Federal Court  Cour fédérale

Date: 20151009

Docket: IMM-8290-14

Citation: 2015 FC 1153

Ottawa, Ontario, October 9, 2015

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

EMAL WAFA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review, brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], concerns the decision of the respondent Minister's Delegate [the Delegate], wherein it was determined that the applicant constitutes a danger to the public in Canada, pursuant to paragraph 115(2)(a) of the IRPA.

[2] The application is granted for the reasons that follow.

I. Background

[3] The applicant is an unmarried male citizen of Afghanistan, born in Kabul on October 6, 1981. He came to Canada on February 14, 1995 with his elder brother and joined his mother and sister. The applicant and his family received Convention refugee status on May 10, 1995.

[4] Between August 14, 2001 and March 4, 2013, the applicant was convicted for various offences of increasing seriousness. The convictions are not in dispute.

[5] In determining that the applicant is a danger to the public in Canada, the Delegate focused on the following:

A. convictions arising from December 1, 2010 relating to the possession of a schedule I substance for the purposes of trafficking, contrary to section 5(2) of the *Controlled Drugs and Substances Act* for which the applicant received a sentence of seven months [the 2010 Convictions]; and

B. convictions arising from March 4, 2013 which related to (1) Trafficking in a schedule 1 substance contrary to the *Controlled Drugs and Substances Act*, (2) Possession for the purpose of trafficking a schedule 1 substance, namely crack cocaine, (3) Possession of a schedule 1 substance, namely heroin, (4) Trafficking a schedule 1 substance, namely crack cocaine, (5) Possession for the purposes of trafficking a schedule 1 substance, namely crack cocaine, and (6) failure to comply with recognizance [the 2013 Convictions]. The applicant received a sentence of eighteen months for the first three offences served concurrently, twelve months for the fourth offence served consecutive to

the first count and twelve months of imprisonment for the fifth and sixth count to be served concurrently to the fourth count.

[6] In November, 2011 the applicant's permanent residence application was refused based on criminal inadmissibility, and a deportation order was issued in August, 2013. On completion of his criminal sentence in October, 2014 the applicant was transferred to the custody of the Canadian Border Services Agency [CBSA] who has detained him on the grounds that he is a danger to the public and will not appear for removal.

[7] In the process leading up to the CBSA seeking an opinion from the Minister under paragraph 115(2)(a) of the IRPA the applicant disclosed that he is bisexual. Although having hidden his sexual orientation he reports having engaged in sexual relationships with other men and being caught on one occasion with another man by a family member. As a result of being caught, news of his sexual orientation has spread to extremist family members in Afghanistan who the applicant fears will kill him.

[8] In the Request for Minister's Opinion, the Citizenship and Immigration Canada [CIC] analyst [the Analyst] notes the applicant's declaration of sexual orientation and indicates that the declaration may be viewed as both opportunistic and inconsistent. In response to this statement the applicant specifically requested the Delegate conduct an interview with the applicant if there are further concerns regarding the applicant's sexual orientation.

[9] Currently, the applicant is in a relationship with a female Canadian citizen, with whom he has a four-year old son. The son is in the custody of his mother.

II. Decision Under Review

[10] The Delegate notes that the decision is being prepared pursuant to paragraph 115(2)(a) of the IRPA, which incorporates article 33(2) of the *United Nations Convention Relating to the Status of Refugees*, creating an exception to the general protection provided to convention refugees in Canadian law. The Delegate then sets out the applicant's criminal history and concludes, based on the 2010 and 2013 Convictions, that the applicant is inadmissible for serious criminality pursuant to paragraph 36(1)(a) of the IRPA.

[11] The Delegate concludes on a balance of probabilities that the applicant represents a present and future danger to the Canadian public and his presence in Canada poses an unacceptable risk due to (1) the applicant's criminal activities, which were serious and dangerous to the public; and (2) the absence of evidence of rehabilitation. In reaching this conclusion the Delegate relies on Justice François Lemieux's decision in *La v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 476 at para 17, 36 Imm LR (3d) 64 (TD) for the meaning of "danger to the public" under paragraph 115(2)(a) of the IRPA. The Delegate concludes that the applicant's most recent offences were extremely serious and demonstrate an escalation from petty theft and break and enter convictions to drug trafficking offences involving large sums of illicit substances of an addictive nature, posing a danger to the public. The Delegate notes that despite the applicant's genuine desire for change, the applicant failed to bring evidence demonstrating his rehabilitation. As a result the Delegate concludes that there is sufficient

evidence to formulate the opinion that the applicant is a likely re-offender, whose presence in Canada poses an unacceptable risk to the public.

[12] Having concluded that the applicant is a danger the Delegate undertook a risk assessment pursuant to paragraph 115(2)(a) of the IRPA based on the process articulated in *Ragupathy v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151 at paras 18-19, 350 NR 137, assessing both documentary evidence related to Afghanistan and the applicant's personal circumstances. On the issue of the applicant's sexuality, the Delegate did not dispute the applicant's statement that he is bisexual, but attributes little weight to the applicant's evidence regarding prior same-sex relationships, in particular the applicant's evidence where he describes being caught with another male by a cousin. The Delegate takes issue with this evidence on the basis that the applicant failed to bring objective supporting evidence demonstrating that he engaged in same-sex relations. Having failed to demonstrate he has previously engaged in a same-sex relationship, the Delegate concludes, on a balance of probabilities, that the applicant's removal to Kabul would not subject him to a personal risk to life, liberty or security of the person.

[13] In addressing Humanitarian and Compassionate [H&C] considerations, the Delegate finds that the applicant did not demonstrate a degree of establishment in Canada, either social or economic that would cause him disproportionate hardship if removed. Furthermore, while the applicant's removal will create long-term or even permanent separation from his family, separation will not cause the applicant or his family hardship that is disproportionate or unusual and undeserved. The Delegate concludes that the need to protect Canadian society from the

danger the applicant poses outweighs the H&C factors and possible risks that arise from the applicant's removal to Afghanistan.

III. Issues

[14] I have framed the issues raised in this application as follows:

1. Did the Delegate unreasonably conclude that the applicant constituted a danger to the Canadian public;

2. Did the Delegate err in not conducting an interview to put credibility concerns to the applicant;

3. Did the Delegate reasonably determine that the applicant would not be at risk if returned to Afghanistan; and

4. Did the Delegate reasonably find that H&C considerations did not weigh in favour of the applicant remaining in Canada?

[15] After carefully considering the documents, authorities and the oral and written submissions of the parties I need only deal with the third issue, as I am of the opinion that the Delegate's risk assessment as it relates to the applicant's sexuality was unreasonable.

IV. Standard of Review

[16] Issue 3 calls into question the reasonableness of the findings and conclusion of the Delegate. It is well-established within the jurisprudence of this Court that a delegate's risk assessment, which engages questions of fact and mixed fact and law, is to be reviewed on a reasonableness standard (*Alkhalil v Canada (Minister of Citizenship and Immigration)*, 2011 FC 976 at para 16, 395 FTR 76 and *Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153 at para 32, 292 DLR (4th) 463).

[17] Where conducting a review on a reasonableness standard, the analysis will address "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether 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] 1 SCR 190 at para 47).

V. Positions of the Parties and Analysis

A. *Applicant's Position*

[18] The applicant argues that the Delegate conducted an unreasonable risk assessment related to the applicant's sexual orientation. First the applicant argues that the Delegate imposed unreasonable evidentiary demands on the applicant in the form of corroborative evidence of previous same-sex partners. Secondly, the applicant argues that the delegate repeatedly conflated sexual orientation with the act of having sex with someone of the same gender. The Delegate did

not recognize that same-sex attraction can be expressed in a multitude of ways and is not limited to sexual acts. In effect the applicant argues that the Delegate's line of reasoning was that so long as the applicant did not engage in same-sex relations he would not be at risk of persecution in Afghanistan, a line of reasoning, the applicant submits, that is inconsistent with the jurisprudence of this Court.

B. *Respondent's Position*

[19] The respondent argues that the Delegate's risk assessment was based on the applicant's own evidence. Despite self-identifying as a bisexual, there was insufficient evidence for the Delegate to conclude that the applicant had conducted himself as a bisexual male. In addition there was no assertion of an intention to engage in same-sex relations and the evidence before the Delegate was that the applicant intended to marry the mother of his child upon release from jail and parent his son. In effect there had been no outward expression of bisexuality and thus the applicant would not need to suppress his asserted identity. The applicant had conducted himself in Canada as a heterosexual male and there was no reason to find that he would conduct himself differently in Afghanistan.

C. *Analysis*

[20] The Delegate states at page 22 of the Certified Tribunal Record [CTR] that "Mr. Wafa may well be bisexual, and I do not dispute that fact". The Delegate at page 23 of the CTR also states "I accept that an individual may identify as bisexual, and therefore I do not question Mr. Wafa's statements regarding his sexual orientation, and I do not ask him to prove his feelings".

In effect the Delegate accepts the applicant's evidence as it relates to his sexual orientation. The Delegate then proceeds to give little weight to the applicant's evidence of prior same-sex relationships on the basis that there is a lack of objective supporting evidence. The Delegate also concludes that the applicant's evidence relating to having been caught with a same-sex partner by a family member "has been concocted by Mr. Wafa to bolster his risk submissions" (CTR at page 23).

[21] Having concluded that the applicant had failed to demonstrate prior same-sex relations the Delegate finds that the applicant will not be subjected to the risks identified in section 115 of the IRPA and section 7 of the *Charter* based on sexual orientation. Essentially the Delegate has concluded that the central claim to risk for bisexual individuals in Afghanistan is prior sexual relations with other men, not sexual orientation. The reasoning underpinning this conclusion and the conclusion itself are, in my opinion fundamentally flawed and undermine the intelligibility of the decision.

[22] It may well have been within the range of reasonable acceptable outcomes for the Delegate to have reached a different conclusion on the applicant's claim of bisexuality based on the insufficiency of the applicant's evidence (*Ferguson v Canada (Minister of Citizenship and Immigration*), 2008 FC 1067 at paras 32, 34, 74 Imm LR (3d) 306; *II v Canada (Minister of Citizenship and Immigration)*, 2009 FC 892 at paras 18-22, 24), but having accepted the applicant's evidence of his sexuality, including his sworn statements, I am of the opinion that the Delegate was obligated to conduct the risk assessment on that basis. Instead the Delegate has conducted a risk assessment on the basis that the applicant's sexuality would not be displayed or

discovered based on his past behaviour. This approach is not consistent with the jurisprudence of this Court and fails to consider the applicant's evidence that having come out to his family he no longer has anything to hide (*Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282 at para 29, 37 Imm LR (3d) 150).

[23] In the context of claim for convention refugee status, Justice Leonard Mandamin addressed the propriety of expecting an individual to practise discretion with respect to their sexual orientation in *Okoli v Canada (Minister of Citizenship and Immigration)*, 2009 FC 332, 79 Imm LR (3d) 253 where he states at para 36:

> [36] The board member found that the Applicant did not present sufficient credible evidence that he would be personally targeted by the police or the public in Nigeria based on his sexuality. Although he noted that the British-Danish Fact Finding Mission Report stated that homosexuals in large cities in Nigeria have a well-founded fear from the person's local community and society at large, he preferred the statement in the Report that homosexuals in larger cities may not have reason to fear persecution as long as they do not present themselves as homosexuals in public. The board member stated: "**There was no evidence to suggest that he [the Applicant] would have to remain in hiding, should he live there, although, as with respect to certain elements of his life in Canada, he would possibly have to practice discretion with respect to his sexual orientation in Nigeria." The Federal Court has repeatedly found such findings perverse as they require an individual to repress an immutable characteristic** (*Sadeghi-Pari v. Canada (M.C.I.)*, 2004 FC 282, para. 29). [Emphasis added]

[24] In *AB v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1332, 381 FTR 312, Justice Mandamin was considering the decision of a Pre-Removal Risk Assessment Officer and similarly states:

> [24] The Officer was required to analyse whether the Applicant, as he is within his personal context, would face a risk of torture,

> risk to life, or risk of cruel and unusual treatment or punishment. The Applicant's history suggests that the Applicant has lived his life being openly gay, that is, in the conventional sense of being open about his sexual orientation. In conducting a risk analysis based on the assumption that the Applicant would not be openly gay in this manner in Guyana, the Officer made an error in his analysis. In conducting the risk assessment, the Officer was not required to dictate how the Applicant should conduct himself in the future. Nor was it the Officer's place to speculate that the Applicant would choose wisely to be discreet. What was relevant was the Applicant's personal risk as an openly homosexual man.
>
> [25] There may or may not have been enough evidence for the Officer to conclude that the Applicant would have faced cruel and unusual treatment as a sexual minority in Guyana. Because the Officer based his analysis only on the treatment faced by transvestites/commercial sex workers and by homosexual persons who were discreet about their sexual orientation, the Officer failed to examine whether the applicant himself, as an openly homosexual man does not fall into either of those categories, would face such a risk.

[25] The Delegate in this case failed to examine whether the applicant himself, a bisexual male who had recently come out to his family would be at risk in Afghanistan (*CCF v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1141 at paras 57-58, 419 FTR 42). The result was an incomplete and therefore unreasonable risk assessment. An unreasonable risk assessment undermines the reasonableness of the decision as a whole. The risk assessment is a necessary step in the process articulated by the Federal Court of Appeal in *Ragupathy* at paras 17-19 that leads to the balancing of the risks inherent in removal and other humanitarian and compassionate circumstances against the magnitude of the danger to the public if the applicant remains in Canada in order to determine if removal from Canada would so shock the conscience as to breach the applicant's rights under section 7 of the *Charter*.

[26] The parties did not identify a question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted and the matter is returned for redetermination by a different Ministerial Delegate. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8290-14
STYLE OF CAUSE:	EMAL WAFA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 15, 2015
JUDGMENT AND REASONS:	GLEESON J.
DATED:	OCTOBER 9, 2015

APPEARANCES:

Swathi Sekhar	FOR THE APPLICANT
Kristina Dragaitis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Swathi Visalakshi Sekhar Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT