is one of adequacy, not perfection: *The Minister of Citizenship and Immigration v Flores Carillo*, 2008 FCA 94.

[30] The officer noted that there was no evidence that the Applicant made reasonable efforts to seek state protection in this case. Although Mr. De Melo suffered an unfortunate incident of

robbery during his time in Brazil, the officer found "there is little to demonstrate that the criminals were likely motivated by homophobia. I also note no objective, or more reliable, evidence in support of this event on file." Furthermore, the Applicant filed letters from friends and family in support of his contention that he faced credible death threats and harassment, but there was no objective evidence before the decision maker to indicate he had gone to the authorities to address these issues. The officer's conclusions are bolstered by the evidence that in 2004, Mr. De Melo voluntarily left the United States to return to Brazil, and that he lived in Brazil for two years (October 2007 to August 2009) where he found employment as an English teacher, and went to college. The fact that he was not a victim of homophobic attacks during this period also assisted the officer in his decision, which this Court finds reasonable, in light of all the evidence.

D. *The Impact of s. 7 of the Charter on s. 97 of IRPA*

[31] The Supreme Court of Canada in *Suresh* was called on to decide whether the deportation of a Convention refugee to potential torture would violate s. 7 of the *Charter*. It held that determining whether such a deprivation was in accordance with the principles of fundamental justice required a balancing approach:

> 45. The principles of fundamental justice are to be found in "the basic tenets of our legal system": Burns, supra, at para. 70. "They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system": Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at p. 503. The relevant principles of fundamental justice are determined by a contextual approach that "takes into account the nature of the decision to be made": Kindler, supra, at p. 848, per McLachlin J. (as she then was). The approach is essentially one of balancing. As we said in Burns, "[i]t is inherent in the . . . balancing process that the outcome may well vary from case to case depending on the mix of

> contextual factors put into the balance" (para. 65). Deportation to torture, for example, requires us to consider a variety of factors, including the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country's security, and the threat of terrorism to Canada. In contexts in which the most significant considerations are general ones, it is likely that the balance will be struck the same way in most cases. It would be impossible to say in advance, however, that the balance will necessarily be struck the same way in every case.

[32] Mr. De Melo argues that s. 7 requires a similar approach to balancing to be conducted in his case. In other words, his interests in staying in the country would have to be balanced against the interests of Canadians in his removal.

[33] To the extent the Applicant asserts that s. 7 of the *Charter* requires a CIC officer to balance the risks faced by Mr. De Melo and the interests of Canadians, I disagree. After the hearing in the case at bar, the Supreme Court of Canada released a judgement dismissing Mr. Febles' Appeal in *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 [*Febles SCC*]. The claimant in *Febles* was a rehabilitated Cuban citizen who had been excluded under Article 1(F)(b) for serious criminality, who sought to have his rehabilitation taken into account by the RPD.

[34] Chief Justice McLachlin, for the majority in *Febles SCC*, makes it clear that balancing upon removal occurs once the risk to the applicant has been established:

> [10] Finally, even where a refugee protection claim is rejected by application of s. 98 and a removal order is issued, a claimant may still apply to the Minister for protection against a removal order. In determining whether to stay the removal order, the Minister must balance any danger to the public in Canada against the risk that a claimant would face death, torture or cruel and unusual treatment or punishment if removed from Canada to the

> place designated in the removal order (ss. 97, 112, 113 (d)(i) and 114(1) (b) of the IRPA).

[35] The Respondent contends that the determination of whether such balancing is required is unnecessary in this case because a finding of state protection is determinative of the matter. I am inclined to agree.

[36] Refugee protection exists as surrogate international protection, not a means of immigration. Justice LaForest elaborated on this notion of surrogacy in the seminal case of *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at p. 709:

> International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection; see The Law of Refugee Status (1991), at p. 135.

[37] Although *Ward* was argued under what is now s. 96 of *IRPA*, these principles regarding state protection apply in equal force to those applying under s. 97, and I see nothing in either the *Febles SCC* or *Febles FCA* judgements which alters the role state protection plays in a refugee and person in need of protection determinations.

[38] If the Applicant's argument is taken to its logical conclusion – that s.7 requires a balancing of interests prior to the removal of an applicant, even in the face of a reasonable finding on state protection – this would require that CIC engage in such an analysis no matter

how democratic and developed the claimant's country of origin. It would essentially create two channels of immigration: one utilizing the statutory methodology of *IRPA* and the other based on a CIC officer's PRRA balancing analysis upon removal. It would, without legislative guidance, dilute surrogacy's place in the international framework of refugee protection.

[39] Moreover, it does not follow, as the Applicant argues, that a reasonable finding of state protection would have precluded granting refugee status to the Applicant under s. 96 (were it not for the application of Article 1(F)(b) in this case), a standard based on a "serious possibility" of persecution, but remain inoperative under s. 97, which operates on a more onerous standard of "balance of probabilities": *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 120; *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1.

[40] It is not necessary in this case to make a determination of whether the protections afforded to foreign nationals under s.7 upon removal are broader than those encompassed by the text of s. 97. This may, in certain circumstances and under certain factual scenarios, indeed be the case. However, as in this case, when a reasonable finding of state protection has been made, the removal of the applicant does not result in violation of life, liberty or security of the person. As Chief Justice McLachlin noted in *Medovarski v Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51:

> 46 The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada: Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711, at p. 733. Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the Canadian Charter of Rights and Freedoms .

E. *Certification*

[41] The Applicant proposed four questions for certification:

(1) Does section 97(1)(b) of the *Immigration and Refugee Protection Act* require a claimant to establish that she or he is currently being sought by specific individuals or groups in order to qualify as a person in need of protection?

(2) Does the requirement to address relevant evidence that contradicts the decision-maker's conclusions, as set out in *Cepeda-Gutierrez v Canada (MCI)*, (1998) 157 FTR 35, apply to objective evidence on conditions in the country in question?

(3) Is section 172(4) of the *Immigration and Refugee Protection Regulations* inconsistent with the requirement to ensure that PRRA applicants are not removed to a country where their section 7-protected rights may be in jeopardy? If so, what is the appropriate remedy?

(4) Is a section 97 analysis sufficient to ensure respect of section 7 rights? (This question was proposed orally at the hearing.).

[42] Based on the bulk of the oral and written submissions from counsel to this Court, it is clear that the substance of the case was built on arguments addressing the latter two questions. The Court is not of the view that the first two questions need to be certified because they are not dispositive of the appeal.

[43] In my view, the third question is actually a subset of the fourth, in that if s. 97 is exhaustive of the obligations imposed by s. 7, section 172(4)(b) of the *Regulations* (which mandates a rejection of an application if the elements of s. 97 have not been met) would pose no inconsistency with *IRPA* or the *Charter*. However, as I illustrate in the reasons below, I do not see the facts of this case warranting the certification of these questions.

[44] The Federal Court of Appeal in *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, noted that the test for certification requires that the question:

> (i) be dispositive of the appeal and;
>
> (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance.

[45] I exercise my discretion in declining to certify questions #3 and #4 in this judicial review because, in my view, an answer as to the precise scope of s.7 relative to s. 97 would not meet the first branch of the test for certification – it is not dispositive of this appeal. Since I have held CIC's finding on state protection in Brazil to be a reasonable one, and for the reasons I have already canvassed relating to the principles of surrogate protection and non-refoulement, Mr. De Melo is not entitled to further protection from removal. Consequently, an analysis of the precise scope of s. 7 as it applies to s. 97 would be conducted in a factual vacuum, a circumstance generally inconducive to a proper analysis of the issue: *Prophète v Canada (Citizenship and Immigration)*, 2009 FCA 31, at paras 8-9.

VII. Conclusion

[46] Counsel for the Applicant has ably and diligently raised his concerns regarding Brazil's ability to protect his client. While this Court acknowledges that the situation there is far from ideal and there remains significant progress to be made, it does not find CIC's conclusion, that adequate state protection is available to the Applicant, to be an unreasonable one. As a consequence, it is unnecessary to delve into whether s. 7 imposes additional requirements pertaining to the assessment of risk under s. 97 than what has been recognized thus far in the jurisprudence.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no question will be certified in this matter.

"Alan Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5640-13
STYLE OF CAUSE:	RAPHAEL ELLER DE MELO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 30, 2014
JUDGMENT AND REASONS:	DINER J.
DATED:	NOVEMBER 19, 2014

APPEARANCES:

Jared Will	FOR THE APPLICANT
Martin Anderson Leila Jawando	FOR THE RESPONDENT

SOLICITORS OF RECORD:

The Law Offices of Jared Will Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT