Date: 20090603

Dockets: IMM-2297-09 & IMM-2299-09

Citation: 2009 FC 578

BETWEEN:

Ebrahim Mohammed MAMOON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR ORDER

Lemieux J.

Introduction and Background

[1] On Friday, May 22, 2009, I dismissed an application by Ebrahim Mohammed Mamoon to stay the execution of his removal, on May 24, 2009, to Tanzania. These are my reasons.

[2] His stay application was grafted to two leave and judicial review applications from two decisions dated March 26, 2009, made by the same Immigration Officer:

1) The rejection of his application for permanent residence on humanitarian and compassionate grounds (the H&C application); and,

2) The refusal of protection on the basis of a negative Pre-Removal Risk Assessment (PRRA) holding he would not be the subject of persecution, danger of torture, risk to life or risk of cruel and unusual treatment if returned to Tanzania.

[3] The fear he expressed in the PRRA application was twofold: 1) risks associated with his father's political career as a member of the ruling party and as Deputy Mayor of the Ilala Municipal Council, in Tanzania's capital of Dar es Salaam. Being the son of a prominent business and political family, he stated he and his family had been threatened by opposition members; and, 2) he had become a homosexual in Canada and, as a Muslim, he would face the death penalty or be stoned if his mosque realized he was gay or had a relationship with a person of the same gender.

[4] The Applicant and his brother Cassim arrived in Canada on October 10, 2005, both making refugee claims which were denied by the Refugee Protection Division (the RPD) on July 20, 2006. They had only asserted before the RPD their risk was based on perceived political opinion owing to their father's prominence. The Applicant and his brother Cassim obtained leave but my colleague Justice Barnes upheld the RPD's decision (see *Mamoon v. Canada (Minister of Citizenship and Immigration*, 2007 FC 794). That decision, nor the RPD decision was put before me.

[5] Justice Barnes made the following observations:

- At paragraph 3, he found: "It appears from the record that the senior Mr. Mamoon was instrumental in assisting the Applicants and their sisters to leave Tanzania and he has promoted the within refugee claims";

- At paragraphs 4 and 9, "because of the severity of the threats the family received and the fact they did not seek state protection "borders on the absurd""; and,
- At paragraph 8, the RPD rejected the brothers' claims on the basis of lack of credibility and on the basis of the availability of state protection. He found the RPD's credibility findings were unimpeachable citing, in particular, inconsistencies between the claimants' PIFs and the father's affidavit.

[6] The Applicant's fear on account of his sexuality was a new risk placed before the PRRA Officer and consequently had not been assessed by the RPD.

[7] It is convenient to concentrate first on the negative PRRA decision since the H&C application was one, where under hardship to return to Tanzania to apply for a permanent residence visa for entry into Canada, was based on the same fear expressed in the PRRA application.

<u>The PRRA decision</u>

[8] These reasons deal with the case of Ebrahim Mohammed Mamoon. I dismissed from the bench, on May 24, 2009, his brother Cassim's stay application connected to similar H&C and PRRA applications, except Cassim's fear was that he would be perceived to be a homosexual because of his brother's homosexuality yet he [Cassim] was not one.

<u>The Applicant's sexuality</u>

[9] The evidence submitted to the PRRA Officer in support of his homosexuality consisted of:

- His affidavit dated <u>December 21, 2007</u>;

- An undated letter from his friend Reza Alidad; and,
- A document from MAND8, a chat line for gays which apparently had a photo of the Applicant.

[10] The PRRA Officer was not satisfied the evidence before him was sufficient to persuade him the Applicant was a homosexual or bisexual. The PRRA Officer mentioned:

1) That after the Applicant had his first homosexual act in July or August 2007 with an individual who attended the same college he did, the Applicant in his affidavit wrote that he had a couple of sexual relationships with men and some women;
2) He asserted he had a homosexual relationship with Mr. Alidad but Mr. Alidad did not corroborate this in his undated letter;
3) The chat line was given little weight as being unpersuasive to establish the Applicant's bisexuality or homosexuality; and,
4) The Applicant had provided insufficient evidence to indicate he was presently involved in a relationship with a member of the same sex or when his last relationship was or if he is involved with a member of the opposite sex and when or with whom.

[11] Counsel for the Applicant did not seriously impugn the PRRA Officer's findings on the Applicant's sexuality but rather relied on the Applicant's affidavit, filed in support of his stay application. That affidavit is dated <u>May 12, 2009</u> and was not before the PRRA Officer. It has the following features:

1) It confirms he had no sexual relationship with Mr. Alidad and concedes his previous affidavit gave a false impression on this point; and,
2) It admits in his previous affidavit he had described himself as bisexual but today he would define himself as a homosexual because of a relationship he developed beginning in the last week of December 2007 with Afzal Sardar who also filed a brief supporting affidavit stating he is the common law partner of the Applicant.

Conditions in Tanzania for homosexuals

[12] The PRRA Officer examined the documentary evidence on this issue. She noted current documentary evidence on country conditions (DOS reports for 2008 and 2007) indicated homosexuality was illegal in Tanzania with punishment of up to five years in prison. She observed, however, there were no reports that anyone was punished under the law since 2004 according to a report from Amnesty International. She noted that The Gay Times similarly reported that the laws against homosexuality in Tanzania are rarely enforced. She noted, however, that homosexuals in that country faced societal discrimination.

[13] The PRRA Officer analysed the contrary evidence in these terms:

> Documentary evidence that the Applicant submitted indicates that Amnesty International reports that no arrests due to homosexuality were made in Tanzania or Zanzibar in 2004 or in recent years. The Gay Times similarly reports that the laws against homosexuality in Tanzania are rarely enforced. The report goes on and indicates that gays and lesbians in Tanzania are violently persecuted, mistreated, hated and ostracized wrote Tanzanian Bishop Mdimi Mhogolo. Bishop Mhogolo's letter expressed disagreement with the Diocese's decision to refuse donations from any United States Episcopal Church group that either fails to censure homosexual acts or that blesses same sex union. A World Bank supported working paper entitled Sexual Minorities, Violence and Aids in Africa (July 2005) indicates that homosexuals in Tanzania run a high risk of experiencing violence and intolerance.

> The findings reported indicate that social risks-such as the risk of being evicted or losing a job were especially high in Tanzania. In addition adverse comments against homosexuals in Tanzania were regularly made by senior politicians, including the head of state.

[14] She concluded as follows:

> The evidence appears to be mixed with respect to the treatment of homosexuals in Tanzania. The documentary evidence cited is drawn from a variety of reliable and independent sources, none of which have any vested interest in the outcome of this claim. While there are some inconsistencies among sources, <u>the preponderance of the current objective evidence regarding treatment of homosexuals in Tanzania suggests that the laws against homosexuality in Tanzania are rarely enforced, no reports that anyone was punished under the law during the year and that homosexuals faced societal discrimination</u>. [My emphasis.]
>
> The Applicant has provided insufficient objective evidence that the societal discrimination faced by homosexuals amounts to persecution.
>
> There is insufficient objective evidence before me to indicate that the Applicant would be incarcerated for being bisexual/homosexual upon return to Tanzania today.

[15] The PRRA Officer also commented on an undated article titled “Homosexuality on the rise say Muslim clerics”. Her research dates this article to 2005. She analyzed this document in these terms:

> The article indicates that youth homosexuality is on the rise along east Africa’s Indian Ocean coast. Despite the harsh penalties the clerics complained that homosexuality has resurfaced on Zanzibar. Despite the laws, they lamented that it was difficult to successfully prosecute alleged homosexuals in court, suggesting that alternate methods of preventing the practise might have to be found. Nearly all of Zanzibar’s one million people are Muslims who have over the years fought against homosexuality. Police arrested the clerics for assault in the May 12 incident in which the clerics were accused of attacking a man in Zanzibar who was allegedly planning to marry his male partner from Mombassa.
>
> I have read and considered this article however it does persuade me that the Applicant would be incarcerated for his sexual orientation upon return to Tanzania today.

The H&C decision

[16] As noted, the PRRA Officer decided the Applicant's H&C decision under the rubric of "unusual, undeserved or disproportional hardship". She noted, apart from his brother Cassim being with him in Canada, the Applicant's family lived in Tanzania. On his establishment in Canada, she noted his arrival in October of 2005, his employment full time as a manager and cook at Pizza Pizza since July 2007, his studies at Durham College and his community volunteering.

[17] As previously mentioned, her risk analysis is in terms similar to what she had written in her PRRA decision. She asked herself the question whether the risk identified by the Applicant that if returned to Tanzania would amount to unusual and undeserved or disproportionate hardship in order to make an application for permanent residence to Canada which is what IRPA requires, i.e. such an application be made outside Canada. She concluded in the negative because the Applicant had not established he was either a homosexual or bisexual and would not be at risk to his life upon his return in his country of origin.

Analysis

[18] The law is clear the Applicant in order to obtain a stay must establish: 1) a serious issue to be tried; 2) irreparable harm if the stay is not granted; and, 3) the balance of convenience favours him.

The PRRA decision

a) Serious issue

[19] Counsel for the Applicant proposed the following as serious issues:

1) The PRRA Officer rejected the Applicant's evidence because it did not believe him (a credibility finding), yet did not interview him as required by law; and,
2) The PRRA Officer misread the evidence on country conditions for homosexuals in Tanzania as well as the evidence provided by a law firm in Dar es Salaam.

[20] I do not see any serious issue raised even on the lower threshold of there being merely an arguable case which is one which has some merit, i.e. is not frivolous and vexatious.

[21] The PRRA Officer did not make an adverse credibility finding in respect of the Applicant in terms of not believing he was a homosexual. A plain reading of her decision clearly shows she did not find the evidence the Applicant had provided sufficient to establish he was a homosexual or was a bisexual. The PRRA Officer's conclusion is a finding of fact which commands considerable deference from the Courts and in the case of Federal Tribunals reflects the will of Parliament through the enactment of section 18.1(4)(d) of the *Federal Courts Act* (see the recent decisions of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 53 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at paragraphs 3 and 46).

[22] It seems to me the analysis which my colleague Justice Zinn in *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 to which I entirely subscribe, is on point.

[23] The Applicant attempted to repair the deficiency in his evidence about his homosexuality by providing evidence of a new homosexual relationship since late December 2007. That evidence was

not before the PRRA Officer and cannot nurture a serious issue. Moreover, it remains uncorroborated.

[24] Counsel for the Applicant’s second argument also fails. The PRRA Officer did not err in assessing the evidence before her. She simply preferred the most current reports on country conditions which the jurisprudence clearly states is within her mandate. Again her finding is one of fact which was reasonably open to her and cannot be said to be capricious or arbitrary.

[25] The Applicant has a point on the PRRA Officer’s consideration of the letter from Nasir Rattansi, dated June 17, 2008, but it is hardly determinative in the light of Justice Barnes’ decision and the RPD’s finding of adequate state protection.

b) Irreparable harm

[26] The evidence in support of irreparable harm must be clear and convincing and non speculative. I find the factual underpinnings to the harm of return to be weak considering no serious issue arises.

c) Balance of convenience

[27] In the circumstances, it favours the Minister.

The H&C decision

[28] Counsel for the Applicant raises, as a serious issue, the PRRA Officer applied the wrong test in determining whether returning to Tanzania to make an application for permanent residence to Canada would constitute unusual, undeserved or disproportional hardship.

[29] He argues the PRRA Officer applied the section 97 criteria of risk of torture, risk to life or risk of cruel and unusual punishment which is a higher standard than the hardship test.

[30] He relies on Chief Justice Lutfy's decision in *Pinter v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 366, where it is clearly stated "hardship" in an H&C application and "risk" in a PRRA application are not equivalent and must be assessed on a different standard.

[31] In the case at hand, the PRRA Officer wrote:

> After carefully considering the evidence before me concerning the Applicant's fear of returning to Tanzania, I find that the Applicant has not established that there are probable grounds to believe that, should he return to Tanzania, there will be a risk to his life that would subject him personally to a risk that would amount to unusual and undeserved, or disproportionate hardship.

[32] I agree with counsel for the Respondent, this particular sentence is worded somewhat awkwardly and should not be read in isolation but considered in the light of the decision as a whole. From that perspective, it is clear to this Court she asked herself the right question and considered the evidence before her from the proper hardship lens.

[33] In any event, the Applicant has not established irreparable harm or balance of convenience.

[34] For these reasons, the stay application is dismissed. A copy of these reasons is to be placed in both files.

"François Lemieux"

Judge

Ottawa, Ontario
June 3, 2009

FEDERAL COURT

SOLICITORS OF RECORD

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