

Immigration and
Refugee Board of Canada

Refugee Appeal Division



Commission de l'immigration
et du statut de réfugié du Canada

Section d'appel des réfugiés

N° de dossier de la SAR/RAD File No.: MB3-04146

Huis clos/Private Proceeding

Motifs et décision - Reasons and Decision

Appelant	XXXXXX XXXX	Appellant
Appel instruit à	Montréal, Québec	Appeal considered / heard at
Date de la décision	January 9, 2014	Date of Decision
Tribunal	Stephen J. Gallagher	Panel
Conseil(s) de l'appelant	M ^c Pablo Andrés Irribarra Valdes	Counsel for the Appellant
Représentant(e)(s) désigné(e)(s)	S/O	Designated Representative(s)
Conseil du (de la) Ministre	S/O	Counsel for the Minister

2014 CanLII 19379 (CA IRB)

Canada

REASONS AND DECISION

[1] Mr. XXXXX XXXX, who is 29 years old and a citizen of XXXXX XXXX, is appealing a decision of the Refugee Protection Division (RPD) rejecting his claim for refugee protection. The Appellant has not presented new evidence and has not requested an oral hearing.

DETERMINATION OF THE APPEAL

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

BACKGROUND

[3] The Appellant alleges that he has been the target of homophobic attacks. In addition, the Appellant alleges that throughout his life he has faced threats and harassment because of his membership in a social group, homosexuals.

[4] The Appellant alleges that there were two important incidents when the Appellant was attacked and stabbed in 2004. The Appellant identifies other incidents, one of which was in 2010, where the Appellant alleges he was forced into a humiliating sexual act with a woman. In each case, the Appellant alleges that he would not be able to expect state protection because of the homophobic society-based atmosphere which is held to extend to the police. The Appellant also points out a recent incident where an individual who lives in a house that the Appellant walks by showed the Appellant a gun and threatened him. This greatly frightened the Appellant. The Appellant states that he had an opportunity to travel to Canada which he accomplished by arriving in Toronto on May 8, 2013.

[5] The Appellant submitted a claim for refugee protection on June 7, 2013. The RPD denied the claim in a decision dated September 10, 2013, on the basis that the RPD did not find the allegations credible, on a balance of probability.

SUBMISSIONS

[6] The Appellant alleges that the RPD has committed errors in its decision. The Appellant argues that the RPD erred in its credibility findings. The Appellant argues that the RPD “ignored relevant evidence” which would have led to a different decision if it were reviewed. In addition, the RPD is viewed by the Appellant as not having given enough weight to the “cumulative” effect of the harassment and discrimination that the Appellant alleges occurred.

[7] The Appellant argues that that this “appeal” should be allowed which is understood to mean either that the Appellant be granted protection or that this file should be returned to the RPD for a redetermination by a different member.

STANDARD OF REVIEW

[8] My understanding of my role in this appeal derives from a reading of a decision of the Alberta Court of Appeal in *Newton v. Criminal Trial Lawyers’ Association* (2010) ABCA 399. The *Newton* decision includes an analysis of the role of an Alberta-based appellate board vis-à-vis a first instance determination process to consider whether a *de novo* hearing is required in every case. This is one of the few cases where a court evaluates the role of an appellant-specialized administrative tribunal in a system, which allows for an appeal from a first instance administrative tribunal with the same specialization. The Court in this case notes that: “The Board is not a tribunal of first instance, and cannot simply ignore the proceedings before the presiding officer, and the conclusions reached by him” (Paragraph 82). The Court went on to conclude that: “a decision on such questions of fact by the presiding officer, as the tribunal of first instance, are entitled to deference. Unless the findings of fact are unreasonable, the Board should not interfere” (Paragraph 95).

[9] I conclude that an analysis of the RPD’s credibility determination, which in this appeal constitutes a determinative issue, involves an analysis of issues of fact, and, using *Newton* as a guide, I conclude that such issues attract a deferential standard of review, which is “reasonableness”. With respect to issues of mixed fact and law, which includes a conclusion

related to state protection, I find based on *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 that the standard of review is also reasonableness.

[10] Given the Standard of Review of ‘reasonableness’, my objective is 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.

ANALYSIS

Issue 1: Did the RPD err in making “unreasonable” Credibility Findings?

[11] The RPD concludes that, given an accumulation of credibility and plausibility concerns, it does not find the allegations or the testimony of the Appellant trustworthy on a balance of probability. To begin with, the RPD accepts as credible that the Appellant is homosexual.

[12] The first concern of the RPD relates to the fact that the Appellant is alleging a grievous attack on his person in 2004 where he was stabbed repeatedly and beaten. The Appellant alleges he was in hospital with “serious” injuries and required surgery. The concern of the RPD is that regardless of this alleged occurrence when he was 19 year old, the Appellant, his family or his neighbour who drove him to the hospital, did not make a police report or at least the Appellant is not aware of any police report being made. The RPD finds this to be a credibility issue.

[13] The RPD is further concerned by the fact that the Appellant alleges another attack later that same year in which the Appellant was allegedly stabbed in the hand but this time the Appellant did approach the police. The Appellant argues that the police did nothing because of the Appellant’s sexual identity. The RPD argues that it is a credibility issue that the Appellant would have approached the police on this second assault, which is viewed as not relatively severe, but have no knowledge whether the police were approached concerning the first assault for which the Appellant required hospitalization.

[14] The Appellant argues that it was “unreasonable” of the RPD not to accept the explanation of the Appellant with respect to the first stabbing incident. Here the Appellant is explaining that he was incapacitated and was not aware of the efforts of “third parties” (Memorandum of Argument, Paragraph 15).

[15] In this case, I find the conclusion of the RPD reasonable. The RPD is open to expect that a major attack with severe consequences on the Appellant would increase the likelihood of a police report. Any later attack, such as the stabbing of the hand incident, might also provide an opportunity for the Appellant to revisit the police on any progress with respect to the first assault. I find it reasonable for the RPD to view the absence of some form of complaint or police report to be a credibility issue especially since the Appellant alleges he did make a police complaint for the later less severe stabbing of the hand assault that same year (2004). The RPD notes that no corroborative evidence for these attacks is available although the Appellant alleges that he has made efforts to obtain this material.

[16] The RPD goes on to identify the fact that although the Appellant is alleging harassment and risk to a level of severity consistent with persecution, the Appellant has lived at one residence between 2008 and the year of his departure from XXXXX XXXX and one residence for years prior to 2008. The RPD also notes that the Appellant held the same job for 12 years prior to his departure at a XXXXX, identified in the documentation as XXXXX. The Appellant also notes in the documentation that he XXXXX XXXX XXXXX XXXX XXXXX XXXX from age 18 until he departed XXXXX XXXX in 2012 at age 28 (RPD Record, p. 40).

[17] In his BOC narrative, the Appellant writes: “I often faced anti-gay harassment because of my involvement in a XXXXX group. My group and I often practiced at a community centre in the area, and so members of the public would often stop by to watch us. Whenever I was practicing, however, many of those who were watching would start yelling slurs at me like “battyman”, “antiman”, and “he-she” (Appellant’s Appeal Record, p. 22). In testimony the Appellant notes that he traveled extensively as a XXXXX to visit and perform in St. Lucia, Guiana and Jamaica (Hearing Recording @ 36 minutes) which taken together with the above

implies some status in the XXXXX field and by extension, awareness of his presence and activities by the community at large.

[18] The Appellant argues that although he “developed a group of homosexual friends” (Appellant’s Appeal Record, p. 22) he also was secret about his sexual orientation and was not “living publicly open as a homosexual” (Memorandum of Argument, Paragraph 22). Along with the explanation that the Appellant’s income was not sufficient to allow for residential movement or to live alone the Appellant argues that the RPD’s conclusions with respect to residing in one spot or working at one job as a credibility concern is simply “speculative” and therefore “unreasonable”.

[19] On this issue, I find the RPD has identified an important credibility concern in the claim of the Appellant. On the one hand, the Appellant is arguing that XXXXX XXXX is very small and that he has faced continual harassment and aggression, which cumulatively reaches the level of persecution. In testimony, the Appellant states that “I was scared for my life... Throughout the years... harassment happened almost every day. Every day of my life I’ve been through this...” (Hearing Recording @ 35 minutes).

[20] Yet elsewhere the Appellant argues that he has lived a clandestine lifestyle over many years such that he was in some sense hiding. This argument is used to address/counter the apparent inconsistency of the Appellant’s lack of movement to avoid harm. For example, the Appellant explains away the concern expressed by the RPD about the continuity of residence and employment as inconsistent with a risk of persecution by stating that:

“First, this finding ignores the Appellant’s evidence that he tried his best to keep his sexual orientation a secret while residing in XXXXX XXXX, not living publicly open as a homosexual because of his fears that the negative treatment that he was already receiving would only become worse if suspicions about his sexual orientation were ever confirmed by his family and surrounding community. By suppressing his sexual orientation, the Appellant was able to shield himself from at least some of the persecutory harm he would otherwise have faced” (Memorandum of Argument, Paragraph 22).

[21] Although the RPD finds that the Appellant’s descriptions of physical assaults and harassment ‘may’ have an “air of truth” (RPD Paragraph 9), implicit in the RPD’s decision is that the allegation of the Appellant that he had somehow disguised his homosexual identity (in the

sense of not being ‘confirmed’ by his ‘family and surrounding community’ as noted in the quote above) was found not credible. In this way the RPD concludes that, when taken together, the evidence of continuity of residence and activity including employment indicates that the Appellant’s situation was “not so untenable” (RPD, Paragraph 9). The overall conclusion is therefore that the severity of treatment including discrimination viewed cumulatively, did not reach a level consistent with ‘persecution’. I find this conclusion reasonable.

[22] In addition, the RPD notes that the Appellant has provided no “objective evidence” to show that the situation faced by the Appellant reached a level of severity that would meet a persecution standard. I note that the RPD is referring to evidence specific to the Appellant, including perhaps corroborative evidence of an assault, whereas the Appellant in his Memorandum appears to interpret the RPD to mean that there is no evidence of general homophobia and the absence of state protection in XXXXX XXXX. Overall, I must conclude that the RPD’s assessment of the credibility of the claim and the trustworthiness of the testimony of persecution meets the criteria of reasonable.

Issue 2: Did the RPD err in its conclusion that the Appellant failed to rebut the presumption of state protection with ‘clear and convincing evidence’?

[23] I note that the RPD found that the claimant established his identity as a homosexual and there was documentary evidence showing that homosexuals face ‘difficulties’. The RPD goes on to set out that because the Appellant is a homosexual the existence of state protection for homosexuals in XXXXX XXXX must be analyzed (RPD, Paragraph 11). The RPD then surveys the jurisprudence on state protection.

[24] The RPD notes with respect to the documentation on XXXXX XXXX, that, although this is a small political community, it meets criteria such that it is presumed to be capable of protecting its citizens. The RPD also notes that there is ‘mixed’ evidence with respect to the treatment of homosexuals there.

[25] With respect to the Appellant, the RPD notes that he did not effectively ‘test’ the availability of state protection given that he chose not to approach or maintain contact with police

after the alleged incidents of persecution. After reviewing the literature on the complaints system for the police force and evidence that the police is currently seeking out the perpetrator or perpetrators of a murder of a LGBT minor (RPD, Paragraphs 16-17), that panel concludes that, on a balance of probability, the “Government of XXXXX XXXX and Nevis provides adequate protection to its citizens” (RPD, Paragraph 18).

[26] The Appellant argues that the RPD did not review in some cases or give sufficient weight in other cases to documentary evidence that would allow for a conclusion that state protection is inadequate. Therefore, given this “superficial analysis” on the part of the RPD, the Appellant argues that the RPD’s determination on state protection is unreasonable (Memorandum of Argument, Paragraph 62).

[27] I conclude that the RPD is not obliged to make mention of all of the documentary evidence. I also note that the RPD appears cognisant of conflicting interpretations of the adequacy of state protection in XXXXX XXXX and applied the jurisprudence to the particular circumstance of the Appellant. I conclude that, with specific reference to the Appellant, the RPD did not err in its analysis of state protection in XXXXX XXXX.

[28] Overall, after reviewing the evidence before me, I must conclude that it is reasonable for the RPD to reach a conclusion that the Appellant has not met his burden of showing that his allegations are true, on a balance of probabilities. In addition, the Appellant, recognized as a homosexual, did not meet his burden of establishing that there is ‘clear and compelling evidence’ that state protection was inadequate in his circumstance. Overall, I conclude that this decision “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”.

REMEDIES

[29] For all these reasons, I confirm the determination of the RPD, namely, that Mr XXXXX XXXX is neither a “Convention refugee” nor a “person in need of protection”. Therefore, the appeal is rejected.

Stephen J. Gallagher

Stephen J. Gallagher

January 9, 2014

Date

/ag/kp/or