

Federal Court



Cour fédérale

Date: 20120319

Docket: IMM-4522-11

Citation: 2012 FC 314

Ottawa, Ontario, March 19, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

LUIS FERNANDO RAMÓN LEVARIO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated June 14, 2011, which held that the applicant was not a Convention (United Nations' *Convention Relating to the Status of Refugees*, [1969] Can TS No 6) refugee or person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For the reasons that follow, the application is granted.

Facts

[2] The applicant is a citizen of Mexico. He alleges fear of persecution by his father, who allegedly physically and sexually abused him throughout his life, and continued to harass him as an adult, tracking him down wherever he went. The applicant also alleges fear of persecution in Mexico because he is bisexual.

[3] The applicant alleges that his father began abusing him at a young age and also allowed his friends to abuse him. The applicant states that he was afraid to report his father because he was powerful and involved in drug trafficking. The applicant alleges that his father once cut off part of his finger threatening him never to report the abuse. The applicant states his father was also abusive to his mother and sisters.

[4] The applicant alleges that once he left home to study to become a priest, his father would pursue him wherever he went and harass and threaten him. He also alleges that he was assaulted by other individuals at his seminary and was persecuted because members of the church learned of his bisexuality.

[5] The applicant states that one of his sisters committed suicide in November 2004 and the applicant feared his father would kill him because he was the only one who knew that she killed herself because of their father's abuse.

[6] The applicant traveled to the Dominican Republic in 2007 seeking help from priests to flee to the United States (U.S.). He states that he returned to Mexico to obtain a U.S. visa in March 2007 but the visa was refused. Eventually, a priest in Texas offered to pay the applicant's airfare to Canada where the applicant arrived on July 25, 2008. He entered a church in Canada but after a psychological assessment the church did not accept him. Having nowhere to go, and fearing return to Mexico, the applicant made his refugee claim on August 12, 2009.

[7] The applicant was arrested on February 26, 2011 and charged with luring a child, sexual interference and sexual assault. The charges were still pending at the time of the hearing. The Minister of Public Safety and Emergency Preparedness participated in the refugee hearing.

Decision Under Review

[8] The Board found that there was no credible basis for the applicant's claim. The Board rejected that the applicant had been assaulted by his father, threatened by anyone in Mexico or that anyone in Mexico was looking to harm the applicant.

[9] The Board noted many inconsistencies in the applicant's evidence, including:

- a. His statement that his father sexually abused him was contradicted by his statements to a church psychologist in September 2007 that a neighbour had sexually abused him. The Board further rejected the explanation that the applicant lied because the church would not accept him if he were homosexual, since that same report referred to his attraction to other men.

- b. The Board rejected the claims that the applicant's father was wealthy and powerful, since he was a general labourer and traveled by bus. The applicant could not explain why he did not use his own car and driver. The Board also noted that the father's alleged flight after the neighbours witnessed him abuse the applicant was inconsistent with the father being wealthy and powerful.
- c. The Board found that the applicant gave confusing and inconsistent testimony about his father's alleged involvement in drug trafficking.
- d. The Board found no evidence the applicant's father forced or tried to force the applicant to return home for the nearly two decades after he left home at the age of 19.
- e. The Board found the documentary evidence did not support the applicant's allegation that his father was sexually abusing his sister. The charges against his father, instituted by him on his deceased sister's behalf, were dismissed due to lack of evidence. The Board also noted that the suicide note made no mention of sexual abuse.
- f. The Board found that the applicant's failure to ever pursue charges on his own behalf against his father supported its conclusion he was never abused.
- g. The applicant had given conflicting evidence regarding the date of the incident when the whole family was brought to the police station.
- h. The Board found the applicant tried to embellish his claim by raising new allegations at the hearing that were not in his Personal Information Form (PIF).

- i. The Board found that the applicant's father paying for all his studies was inconsistent with the applicant's assertion that his father hated him. When asked about this, the applicant again advanced a new allegation; that his father wanted him to learn the narcotics business. The Board found this implausible.

[10] The Board also drew negative credibility findings from the applicant's failure to seek protection in the Dominican Republic, his re-availment to Mexico in 2007 and his delay in claiming protection in Canada.

[11] Regarding the applicant's fear of Mexican society due to his bisexuality, the Board found that the applicant's actions in Canada did not support a claim of fear of returning to Mexico. The Board noted that he had allegedly engaged in sexual acts with a minor in public, for which he was subject to criminal charges. The Board stated it was not its place to examine the facts of those charges or make a finding of guilt.

[12] The Board concluded that there was no credible basis for the applicant's claim, pursuant to section 107(2) of the *IRPA*. The claim was therefore rejected.

Issue

- [13] The applicant presents the following issues:
- a. Was the Board's no credible basis finding reasonable?
 - b. Was the Board's credibility finding reasonable?
 - c. Was the Board's subjective fear finding reasonable?

[14] Because the decision must be set aside on the basis of the first issue the Court need not address the other issues.

Analysis

[15] The applicant submits that the Board can only make a no credible basis finding if there is no trustworthy or credible evidence that could support the claim, a finding that the applicant is not credible is insufficient: *Rahaman v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, at para 51. The applicant submits that since the Board accepted that he was bisexual it was an error not to consider the documentary evidence of persecution of sexual minorities, this was credible evidence that could support the claim: *Singh v Canada (Minister of Citizenship and Immigration)*, 2007 FC 732.

[16] In the respondent's Further Memorandum, it abandoned its substantive arguments about the "no credible basis" finding and submitted that the Board did not make a finding pursuant to section 107(2). This is clearly wrong; the Board states at paragraph 75:

In accordance with section 107(2) of the *IRPA* I am required to state that there is no credible basis for this claim. As I find there is no credible or trustworthy evidence upon which the Board could have determined the claimant is a Convention refugee or a person in need of protection, the claim is rejected.

[17] I agree with the applicant that the "no credible basis" finding was unreasonable and for that reason the Board's decision must be set aside. While the Board found the applicant not to be credible in relation to his allegations about his father, the Board did accept that he was bisexual. The applicant alleged risk on the ground of his bisexuality and presented extensive documentary

evidence on the risk faced by sexual minorities in Mexico. In light of this evidence the Board's conclusion that there was no credible basis for the claim was unreasonable.

[18] The threshold for a finding that there is no credible basis for the claim is a high one, as set out in *Rahaman*, at para 51:

...As I have attempted to demonstrate, subs. 69.1(9.1) requires the Board to examine all the evidence and to conclude that the claim has no credible basis only when there is no trustworthy or credible evidence that could support a recognition of the claim.

[19] Thus, if there is *any* credible or trustworthy evidence that could support a positive determination the Board cannot find there is no credible basis for the claim, even if, ultimately, the Board finds that the claim has not been established on a balance of probabilities.

[20] As the applicant submits, this case is similar to *Singh*, above. In that case, while the Board rejected the applicant's testimony about being tortured and found him not to be credible, the Board did not question the applicant's status as a baptized Sikh. Since there was documentary evidence before the Board that baptized Sikhs were at risk of persecution in India, the Court found it was an error to conclude there was no credible basis for the claim without consideration of that evidence.

Justice Edmond Blanchard stated at paragraph 26:

Accordingly, since there was uncontradicted evidence in the file establishing that the applicant was a Sikh priest and where the documentary evidence showed that baptized Sikhs are a group at risk of persecution in India, the Board could not properly find that the applicant's refugee claim had no credible basis.

[21] Similarly in this case, having accepted that the applicant is bisexual, and faced with extensive documentary evidence of persecution of sexual minorities in Mexico, it was unreasonable for the Board to conclude that the applicant's claim had no credible basis.

[22] The respondent argues (in its initial Memorandum) that the documentary evidence is not capable of supporting the applicant's claim because it alone does not support a finding that it is more likely than not that the applicant faces a risk under section 97. However, this submission is at odds with the reasoning in *Singh* and conflates the standard under section 107(2) with the standard under section 97: while it may have been reasonably open to the Board to find, on a balance of probabilities, that the applicant would not be at risk because of his bisexuality, that does not mean that it could make a "no credible basis" finding in light of credible and trustworthy documentary evidence that persons in the applicant's circumstances are at risk. Because of the presence of this evidence (and the Board's finding that the applicant was bisexual, thus linking him to the alleged risk), the Board was required to weigh the evidence and determine if the claim had been established.

[23] The application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is referred back to the Immigration Refugee Board for reconsideration before a different member of the Board's Refugee Protection Division. No question for certification has been proposed and the Court finds that none arises.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4522-11

STYLE OF CAUSE: LUIS FERNANDO RAMÓN LEVARIO v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto

DATE OF HEARING: January 26, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** RENNIE J.

DATED: March 19, 2012

APPEARANCES:

Aisling Bondy FOR THE APPLICANT

Tessa Kroeker FOR THE RESPONDENT

SOLICITORS OF RECORD:

Aisling Bondy FOR THE APPLICANT
Barrister & Solicitor
Toronto, Ontario

Myles J. Kirvan, FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario