Federal Court  Cour fédérale

Date: 20111013

Docket: IMM-1481-11

Citation: 2011 FC 1155

Toronto, Ontario, October 13, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

CECIL BIANCA FONTENELLE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated February 9, 2011, that the applicant is not a Convention refugee or person in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), because of a delay in claiming and because the applicant failed to rebut the presumption of state protection in St. Lucia.

FACTS

Background

[2] The applicant, Cecil Bianca Fontenelle, is a citizen of St. Lucia. She was born on May 13, 1989, in Castries, St. Lucia.

[3] In March 2006, at the age of 16 years old (nearly 17), the applicant began a relationship with Sharnel Alexander. The applicant states that he physically assaulted her the first time after they had been dating for a couple of months. She ended their relationship after this assault, but he wrote to her repeatedly over the next month, begging her to take him back. She states she eventually decided to give him another chance.

[4] The applicant states that her mother and stepfather were against their relationship, and when she decided to take Sharnel back, her mother gave her an ultimatum to either end the relationship or leave her house. The applicant states that she moved in with Sharnel in June 2006.

[5] The applicant states that she learned at that point that Sharnel was a drug and arms dealer. She states that he repeatedly physically and sexually abused her while they were living together. She states that she felt helpless and that he was in control of her life.

[6] The applicant states that she went to the community police station for help for the first time on July 6, 2007. She reported the abuse to the front desk officer, David Jean (Jean), and he told her he would deal with it and sent her home. When she got home, she discovered that Jean was Sharnel's cousin, and he had told Sharnel about her report. The applicant states that Sharnel assaulted her as punishment for trying to report him.

[7] The applicant states that the next day, on July 7, 2007, she went to the central police station in Castries to report Sharnel's abuse and Jean's actions. The applicant states that, on July 10, 2007, Jean summoned her and Sharnel to the community station. Jean was upset that she had reported him

to the central police station, and ordered her not to make any more police reports. He threatened to arrest her for false allegations if she made another report.

[8] The applicant states that, during this meeting at the community station, Sharnel severely assaulted her in the presence of his cousin.

[9] The applicant states that she got in contact with her cousin who was living in Canada, who offered to send her a plane ticket. The applicant accepted, and fled St. Lucia on July 18, 2007 (she was 18 years old).

[10] The applicant states that when she first arrived in Canada, she lived without any legal status, staying with her cousin. She states that she began a relationship with Kenel Carty, who offered to help get her status in Canada. She states that, in February 2008, Kenel brought an immigration consultant to meet with her, who told her he could get her permanent residence. She states that Kenel paid the consultant $200, but that the consultant never did anything for them, and she was never able to get in contact with him again.

[11] The applicant states that in January 2009, she found another immigration consultant, this time on her own. That consultant assisted her in preparing her refugee claim, which she made on January 26, 2009.

Decision under review:

[12] In its decision dated February 9, 2011, the Board found that the applicant was not a Convention refugee or a person in need of protection. The Board noted that it had considered the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (Gender Guidelines), and also that it had considered the applicant's counselling reports. The Board found that the determinative issues in the applicant's claim were her delay in claiming and state protection.

Delay in claiming

[13] The Board noted that the applicant arrived in Canada in July 2007, but did not make her claim for refugee protection until January 26, 2009—one and a half years later (she was 19 years old).

[14] The applicant testified that an immigration consultant did not provide the service he promised. However, the Board drew a negative inference from the applicant's failure to produce a receipt from the consultant – the Board found it reasonable to assume that a woman with the applicant's education would know to get a receipt for monies paid.

[15] The Board stated that the applicant claimed Kenel had offered to sponsor her, but did not do so in the end. The Board noted, however, that the applicant had adduced no evidence to substantiate this relationship. The Board found it reasonable to assume that if she had been in such a relationship, she would have continued to enlist his support in regularizing her status.

[16] The Board cited *Velez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 923, for the proposition that, in the absence of a reasonable explanation, a delay in claiming can be fatal to a refugee claim. The Board found that as a result of the applicant's delay in claiming, the applicant lacked the subjective fear to support her refugee claim.

State Protection

[17] The Board stated that there is a presumption a state can protect its citizens, which may only be rebutted by clear and convincing proof to the contrary. The Board noted that protection need not be perfect, but the state must make serious efforts to protect its citizens. The Board then reviewed some of the background facts regarding conditions in St. Lucia, including that it is a democracy, with an independent judiciary. The Board summarized facts about the police force in St. Lucia, and noted that corruption is pervasive in the police force.

[18] The Board acknowledged that violence against women is a serious problem in St. Lucia. The Board found, however, based on the documentary evidence, that "the government of St. Lucia is making serious efforts to address the problem." The Board then summarized the institutions where one could seek protection, including the Family Court, the Women's Support Centre, the Saint Lucia Crisis Centre, and the Domestic Violence Unit of the Royal St. Lucia Police Force.

[19] The Board stated that the applicant had had no contact with Sharnel in three and a half years, and concluded on a balance of probabilities that he was no longer interested in pursuing her. The Board accorded no weight to a letter from the applicant's sister, which stated Sharnel was still in love with her and would kill her if she returned.

[20] The Board summarized the applicant's story regarding her relationship with Sharnel. The Board noted the applicant's testimony that she did not leave Sharnel because she had lost track of her mother. The Board found it implausible for the applicant to have lost track of her mother, because St. Lucia is such a small island.

[21] The Board noted that the applicant made no effort to seek police protection until July 2007. The Board stated:

> 26 …During this time, she continued to attend school, albeit inconsistently according to testimony at the hearing, and would have had access to support from her teachers or school staff. It is reasonable to assume that a young woman, still attending school, would talk about these issues with her teachers, given the alleged physical abuse that was being inflicted upon her. The panel draws a negative inference. It would be reasonable to assume that some of the alleged beatings at the hands of Sharnel would produce visible bruises or lesions that would attract the attention of the school staff.

[22] The Board recounted the applicant's testimony regarding her attempt to report Sharnel to the community police. The Board stated: "There was no documentation produced at the hearing to indicate this action took place, and the panel draws a negative inference." The Board found the

testimony that Sharnel assaulted her in front of his cousin implausible – since the officer had apparently been at risk of losing his job after she made the report to the central station, the Board did not believe he would fail to take action after witnessing an abusive incident.

[23] The Board found that the applicant made no effort to return to the central police station after the first time, despite the fact that she had received support from them. The Board therefore drew a negative inference.

[24] The Board found that the applicant had not rebutted the presumption of state protection – it found that protection would have been available to her had she sought it. The Board added that it did not find it credible that police would not take action against Sharnel, given that he was a drug and arms dealer. The Board noted the applicant could have sought a protection order, and also listed other support services available to the applicant in St. Lucia.

[25] The Board reviewed the case law on state protection, and found that the proper test is whether state protection is adequate. The Board found that, “St. Lucia is providing adequate though not necessarily perfect state protection for its citizens.” The Board therefore concluded that the applicant had not rebutted the presumption of state protection.

[26] The Board stated in its conclusion that it had taken all evidence and submissions into account, as well as the relevant case law. The Board stated: “as a result of the lack of evidence produced at the hearing to substantiate her claim, [the Board] did not find the claimant credible regarding her story and alleged abuses in St. Lucia.”

LEGISLATION

[27] Section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) grants protection to Convention refugees:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[28] Section 97 of the Act grants protection to persons whose removal from Canada would subject them personally to a risk to their life, or of cruel and unusual punishment, or to a danger of torture:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUES

[29] The Court finds that, based on the submissions of the parties, the following issues are raised:

1. Were the Board's conclusions regarding the applicant's credibility unreasonable?
2. Was the Board's conclusion that the applicant failed to rebut the presumption of state protection unreasonable?
3. Did the Board err by failing to consider and apply the Gender Guidelines?

STANDARD OF REVIEW

[30] In *Dunsmuir v New Brunswick*, 2008 SCC 9, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether

the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Khosa v Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53.

[31] Questions of credibility, subjective fear, and whether an applicant has rebutted the presumption of state protection are question of mixed fact and law, to be reviewed on a standard of reasonableness: see my decisions in *Corzas Monjaras v Canada (Minister of Citizenship and Immigration)*, 2010 FC 771 at paragraph 15.

[32] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at paragraph 47.

ANALYSIS

Issue #1: Were the Board's conclusions regarding the applicant's credibility unreasonable?

[33] The Board did not explicitly state that credibility was a determinative issue in its decision. However, the Board made several negative credibility findings and, in the Court's view, those findings were material to the Board's ultimate decision. The Board drew negative credibility inferences in its analysis of both delay and state protection, several of which were unreasonable.

Finding #1: the applicant's failure to obtain a receipt from the immigration consultant

[34] In its analysis of the applicant's delay in claiming, the Board drew a negative inference because the applicant did not have a receipt for the money paid to the immigration consultant:

> 10 …The claimant has 12 years of high school education, more than sufficient to cause her to acquire receipts for monies paid. It is possible that the claimant hired or contracted and [*sic*] immigration consultant who did not honour the agreement. However, it would be

> reasonable to expect that the claimant would have a record of this transaction, given that she was paying money.

[35] This negative inference is not reasonable: the applicant testified at the hearing that her common-law partner was the one who brought the consultant to their home and paid him. The relevant portion of the hearing transcript states:

> CLAIMANT: Because the consultant who came to the house said he would help me process my papers, but he never did. So, we waited for a while, not knowing that he was not…when we called him, he never answered, we got no response of nothing, because at that point of time, I wanted a work permit and I could never got one.
> MEMBER: Did you pay him money?
> CLAIMANT: The guy that I was seeing at the time, he did pay money.
> MEMBER: Okay, have you got a receipt or any proof that you went to this consultant?
> CLAIMANT: No, we do not have the receipt.

[36] The Board did not consider the applicant's explanation that she was not the one who paid the consultant, and therefore was made without regard to the evidence. Furthermore, the Court finds it unreasonable for the Board to rely on the applicant's educational attainment to conclude that she should have known to obtain a receipt from the consultant. The applicant does not, as the Board states, have "12 years of high school education" – the applicant had 12 years of education in total, and in fact did not complete high school. The Board did not question the applicant on whether she understood the importance of retaining these kinds of records at the time. Given the applicant's age (a teenager) and relatively little education, and the failure to question her further on this point, the Board was unreasonable to draw a negative inference on this basis.

Finding #2: the applicant's common-law relationship in Canada

[37] The Board drew a negative inference regarding the applicant's testimony about her common-law partner's promise to sponsor her:

> 11 The claimant began a relationship with a man, a permanent resident of Canada, who said he would help her with sponsorship but this did not occur. No evidence was adduced at the hearing to substantiate this relationship. The panel finds that it would be reasonable to assume that if she was in this relationship with the permanent resident, that she would persist in enlisting his support to regularize her status in Canada…

[38] The Court finds this conclusion unreasonable. The Board had before it a Statement of Live Birth for the applicant's daughter, which lists Kenel Carty as the father – it is therefore not true that the Board had no evidence before it to "substantiate this relationship." Furthermore, the Board questioned the applicant about this relationship at the hearing, and the applicant testified that she was no longer in this relationship and did not see Kenel anymore:

> MEMBER: Now, this man that you were with, who is he?
> CLAIMANT: Kineal Cardy (ph) he is my daughter's father.
> MEMBER: Okay, do you live with him?
> CLAIMANT: No, I do not live with him.
> MEMBER: Do you still see him?
> CLAIMANT: No sir.

[39] The applicant could not have pursued a sponsorship from Kenel if they were no longer together. The Board did not question the applicant about when the relationship ended or when Kenel indicated he would no longer sponsor her. The Court therefore finds that the Board's conclusion on this point was reached without regard to the evidence, and is therefore unreasonable.

Finding #3: the applicant's mother's whereabouts

[40] The Board drew a negative inference based on the applicant's testimony that she could not leave Sharnel and return home because she had lost track of her mother, and had nowhere else to go. The Board stated: "The panel finds this testimony not plausible. St. Lucia is not a large island and to lose track of her mother is not reasonable."

[41] The Board's conclusion on this point is unreasonable: the applicant testified at the hearing that her mother had in fact fled St. Lucia. The relevant portion of the hearing transcript states:

> MEMBER: But if you had left him, do you think your mom would have let…welcomed you back into her house?
> CLAIMANT: My mom, my mom fled the island at one point in time, I did not know where…
> MEMBER: Your mom what?
> CLAIMANT: She fled the island, I did not know where she was. She left, I could not find her.

[42] Later on in the hearing transcript, the applicant repeats this testimony, stating that her mother fled to Canada around June 2006:

> CLAIMANT: I live with my mom now.
> MEMBER: Your mom?
> CLAIMANT: Yes sir.
> MEMBER: When did she come to Canada?
> CLAIMANT: She came in 2006.
> MEMBER: When?
> CLAIMANT: I think it is June 2006, I am not exactly sure.
> MEMBER: June?
> CLAIMANT: 2006.
> MEMBER: June 2006?
> CLAIMANT: Yes sir.
> MEMBER: So did she come to Canada before you?
> CLAIMANT: Yes she did.

Finding #4: the applicant's failure to report her abuse to her teachers

[43] The Board made the following findings related to the applicant's failure to seek support from her teachers in school while being abused:

> 26 …During this time, she continued to attend school, albeit inconsistently according to testimony at the hearing, and would have had access to support from her teachers or school staff. It is reasonable to assume that a young woman, still attending school, would talk about these issues with her teachers, given the alleged physical abuse that was being inflicted upon her. The panel draws a negative inference. It would be reasonable to assume that some of the

> alleged beatings at the hands of Sharnel would produce visible bruises or lesions that would attract the attention of the school staff.

[44] The Court agrees with the applicant that this analysis is inconsistent with the Board's previous findings. The Board stated previously in the decision that it found, on a balance of probabilities, that the applicant was physically abused by Sharnel. However, in this passage the Board refers to the "alleged physical abuse" the applicant suffered, and appears to conclude that her testimony of being abused is not plausible because, if she was abused, she would have told her teachers or they would have noticed her bruises.

[45] The Court agrees with the applicant that there was no evidence before the Board regarding the applicant's bruises or the possible reaction of teachers and staff to the abuse. The Court therefore finds that this negative inference was not based on the evidence, and was unreasonable.

Finding #5: the applicant's first attempt to report Sharnel to the police

[46] The Board drew a negative inference regarding the applicant's testimony about reporting the abuse to the front desk officer of the community station, only to find out that the officer was Sharnel's cousin. The Board stated: "There was no documentation produced at the hearing to indicate this action took place, and the panel draws a negative inference."

[47] The Board's rejection of this part of the applicant's story is unreasonable. The only stated reason for rejecting it is the absence of documentation to corroborate her story – the Board did not state that it found the story implausible or that it was inconsistent with other parts of her testimony. Furthermore, the Board's reasons do not consider the applicant's explanation for not having a police report, or her efforts to obtain the police report. The Court finds that the failure to adduce a police report was insufficient to warrant making this negative inference, and therefore the Board's conclusion was not reasonably open to it: *Triana Aguirre*, above.

Issue #2: Was the Board's conclusion that the applicant failed to rebut the presumption of state protection unreasonable?

[48] The applicant submits that state protection is to be assessed at the operational level based on the standard of effectiveness. The test is whether, on a pure common-sense approach, St. Lucia has implemented effective protection measures and action for people similarly-situated to the applicant: *Ralda Gomez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1041.

[49] The applicant submits that the Board ignored whether measures have translated into meaningful protection for women. The applicant submits that it was clear from the objective documentary evidence that St. Lucia would be either unwilling or unable to protect the applicant.

[50] The respondent submits that the Board applied the correct test for state protection – whether adequate state protection was available to the claimant: *Flores Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94. The respondent submits that there has been a divergence of opinions from the Federal Court regarding the adequacy of state protection in St. Lucia for victims of domestic violence. However, every case must be examined on the facts before it, including assessing whether or not the claimant had rebutted the presumption of state protection and whether the Board considered the totality of the evidence before it.

[51] The respondent submits the Board provided a detailed review of the evidence and concluded that the presumption of adequate state protection had not been rebutted. The Board found that St. Lucia is providing adequate though not necessarily perfect state protection for its citizens. The respondent submits that the Court cannot re-weigh the evidence considered by the Board.

[52] The respondent submits that the applicant made a minimal attempt to access state protection, and the Board was reasonable to find that resources were available to the applicant, but she chose not to avail herself of them.

[53] The Court agrees with the respondent that the Board committed no error in stating the test as whether there was adequate state protection available to the applicant, rather than ‘effective’ state protection. The Board’s statement of the test for state protection is consistent with the Federal Court of Appeal case law, and the Board considered the relevant documentary evidence in applying that test.

[54] However, the Court finds that the Board’s conclusion regarding state protection was dependent on its credibility findings. The Court has found that the Board made multiple errors in analyzing the credibility of the applicant’s story – while not every negative credibility finding constituted an error, the Court cannot find that the Board’s conclusion regarding state protection would have been the same had it not been for the errors it did commit.

[55] Furthermore, the Court finds that the Board’s state protection analysis erred by being unintelligible: it contained several negative inferences that were not reasonable, such as that the applicant made no effort to contact the police and the letter from the applicant’s sister was rejected because it was not notarized.

[56] Thus, the Board’s reasoning regarding state protection did not have the requisite intelligibility to be considered reasonable. The Court therefore finds that the decision must be set aside and referred back to the Board for reconsideration by a different panel.

Issue #3: Did the Board err by failing to consider and apply the Gender Guidelines?

[57] The Court agrees with the applicant that the Board’s decision demonstrates that it was only paying lip-service to the Gender Guidelines, rather than considering and applying them. The Court notes the following passage in particular, at paragraph 26:

> 26 …During this time, she continued to attend school, albeit inconsistently according to testimony at the hearing, and would have

> had access to support from her teachers or school staff. It is reasonable to assume that a young woman, still attending school, would talk about these issues with her teachers, given the alleged physical abuse that was being inflicted upon her. The panel draws a negative inference. It would be reasonable to assume that some of the alleged beatings at the hands of Sharnel would produce visible bruises or lesions that would attract the attention of the school staff.

[58] This comment belies the Board's claim to have considered and applied the Gender Guidelines. The Gender Guidelines remind Board members to be mindful of the social and cultural context of claimants alleging gender-based persecution. One aspect of this context, in the case of domestic violence claims, is that women are often reluctant to disclose their abuse to others.

[59] The Board's assumption in the above passage reflects a myth about domestic violence—if a woman were really being abused, she would have told someone. The Supreme Court of Canada found in *R. v Lavallee*, [1990] 1 S.C.R. 852, per Justice Wilson, that these kinds of myths were so prevalent that expert evidence was admissible to dispel them in the criminal context:

> 35 …The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals.

[60] The Supreme Court went on to note in particular that one common aspect of a woman's behaviour in these circumstances is not to disclose the abuse:

> 59 Apparently, another manifestation of this victimization is a reluctance to disclose to others the fact or extent of the beatings. For example, the hospital records indicate that on each occasion the appellant attended the emergency department to be treated for various injuries she explained the cause of those injuries as accidental…

[61] The Gender Guidelines exist to assist the Board in dispelling these myths and understanding the behaviour of a claimant fleeing domestic violence. By failing to properly consider and apply the Gender Guidelines to the applicant's claim, the Board erred. The Board found that the applicant would have told her high school teachers about the abuse. The Gender Guidelines are supposed to make the Board Member sensitive enough to know that abused women often do not disclose the abuse, as recognized by the Supreme Court of Canada. This basic lack of sensitivity shows that the Board Member did not understand or apply the Gender Guidelines.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, and the matter is referred back to the Board for re-determination by a different panel. No question is certified.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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