

Federal Court



Cour fédérale

Date: 20110323

Docket: IMM-4283-10

Citation: 2011 FC 363

Toronto, Ontario, March 23, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

LESLIE KERVIN WARNER

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Only one of the issues raised requires the Court's attention: was the decision rejecting Mr. Warner's claim for refugee protection reasonable? I find that it was not and therefore allow this application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board.

[2] Mr. Warner is homosexual. He is a citizen of both Trinidad and Tobago and Saint Vincent and the Grenadines. His claim for protection was based on his fear of persecution on the grounds of his sexual orientation.

[3] The Board accepted his identity and sexual orientation and made no negative credibility findings; his evidence of the treatment to which he was subjected was accepted. However, the Board concluded that Mr. Warner had not satisfied the burden of establishing a serious possibility of persecution on a Convention ground or that he would personally be subjected to a danger of torture or a risk to life or of cruel and unusual treatment or punishment, and that accordingly he did not fall within s. 96 or s. 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[4] The Board properly held that Mr. Warner was required to establish his claim vis-à-vis both of his countries of nationality. It also noted that refugee protection is “forward looking” and that “in order for past persecution to establish a valid basis for a prospective fear of persecution, there must be sufficient evidence to establish continuity of risk.” The Board did not consider whether the treatment he received over the previous years would continue in his countries of nationality; it simply found that the treatment did not amount to persecution.

[5] The respondent at paragraph 8 of his written memorandum captures the Board’s critical finding and summarizes it as follows: “The Board specifically considered the Applicant’s testimony about his own and his partner’s experience ... and concluded that the harassment experienced by both men was not severe enough that it amounted to persecution.”

[6] The incidents about which Mr. Warner testified involved both countries of nationality and many locations within them, as he and his partner moved in an effort to avoid further incidents.

These incidents of “harassment,” as the Board characterized them, included the following:

- (i) In 1993, Mr. Warner was spat upon and his van was vandalized. The words “homosexuals must die” were written on the van and its windows were smashed. His driver subsequently ran the van into a wall and called to say he would not work for a homosexual. When Mr. Warner went to pick up his van, he was beaten by a group of young men.
- (ii) In December 1999, while Mr. Warner was on the beach with a male friend, they were accosted by a group of young men who told them that gay men should not be allowed and that they must go away or die. When they refused to leave, they were beaten. When they complained to the police, they were told to leave and told that they should have been shot because they were “battymen” (a derogatory term for homosexuals). Mr. Warner’s friend later died; his death was caused in part by the injuries he sustained during this beating.
- (iii) In October 2001, the partner of one of Mr. Warner’s female friends, calling him a “battyman,” attacked Mr. Warner with a knife, cut him on his face, and threatened to kill him.
- (iv) In 2005, soon after Mr. Warner began living with his partner, Mr. Lance Nicholls, people began writing “homosexuals must die” on their house. As well, their house was broken into and vandalized.
- (v) Their home was often bombarded with stones at night.

(vi) In December 2006, after finishing work as a security officer, Mr. Warner was beaten by five men who told him they did not want homosexuals in town and that they would kill all “bullermen” (another derogatory term for homosexuals). The applicant was left injured on the ground, was taken to his home by a Good Samaritan, and subsequently suffered a mild stroke as a result of the injuries he sustained.

(vii) In March 2007 Mr. Warner, Mr. Nicholls, and a friend were beaten with sticks by a group of men who again called them homophobic names. Mr. Nicholls was hospitalized for 10 days.

(viii) In May 2007 two men ran down Mr. Nicholls with their car. When Mr. Warner went to help him the assailants rounded up more people who followed them to their house and bombarded their house with bottles and stones for approximately thirty minutes. The police were called but they said they had “no transport,” that the applicant must be a homosexual, and that he must get out of the community.

(ix) In June 2007, Mr. Warner and Mr. Nicholls were physically attacked by a group of four young men.

(x) In early 2008, after moving, the house Mr. Warner shared with Mr. Nicholls was stoned.

(xi) In June 2008 their home was firebombed. Again, the police were called but no one ever came to investigate or take action.

(xii) Finally, on June 12, 2008, Mr. Warner, Mr. Nicholls, and the applicant’s son were coming home from dinner when individuals tried to run them off the

road, began to stone them, and shot at them. It was after this final incident that Mr. Warner and Mr. Nicholls decided they had to leave Saint Vincent and Trinidad and Tobago.

(xiii) Mr. Nicholls continues to live in Trinidad and Tobago. Mr. Warner sends him money so he can stay elsewhere than in the home they shared because people have been trying to break into the home and have been bombarding it with stones.

[7] Repeated physical violence directed against someone because of his sexual orientation can amount to persecution. The meaning of “persecution” is significantly broader than envisioned by the Board. In *Rajudeen v Canada (Minister of Employment and Immigration)* (1984), 55 NR 129 (FCA), the Federal Court of Appeal considered a definition of “persecute” as “[t]o harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently.” This definition has been accepted recently by Justice Kelen in *Sefa v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1190, at para. 25, by Justice Pinar in *Jeyaraj v Canada (Minister of Citizenship and Immigration)*, 2009 FC 88, at para. 16, and by myself in *AB v Canada (Minister of Citizenship and Immigration)*, 2009 FC 640, at para. 27. In *AB*, at paras. 28-29 I noted other relevant cases on this issue:

Justice Mosley of this Court more recently reviewed the jurisprudence on the meaning of "persecution" in *Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 316, 2004 FC 282, and summarized it at para. 29 as follows:

The meaning of persecution, as set out in the seminal decisions of *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 and *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, is generally defined as the serious interference with a basic human right.

It has been held that harassment and discrimination may amount to persecution. In *Sagharichi v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 796 (F.C.A.), Justice Marceau wrote:

It is true that the dividing line between persecution and discrimination or harassment is difficult to establish, the more so since, in the refugee law context, it has been found that discrimination may very well be seen as amounting to persecution. It is true also that the identification of persecution behind incidents of discrimination or harassment is not purely a question of fact but a mixed question of law and fact, legal concepts being involved.

The Court of Appeal did indicate, however, that discrimination will only amount to persecution when it is "serious or systematic enough to be characterized as persecution": See also *Ramirez v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1888, 88 F.T.R. 208 at para 8.

[8] Any reasonable assessment of the evidence of Mr. Warner leads to a finding that he was subject to many acts which meet and go far beyond the criteria of cruelty and annoyance. Further, the violence against him and his partner was serious and systemic; the same pattern of homophobic violence was repeated again and again despite relocating to different parts of Saint Vincent and Trinidad and Tobago. It was only after no less than twelve incidents of very serious physical violence over a period of fifteen years – in addition to pervasive societal discrimination – that Mr. Warner fled his countries of citizenship.

[9] If one accepts that the Board's decision is reasonable, then, as stated by the applicant at paragraph 2 of his Reply Memorandum, one must subscribe to the view that:

... harassment and/or discrimination [not amounting to persecution] includes beating with sticks, being run down by a car, being attacked, having one's house fire-bombed, being run off the road, being stoned, being shot at, being beaten, being cut on the face, and being

beaten so badly that one individual suffered a stroke and another had to be admitted to hospital for ten days for treatment.

I agree with the applicant that it is unreasonable to find, as the Board did, that these acts cumulatively amount to no more than harassment and discrimination.

[10] The respondent says that the fact that there are laws in Mr. Warner's countries of nationality criminalizing homosexual acts does not prove a risk of persecution, especially where such laws are not enforced. These submissions are without merit as Mr. Warner's claim was not based on the enforcement of these laws, and the police or the state were not the primary agents of persecution. Mr. Warner's claim was based on persecution at the hands of citizens of these countries. The anti-homosexual laws are relevant only insofar as they may demonstrate a lack of state protection – a lack of protection which was substantiated by the refusal of the police to protect Mr. Warner and their own homophobic treatment of him.

[11] This decision must be set aside and the refugee claim of the applicant referred to another member of the Board for determination.

[12] Neither party proposed a question of general importance for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed and the Board's decision denying the applicant's refugee claim is set aside, the applicant's refugee claim is referred to another Board member for determination, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: LESLIE KERVIN WARNER v THE MINISTER OF
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DATED: March 23, 2011

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