Federal Court Cour fédérale

Date: 20250429

Docket: IMM-8464-24

Citation: 2025 FC 774

Ottawa, Ontario, April 29, 2025

PRESENT: Mr. Justice Pentney

BETWEEN:

MATHEW KIPKIRUI KOSGEY

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mathew Kipkirui Kosgey, seeks judicial review of the refusal of his request to defer his removal. He is a citizen of Kenya, and says he risks persecution there because of his sexual orientation.

[2] After the Applicant's deferral request was refused, he obtained an Order from Justice Zinn of this Court staying his removal: *Kosgey v Canada (Public Safety and Emergency Preparedness)*, 2024 CanLII 44287. The stay was to remain in effect until the final determination of his application for judicial review or a decision on his Pre-Removal Risk Assessment [PRRA] redetermination request finding that he is not at risk if he returns to Kenya. Although the Applicant has filed his PRRA redetermination application, no decision had been made on it as of the date of the hearing of this matter.

[3] For the reasons set out below, this application for judicial review will be granted.

I. Background

[4] The Applicant is a citizen of Kenya. He entered Canada on a study permit in 2016 and then sought refugee status, claiming that he is gay and will be at risk if he is forced to return to Kenya.

[5] The Refugee Protection Division [RPD] dismissed the Applicant's claim in March 2017, finding that the Applicant's testimony was not credible and that his supporting evidence was not sufficient to establish his case. The RPD found that the Applicant's "testimony was not easily forthcoming and key areas were hesitant and evasive, as well as inconsistent and contradictory internally within his own testimony and that of other evidence."

[6] The RPD found that the Applicant's descriptions of his previous same-sex relationships were vague, lacking specific details about the way these relationships formed. The Applicant had

submitted a letter from a former partner, but the RPD found it to be vague and that it "very closely matched the wording and content" of the Applicant's Basis of Claim form. An allegedly current boyfriend of the Applicant testified, but the RPD found his evidence to be vague and inconsistent, and certain aspects contradicted the Applicant's evidence. Based on its assessment of the evidence, the RPD dismissed the Applicant's claim.

[7] An appeal to the Refugee Appeal Division was dismissed because it was not perfected. An application for leave and for judicial review was filed in this Court, but it too was dismissed because it was not perfected.

[8] The Applicant then retained a second counsel to submit an application for a PRRA, which included new evidence to establish that he is gay. In July 2018, an Officer found that the Applicant would not face a risk to his life or of cruel or unusual treatment or punishment if he were returned to Kenya. The Officer found that the Applicant's new evidence was not sufficient to overcome the negative credibility findings made by the RPD. The Officer gave the new evidence limited weight, finding that it "echoes the evidence which was presented and assessed by the RPD."

[9] Following the refusal of his PRRA application the Applicant was invited to attend a removal interview in October 2018, to plan for his departure from Canada. He failed to attend the interview and then evaded detection until May 7, 2024, when he was arrested by police during a traffic investigation.

[10] The Applicant was held in detention following his arrest. On May 10, 2024, he was provided a Direction to Report indicating his removal from Canada would occur on May 20, 2024. The Applicant submitted a request to defer his removal so that he could file another PRRA application based on new evidence, in particular the information about his long-term relationship with his same-sex partner, Mr. Kogo. Both the Applicant and Mr. Kogo filed sworn affidavits, testifying to their relationship. Mr. Kogo attached supporting evidence, including photos of himself with the Applicant and phone records showing the nature and extent of their interactions.

[11] An Inland Enforcement Officer [the Officer] refused the Applicant's request to defer his removal, finding that there was insufficient evidence about the Applicant's relationship with Mr. Kogo, and that the evidence of his risks in Kenya was generalized in nature. The Officer concluded that a "subsequent PRRA application in the absence of new, personalized and non-speculative risk does not warrant a deferral of removal."

[12] The Applicant applied for leave and judicial review of this decision, and also applied for an interim stay of his removal. As noted above, the stay motion was granted. This decision relates to the Applicant's application for judicial review of the refusal to defer his removal.

II. Issues and Standard of Review

[13] The Applicant submits that the decision is unreasonable because the Officer failed to assess the new evidence he submitted and mischaracterized the legal test for risk. This question is to be dealt with under the framework for reasonableness review set out in *Canada (Minister of*

Citizenship and Immigration) v Vavilov, 2019 SCC 65 [*Vavilov*], and confirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21.

[14] The Respondent argues that the Applicant does not have clean hands because he deliberately disobeyed the removal order and actively evaded authorities for several years. The Respondent argues that the Court should therefore either refuse to hear the application on its merits or deny the Applicant the relief he seeks, based on the decision of the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2006 FCA 14 [*Thanabalasingham*].

[15] The parties agree that the matter is not moot because the Applicant's request for a redetermination of his PRRA has not yet been dealt with. I agree with that assessment and will therefore address the issues raised by the parties.

III. Analysis

A. *Should the claim be dismissed because of the Applicant's misconduct?*

[16] The Respondent submits that the Applicant lacks clean hands because he failed to appear for removal as the law requires him to do, and he actively evaded the law for five years. This cannot be ignored, because doing so will encourage others to disobey the law.

[17] In *Thanabalasingham* at para 10, the Federal Court of Appeal identified factors to be considered when dismissing an application for judicial review based on clean hands:

> [10] In exercising its discretion, the Court should attempt to strike abalance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[18] According to the Respondent, these factors weigh in favour of dismissing the Applicant's case. The Respondent's argument is set out in its Memorandum of Fact and Law:

> 22. This litigation outright only exists because the Applicant failed to follow the law. Hearing this litigation would, in no small way, be condoning his disregard for Canada's immigration laws. While the Applicant's argument may be that his failure to appear and evasion were necessary evils because he needed a fourth opportunity to have a risk assessment, every failed refugee claimant could make this argument. As discussed below, he had multiple opportunities but was found not credible and his evidence unpersuasive. The new evidence before the Officer, and now this Court, was equally unpersuasive given the circumstances, and does not excuse his conduct [emphasis in original].

[19] The Applicant frankly acknowledges his non-compliance with Canadian immigration law but argues that this is not sufficient to disentitle him to relief. In his affidavit submitted with his deferral request, the Applicant explains his situation after his refusal of his PRRA application:

> 34. I did not know that I could appeal the PRRA to the Federal Court – I thought this was my last chance to stay in Canada.
>
> 35. In October of 2018, I was supposed to attend a removal interview at CBSA. I did not attend. I believed that if I had attended I would be deported to Kenya, where I would be killed or

> beaten and persecuted because I am gay. I really did not know what to do and retreated away from the world.

[20] The Applicant argues that in assessing clean hands, the Court must consider that ensuring that a claimant's risks are assessed before removal is a constitutional imperative that engages the right to security of the person under section 7 of the *Canadian Charter of Rights and Freedoms*: *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144 [*Atawnah*]. In light of this, the Applicant submits that the Court should be reluctant to deny him the opportunity to obtain relief if the deferral refusal is found to be unreasonable. The Applicant also points out that in addressing this question on the motion for a stay of removal, Justice Zinn found that he should not be denied the relief he requested even though he said that he was "greatly concerned with the conduct of the Applicant" (at para 18).

[21] Having considered the submissions of both sides, I agree with Justice Zinn's assessment. I too am greatly concerned about the Applicant's conduct. He knowingly, deliberately and actively disobeyed the law and sought to evade authorities. This is not a case where he mistakenly thought he could remain in Canada; the Applicant acknowledges he was aware of the invitation to the removal interview. The fact that he was fearful of returning to Kenya does not excuse his behaviour. Moreover, I agree with the Respondent's argument that granting the relief sought by the Applicant could send a signal to other claimants that they can knowingly disobey Canadian law and not face consequences for their illegal conduct: see the discussion in *Debnath v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 332 at paras 20–27.

[22] Against that, however, I find that the Applicant's conduct in this case is not sufficiently grave to warrant denying him the relief he seeks when measured against the importance of the interests at stake and the nature of his legal claim. As explained below, I find that the Officer's decision is unreasonable because it is based on a series of fundamental errors. It bears repeating that the Applicant says he faces extreme risk as a gay man if he returns to Kenya. The objective country condition evidence demonstrates that his fears are not misplaced. To borrow the words of the PRRA Officer: "I reviewed the objective documentation… and I accept that gross mistreatment of members of the LGBT community does in fact occur in Kenya."

[23] In a case where the claimant's alleged risks have not been independently assessed by a competent decision-maker, a court should be extremely reluctant to bar the individual from relief on judicial review. This is consistent with *Thanabalasingham* factors listed at paragraph 10, cited above. It takes on even greater force in cases where risk is alleged, in light of the finding in *Atawnah* that ensuring that a proper risk assessment is done is a constitutional imperative (see also *Surmanidize v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1615 at paras 47–49; *Thuo v Canada (Public Safety and Emergency Preparaedness)*, 2019 FC 48 at para 6 [*Thuo*].

[24] In this case, the importance of the individual rights affected is at the highest level. This case engages some of the core human rights recognized in Canadian law – the right to security of the person and the right to equal protection of the law. The fact that the Applicant's case has not been found credible weighs against him, to some degree, but this must be balanced against the new evidence he has brought forward, which is discussed in more detail below. While the

Applicant disobeyed the law and evaded authorities for a lengthy period of time, there is no evidence of any criminality during this period.

[25] Balancing all of these factors, I am not persuaded that the Applicant's lack of clean hands is sufficient to bar him from the relief that he seeks.

B. *Is the Officer's decision unreasonable?*

[26] Although the Applicant advanced a number of arguments about the different ways the decision is unreasonable, in my view the determinative issue is the Officer's failure to truly grapple with the new evidence the Applicant had submitted, which in turn resulted in a faulty line of analysis. The new evidence went to the crucial question before the Officer: should the Applicant's removal be deferred so that his risks as a gay man in Kenya could be assessed? The new evidence went to this question, and the Officer was obliged to grapple with it. Moreover, the Officer was obliged to explain the reasons for refusing the deferral request in a logical manner based on the evidence and the legal framework that governs deferral decisions. For the reasons set out below, I find the Officer's analysis falls short and therefore the decision is unreasonable.

[27] The Applicant submitted his deferral request while he was in detention. He submitted his own affidavit, attesting to his new relationship with his partner, Mr. Kogo. He also submitted an affidavit from Mr. Kogo, as well as a copy of the RPD decision in Mr. Kogo's case, screenshots of text messages they had exchanged, call logs, and photos of the two of them. In his submissions on the deferral request, the Applicant described this as new and compelling evidence. He described his relationship with Mr. Kogo and its evolution in his affidavit, stating

that he has become more comfortable speaking about his sexuality since his RPD hearing. The Applicant noted that the RPD had granted Mr. Kogo refugee status because of the risk he faced as a gay man in Kenya. He submitted that Mr. Kogo's affidavit merited considerable weight because the RPD found him to be a forthright and credible witness. The Applicant also pointed to the objective country condition evidence showing that homophobic abuse and mistreatment are widespread in Kenya. Based on this, the Applicant requested a deferral of his removal so that his new evidence of risk could be assessed.

[28] The Officer refused to defer the Applicant's removal. The Officer made two key findings: that the evidence of the Applicant's relationship with Mr. Kogo was insufficient, and that the evidence of risk in Kenya was generalized and not personal to the Applicant. Both findings cannot stand.

[29] The first problem with the decision is that the Officer appears to have viewed the new evidence as simply a continuation of the type of evidence the Applicant previously submitted before the RPD and in his PRRA application. The Officer states that "the risk alleged is not new [and has already been considered by the [RPD] and PRRA." At one level that is an accurate statement: the Applicant has consistently claimed that he faces risk in Kenya because he is gay. He is still claiming that. However, the Officer needed to assess the Applicant's new evidence to determine whether it was sufficiently probative to constitute new evidence of that risk: *Thuo* at para 8.

[30] In assessing the Applicant's new evidence submitted in support of his deferral request, the Officer found that there was "insufficient evidence which shows the legitimacy of the relationship" between the Applicant and Mr. Kogo. The Officer noted the absence of documentary evidence of cohabitation, such as "joint tax returns, spousal sponsorship or bank accounts etc."

[31] The Respondent argues that in making this finding, the Officer essentially determined that the Applicant's evidence of his relationship was simply "more of the same" – a continuation of his efforts to establish that he is gay by bringing forward evidence his partner. The Respondent notes that the Applicant's former partner's evidence before the RPD was discounted because it was vague, and in some respects, it contradicted the Applicant's narrative. Similarly, the Applicant submitted evidence from his then-partner in support of his PRRA application, but this too was found lacking in credibility. The Respondent asserts that the Officer acted reasonably in giving little weight to Mr. Kogo's evidence, since it was simply a continuation of the pattern.

[32] I disagree, for several reasons. First, the Officer did not explicitly compare the evidence of Mr. Kogo with the evidence that was submitted to the RPD or in the PRRA application. Instead, the Officer simply stated that it was "insufficient." The only explanation for this finding is what was not included: namely, documentary evidence of cohabitation. There is virtually no discussion of the details of Mr. Kogo's affidavit, nor of the supporting evidence he provided.

[33] If the Officer's finding rests on a comparison of Mr. Kogo's evidence with that of the Applicant's previous partners, it is not evident in the reasons. On the face of it, such a comparison is not compelling. The RPD found the Applicant's evidence to be "vague and evasive," and his credibility was diminished because his testimony contradicted his Basis of Claim form. The RPD also gave little weight to the evidence of the Applicant's ex-partner and his boyfriend at the time of the hearing. In both instances, the RPD found the evidence to be vague and inconsistent, noting that the partners used very similar language as the Applicant to describe why they were attracted to each other. The RPD also noted the lack of details regarding the timing and evolution of these relationships.

[34] In contrast, Mr. Kogo's evidence is detailed, and largely matches that of the Applicant, without using precisely the same language. Mr. Kogo describes the evolution of his relationship with the Applicant in some detail, and also provides details of their life together as a couple. None of this is discussed in the Officer's reasons, and I am not persuaded that the decision rests on a finding that the Applicant's new evidence was simply "more of the same."

[35] The Officer had the benefit of two sworn affidavits, one from the Applicant and the other from Mr. Kogo. I agree with the Applicant that it was relevant that Mr. Kogo had recently been found to be forthright and credible in his testimony before the RPD about the persecution he faced as a gay man in Kenya. The decision does not cast any doubt on the veracity of either the Applicant or Mr. Kogo, but rather simply finds the evidence to be "insufficient," for reasons that can only be imagined because they are not explained. That is not reasonable.

[36] A related problem with this aspect of the Officer's reasons is the following statement. After finding insufficient evidence to show the legitimacy of the relationship, the Officer stated: "I have also not been presented sufficient evidence that [the Applicant] is at risk of returning to Kenya due to his alleged relationship with [Mr. Kogo] in Canada." To state the obvious, the Applicant never claimed to be at risk because of his relationship with Mr. Kogo. This finding misses the point and starts the Officer down an incorrect line of analysis about the Applicant's risk.

[37] The second major flaw in the Officer's decision is the treatment of the objective country condition evidence about the risk of persecution in Kenya based on sexual orientation. On this question, the Officer found the evidence to be "generalized in nature," noting that there was no evidence that police or anyone else were actively pursuing the Applicant in Kenya because of his sexual orientation. The Officer also found that there was "insufficient information that [the applicant] would be exposed to extreme sanctions or inhumane treatment upon return to Kenya…" As a result, the Officer determined that "[a] subsequent PRRA application in the absence of new, personalized and non-speculative risk does not warrant a deferral of removal."

[38] This finding is unreasonable, because it is based on an incorrect legal test. The Applicant did not need to demonstrate personalized risk, but rather simply needed to establish that he faced a risk in Kenya because of his sexual orientation: *Fodor v Canada (Citizenship and Immigration)*, 2020 FC 218 at para 41–42, and the cases cited there. The risk of persecution based on sexual orientation is evident in the objective country condition evidence. The fact that

the Applicant did not demonstrate that he was personally targeted should not have been fatal to his claim.

[39] The law has been clear for many years that removal should be deferred "where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment:" *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 51, citing *Wang v Canada (Citizenship and Immigration)*, 2001 FCT 148 (CanLII) at para 48. Although a personalized risk will certainly qualify under this test, it is not the only type of risk that must be considered. The fact that the Applicant faced a significant risk as a gay man in Kenya was sufficient, even if there was no evidence that police or others were actively searching for him.

[40] The Applicant relied on several country condition documents to establish the risk he faced. The nature of this evidence is captured in a 2023 report in which the head of Amnesty Internation Kenya stated: "Amnesty [International] is deeply concerned by the growing confidence among politicians, religious leaders and extremist individuals that [call] for LGBTQ+ individuals to be assaulted or put to death." To quote the PRRA Officer's finding once again "gross mistreatment of members of the LGBT community does in fact occur in Kenya."

[41] The Officer's assessment of the risks faced by the Applicant on his return to Kenya is based on an incorrect legal test and fails to grapple with the objective evidence about the persecution of gay men (and members of the LGBTQ community in Kenya).

IV. Conclusion

[42] For the reasons set out above, I find that the decision is unreasonable. It rests on two fundamentally flawed lines of analysis and must be quashed and set aside. I will not send the matter back for redetermination because the Applicant was granted the opportunity to file another PRRA application under the stay order issued by Justice Zinn. That application is being processed, and the decision-maker should take guidance from the reasons set out above.

[43] There is no question of general importance for certification.

JUDGMENT in IMM-8464-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8464-24
STYLE OF CAUSE:	MATHEW KIPKIRUI KOSGEY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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