

Federal Court



Cour fédérale

**Date: 20130625**

**Docket: IMM-9675-12**

**Citation: 2013 FC 701**

**Toronto, Ontario, June 25, 2013**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**PRESCOTT KAMBURONA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant, Prescott Kamburona, is a citizen of Namibia. He alleges that he fled to Canada because it was revealed that he was in a homosexual relationship in that country. He says that because of his homosexuality, he currently fears that he will face persecution if returned to Namibia. The refugee claim of the man he claims is his current homosexual partner in Canada was granted by the Refugee Protection Division of the Immigration and Refugee Board [the Board] after a refugee hearing in which Mr. Kamburona testified as a witness. A differently-constituted Board did not, however, grant Mr. Kamburona's refugee claim which was heard at a later date. The Board

Member stated: "I am not satisfied that the Claimant has established, on the balance of probabilities, his alleged sexual orientation which is at the core of the claim."

[2] Mr. Kamburona's partner did not appear as a witness at his hearing or provide a written statement confirming that they were in a homosexual relationship. Mr. Kamburona testified that his partner was originally supposed to testify at the hearing but he got ill shortly before the hearing, took time off, and could not take further time off from work to attend the hearing. It was only at the end of the week preceding the Monday hearing that this became known to him.

[3] In the absence of his partner's evidence, the evidence before the Board as to the sexual orientation of Mr. Kamburona was his own sworn testimony and some corroborating evidence.

[4] The Board made three negative credibility findings, described as "substantial evidentiary discrepancies," that caused it to reject Mr. Kamburona's evidence. In my view, and despite the deference to be paid to the original trier of fact, they are neither "substantial discrepancies" nor do they form a reasonable basis to question the applicant's credibility.

[5] First, I agree that the Board is generally entitled to draw a negative credibility inference from the applicant's failure to produce evidence from his partner that was presumptively available to him: See, e.g., *He v Canada (Minister of Citizenship and Immigration)*, 2013 FC 362 at para 26:

Not only was there no corroborative evidence, but no attempt to obtain such evidence was made. The Applicant does not address the statement in the 2010 Response to Information Request to the effect that "[i]t is possible to obtain a copy [of an arrest or summons] afterwards by contacting the local Public Security Bureau and making this request". n *Wei v. Canada (Minister of Citizenship &*

*Immigration*), 2012 FC 911 (F.C.), Justice Russell drew a negative inference from the Applicant's failure to produce a copy of an alleged PSB warrant, referencing the earlier 2004 Response to Information Request for the proposition that it is possible to obtain a copy from the PSB. In the absence of any allegation that it would have been unreasonable for the Applicant's family to contact the PSB, the same negative inference can be drawn here.

[6] Here, the applicant's partner did not give oral or written evidence about their relationship, nor was there any corroborating evidence about why the partner could not testify at the applicant's refugee hearing such as a doctor's note, or note from the partner which, presumptively, would have been available. If such corroborating evidence was not in fact readily available, it was the applicant's burden to say so. He did not, and he was represented by counsel. On its face, this weighed against the applicant. However, this finding must be balanced against the comments below about the failure of the Board to access and review the partner's refugee determination file in the possession of the Board.

[7] Second is the issue of the applicant's former partner's arrest in Namibia. The applicant's testimony was that he left Namibia in April 2010 shortly after his then partner was arrested for being homosexual and was tortured into giving up the applicant's name to the police. However, the notes of the officer who summarized the applicant's reasons for seeking Canada's protection on Form IMM 5611 at Pearson International Airport in Toronto, the port of entry, make no mention of any arrest and only state that "Recently, I do not even know where my partner is." The applicant stated at the Board hearing that he told the officer everything and that it was the officer's failure to note that the partner was arrested. The Board preferred the explanation that the applicant never told this story to the officer. One can accept that the Board was entitled to prefer one explanation over another; however, it must be observed that the applicant's evidence must be considered in the

context of that short written narrative, which strongly suggests that material details were omitted by the officer in his notes:

Recently after they found out that I am one of the gays. I cannot go to work. I could not go home. They were chasing me and trying to harm me. They were claiming that homosexuals were not supposed to be in the country. It is very difficult for me to be there. Coming here, I am trying to escape that. Recently, I do not even know where my partner is.

[8] Moreover, the directions in Form IMM 5611 are to “Please keep your answer short. You will have the opportunity to explain all the facts related to your claim to the Immigration and Refugee Board of Canada” [emphasis added]. This is to be contrasted with the Personal Information Form [PIF], Board Form IRB/CISR 189, which is commonly referred to by the Board and at issue in these judicial review proceedings, which requires that refugee claimants “set out in chronological order **all the significant events and reasons** that have led you to claim refugee protection” [emphasis in original]. In his PIF, the applicant recounted his partner’s arrest in Namibia.

[9] Moreover, the applicant provided the Board with an affidavit sworn by his Namibian partner’s sister and that affidavit confirmed and fully supported the applicant’s story of his partner’s arrest, that he revealed the applicant’s name to the police, and that the sister had informed the applicant of these facts and encouraged him to flee.

[10] For those reasons, I find the Board’s negative inference based on the contents of Form 5611 made at the port of entry to be unreasonable.

[11] Last of the three credibility findings, the Board drew a negative inference from the applicant's failure to distinguish his residence in his PIF. The applicant's testimony was that he hid at a cousin's house for roughly ten days after his partner was arrested, yet his PIF he indicated one continuous period of residence in "Windhoek, Katatura." At the hearing, the Board asked the applicant about this apparent discrepancy and it was revealed that both his cousin's house and his parents' house (where he had lived his entire life) are in that same, large suburb. The Board continued and asked why the applicant did not make any effort on the PIF to indicate his cousin's specific residence and the applicant replied that he did not know his cousin's specific address.

[12] It is a mystery why the Board drew a negative credibility inference from the lack of such specific detail in the residence portion of the PIF. First, the applicant did positively state in his PIF narrative that he fled to his cousin's home. Thus, this is not an example of a detail arising in oral testimony that is not borne out in the PIF. It was in the PIF. Second, in my view, the Board again paid insufficient attention to the wording of the form at issue. In the residence section, the PIF asks a claimant to indicate their address, which is stated as meaning "village, town, city, county, district, province." It does not ask, much less require, claimants to indicate a street name or number. The applicant fully complied with the requirements stated on the form. For these reasons, this credibility finding was also made unreasonably.

[13] Even if one accepts as reasonable the first credibility finding based on the absence of evidence from the homosexual partner in Canada, it is impossible to ascertain the weight given to each of these findings, and since the majority of the Board's findings are unreasonable, its decision must be set aside. However, in light of the following comments, I am also of the view that the

Board should not have so readily challenged the applicant's credibility based on the absence of testimony from his homosexual partner in Canada.

[14] It is evident from the reasons that the lack of this evidence weighed strongly in the decision to reject the refugee claim:

In the absence of any affidavit or viva voce evidence from any alleged same-sex partner, or reliable evidence as to the reasons for its absence and substantial evidentiary discrepancies which remain inadequately explained, I am not satisfied that the Claimant has established, on the balance of probabilities, his alleged sexual orientation which is at the core of the claim.

[15] The Board accepted that the applicant's homosexual partner in Canada had been previously granted refugee status by the Board and that the applicant testified at that hearing. It is clear from the record before me that the partner's claim was on the basis of his sexual orientation. While the Member expressed some concern that his decision was contrary to that earlier decision, he took the position that each claim must be assessed on its merits:

[T]he alleged same-sex partner would be an interested party. He is from Namibia. Both are refugee claimants who live together with one other person in Edmonton. The Claimant and his alleged partner work in Edmonton. The Claimant testified at his alleged same-sex partner's hearing: the partner was accepted as a Convention refugee by another Panel of the division.

Decision-making consistency of like claims is an important feature of administrative justice at the Immigration and Refugee Board. However, at the same time, claims are assessed and decided on their own merits. In my view, if the Claimant's explanations as to the reasons why his same-sex partner did not, or was unable to come to Toronto to be a witness in the Claimant's hearing, or indeed to fax an affidavit in advance of the hearing, were credible, then more likely than not there would be independent corroboration to help support the important allegation of this claim. [emphasis added]

[16] In fact, in my view, there was “independent corroboration” to help support that the applicant is homosexual; namely, the testimony of the applicant and his same-sex partner, given under oath at the partner’s refugee hearing and the Board’s decision accepting the partner’s claim and granting him refugee status.

[17] The partner’s hearing file is confidential and is not available to this applicant or his counsel. The Court recognizes and accepts that the applicant or his counsel could have requested the file from the same-sex partner or could have requested the Board to access it. They did neither. However, the Board may do so on its own motion.

[18] The *Refugee Protection Division Rules*, SOR/2002-228 [the *Rules*], then in force, applied to the applicant’s hearing and a combination of Rules 17(1) and 69(a) provides the Board with such authority:

17. (1) Subject to subsection (4), the Division may disclose to a claimant personal and other information that it wants to use from any other claim if the claims involve similar questions of fact or if the information is otherwise relevant to the determination of the claimant’s claim.

17.(1) Sous réserve du paragraphe (4), la Section peut communiquer au demandeur d’asile des renseignements – personnels ou autres – qu’elle veut utiliser et qui proviennent de toute autre demande d’asile si la demande d’asile soulève des questions de fait semblables à celles de l’autre demande ou si ces renseignements sont par ailleurs utiles à la solution de la demande.

...

...

69. The Division may (a) act on its own initiative, without a party having to make an application or request to the

69. La Section peut :  
a) agir de sa propre initiative sans qu’une partie n’ait à lui présenter une demande;

Division;	
(b) change a requirement of a rule;	b) modifier une exigence d'une règle;
(c) excuse a person from a requirement of a rule; and	c) permettre à une partie de ne pas suivre une règle;
(d) extend or shorten a time limit, before or after the time limit has passed.	d) proroger ou abréger un délai avant ou après son expiration.

[19] In my view, the circumstances before this Panel of the Board cried out for it to access the same-sex partner's information under the *Rules* because the claims clearly involved "similar questions of fact," the explanation offered by the applicant as to why his same-sex partner was not available to testify was plausible, and the claim for protection was being made by a self proclaimed homosexual from a country where that sexual orientation is a criminal offence. In short, the possibility of error in determining, as a fact, his sexual orientation, had significant consequences on the applicant if he were returned to Namibia. The Board operates under the *Immigration and Refugee Protection Act*, SC 2001, c 27, the main purpose of which with respect to refugees is set out in paragraph 3(2)(a) as being to "recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted." In the circumstances here it must exercise vigilance, and it ought to have accessed the partner's information in the Board's possession, before determining that there was no independent corroboration of this applicant being a homosexual.

[20] This application is allowed. No question was proposed for certification.



**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application is allowed, the Board's decision is set aside, the applicant's claim for refugee protection is referred back to the Board to a differently constituted Panel for determination in keeping with these reasons, and no question is certified.

"Russel W. Zinn"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-9675-12

**STYLE OF CAUSE:** PRESCOTT KAMBURONA v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 19, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** ZINN, J.

**DATED:** June 25, 2013

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