



RAD File No. / N° de dossier de la SAR : MB3-04698

Private Proceeding / Huis clos

2014 CanLII 24207 (CA IRB)

Reasons and decision – Motifs et décision

Person who is the subject of the appeal	XXXX XXXX XXXX	Personne en cause
Appeal considered / heard at	Montreal, Quebec	Appel instruit à
Date of decision	March 28, 2014	Date de la décision
Panel	Stephen J. Gallagher	Tribunal
Counsel for the person who is the subject of the appeal	M ^c Carlos Hoyos-Tello	Conseil de la personne en cause
Designated representative	N/A	Représentant désigné
Counsel for the Minister	N/A	Conseil du ministre

REASONS AND DECISION

[1] Ms. XXXX XXXX XXXX is appealing a decision of the Refugee Protection Division (RPD) rejecting her claim for refugee protection. The Appellant has not presented new evidence and has not requested an oral hearing.

I. DETERMINATION OF THE APPEAL

[2] Pursuant to Section 111(1)(a) of the *Immigration and Refugee Protection Act* (IRPA), the Refugee Appeal Division (RAD) confirms the determination of the RPD, namely, that Ms. XXXX XXXX is neither a “Convention Refugee”, pursuant to Section 96 of IRPA, nor a “person in need of protection”, pursuant to Section 97 of IRPA.

II. BACKGROUND

[3] The Appellant, who is a 49 year old citizen of Cuba, alleges that she has faced persecution in the past because of her homosexual sexual orientation and, in the future, will face persecution because she is homosexual and also because she has made a refugee claim in Canada. In addition, the Appellant argues that in the past she has been forced to live in a clandestine manner. The Appellant alleges that she is unable to freely express her identity and this constitutes a breach of her human rights.

[4] The Appellant alleges that in the mid-nineties she was discovered to be having an affair with a woman. As a result, her husband and family abandoned her and she was forced to give up her children by court order. The Appellant alleges that she faced all manner of discrimination including being fired from her job and she faced a risk of assault. On one occasion her residence was invaded and her possessions damaged by a machete wielding assailant. The Appellant alleges that the police would not provide protection because of her sexual identity.

[5] The Appellant alleges that she has, to some extent, reopened communication with her family and in XXXX 2013 obtained a visa to visit her brother in Canada. This brother’s views on

homosexuality have evolved such that there has been a reconciliation. The Appellant arrived in Canada on XXXX XXXX XXXX 2013 and lodged a refugee claim in August 2013. The RPD heard the Appellant's refugee claim and in a decision, dated November 20, 2013, denied the claim. Ms. XXXX XXXX appealed this decision by submitting a Notice of Appeal, which was received by the RAD on December 6, 2013.

III. SUBMISSIONS

[6] The Appellant alleges that the RPD has committed errors in its decision. The Appellant argues contrary to the RPD's determination that if she returns to Cuba she will face persecution because she will be forced to hide her sexual orientation. The Appellant argues that because she is unable to live 'openly' as a homosexual this constitutes an infringement of her basic human rights. The Appellant argues further that the RPD erred in not recognizing this situation and not concluding that the Appellant's concerns were serious enough to warrant Canada's protection.

[7] In addition, the Appellant argues that if she returns to Cuba after 24 months, she will face 'blacklisting' and punishments for failing to return to Cuba within the required time period. The Appellant would also face punishments as a failed asylum seeker (Appellant's Observations, Paragraph 27).

IV. STANDARD OF REVIEW

[8] The Appellant is arguing that the RPD provided an incomplete and inadequate analysis of the Appellant's allegations by overlooking the Appellant's allegation that she could not live openly as a homosexual in Cuba. Along with the other identified errors related to visa overstay and asylum seeking, these are questions of mixed fact and law. With respect to issues of mixed fact and law, I find based on *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 that the standard of review is reasonableness.

[9] My objective is therefore to review the RPD decision for the "existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of

the facts and law”. This understanding also flows from *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

V. ANALYSIS

Core Issue: Did the RPD err by not undertaking a complete and adequate analysis of the Appellant’s allegations that she was not able to live openly as a Lesbian?

[10] The RPD in this case accepted as credible the Appellant’s allegations that she is a homosexual. The RPD, however, found that the Appellant lacked credibility in “important aspects of her claim”. This led the RPD to conclude that “the claimant did not establish that her past experience as a lesbian in Cuba does not rise to level of persecution” (RPD Decision, Paragraph 11).

[11] The Appellant responds that although the Appellant may be viewed as having “some inconsistencies” in her testimony, the fact that the RPD accepted the Appellant’s sexual orientation and viewed as credible core allegations related to the loss of her children because of her sexual orientation, this requires the RPD to examine the real risk that the Appellant faces in Cuba because of the necessity to maintain a covert lifestyle. In this case the Appellant is arguing that the Appellant expressed a wish to live openly as a Lesbian which is simply not possible in Cuba without facing persecution. According to the Appellant,

“16. So, if an individual has to hide her sexual orientation this is a serious interference with a basic human right and therefore persecution.

17. But in this case, the Board Member simply ignored the important element mentioned in the testimony and in the BOC: the desire and right of my client to live openly her sexual orientation without repressing it and without living it in hiding (Appellant’s Observations, Paragraphs 16-17).”

[12] I cannot accept the argument that this element of the Appellant’s argument has not been addressed by the RPD in its decision. The RPD has concluded that the Appellant has ‘embellished’ her claim and that, in fact, she now lives with her parents and sons in Cuba (RPD Decision, Paragraph 20). The RPD finds not credible the Appellant’s allegation that she has faced problems with the police (RPD Decision, Paragraph 22) or has been attacked in recent years. The

RPD concludes that “the claimant tried to embellish her history of threats, physical violence and harassment by neighbours for the purpose of a refugee claim” (RPD Decision, Paragraph 24).

[13] In addition, the RPD questions how her employer could not know about her homosexuality after 13 years of work there. This would be the case even though everyone else around her would be aware of her sexual orientation including the police and the Comités de Defensa de la Revolución (CDR) which in her visa application she sets out that she has been a member of since 1978 (RPD Record, p. 103).

[14] To this must be added to the credibility concern identified by the RPD that results from the Appellant’s desultory efforts to seek safety in the past given that travel to Canada has been a possibility for some time, and given the Appellant’s XXXX month delay before claiming protection after her arrival in Canada. All of these conclusions are not challenged by the Appellant. All of this supports a conclusion that, in the Appellant’s individual circumstance, which existed in Cuba prior to her departure, if not comfortable, she was at least complacent and lived free of any risk that would evoke Canada’s protection responsibility. In terms of prospective risk, the Appellant has provided no argument or evidence for why this situation would be changed given her travel or period of living in Canada.

[15] In addition, I note the RPD surveyed the documentation on the risk faced by homosexuals in Cuba and although risks were identified for those with particular profiles, the RPD concluded that such a profile is not shared by the Appellant (RPD Decision, Paragraph 38). I conclude that with respect to the Appellant, the RPD undertook a complete and comprehensive analysis to conclude that the Appellant would face less than a serious possibility of persecution should she return to Cuba because of how she expressed her sexual orientation. I find this to be a reasonable conclusion.

[16] With respect to the other elements of the Appellant’s arguments, related to overstay and asylum seeking, the Appellant entered Canada in XXXX 2013, therefore the ‘two years outside

of the country’ risk is still some time away. In any case, this risk should be seen as a ‘self-created’ overstay risk and as such would not evoke Canada’s protection.¹

[17] With respect to the risk that arises from having made an asylum claim in Canada, considering the private nature of the refugee proceedings, as noted by the RPD, this only presents a slight chance of the Cuban government discovering the Appellant’s refugee claim (RPD Decision, Paragraph 16). I find this to be a reasonable conclusion given that the Appellant has not established that she would have a profile in Cuban society that might invite some degree of careful scrutiny or attention.

[18] Overall, I conclude that the RPD’s decision in this claim, that the Appellant does not meet the criteria required to secure Canada’s protection, “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”.

VI. REMEDIES

[19] For all these reasons, I confirm the determination of the RPD, namely that Ms. **Yamilet XXXX XXXX** is neither a “Convention refugee”, nor a “person in need of protection”. Therefore, this appeal is dismissed.

Stephen J. Gallagher

Stephen J. Gallagher

March 28, 2014

Date

/kp

¹ Perez v Canada (Minister of Citizenship and Immigration), 2010 FC 833.