Federal Court  Cour fédérale

Date: 20121220

Docket: IMM-2900-12

Citation: 2012 FC 1519

Ottawa, Ontario, December 20, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

HARINARAIN, KUMATI

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated February 28, 2012, wherein the applicant was determined to be neither a Convention refugee within the meaning of section 96 of the Act nor a person in need of protection as defined in subsection 97(1) of the Act.

[2] The applicant requests that the Board's decision be set aside and the application be referred back to the Board for redetermination by a different panel.

Background

[3] The applicant was born in Guyana in 1958. She married her husband in 1980. The marriage began well and the couple had two children. Eventually, however, her husband joined a criminal gang and began drinking heavily.

[4] The applicant's husband became physically violent, punching and kicking her and using weapons. He beat her in front of their children. She became a slave in her own house. Once her children left home, she was left alone with her alcoholic abuser.

[5] The applicant repeatedly reported the abuse to the Guyanese police, but they only warned the husband and refused to get involved in domestic matters. The abuse continued, including strangling and death threats. Her husband was kicked out of the gang and this led to more drinking and bitterness.

[6] As the abuse increased, the applicant decided to file for divorce. Once her husband learned of this plan, he continued to threaten her and he said he kept a loaded gun in order to murder her.

[7] The applicant went into hiding. In June 2007, she was granted a visitor's visa for Canada in order to attend her niece's wedding.

[8] The applicant arrived in Canada on June 28, 2007 and claimed protection on September 9, 2011. She fears if she returns to Guyana, her ex-husband will kill her.

Board's Decision

[9] The Board made its decision on February 28, 2012. After summarizing the basis of the applicant's fear and accepting her identity, the Board turned to the issue of state protection.

[10] The Board stated that Guyana was presumed capable of protecting its citizens and it was up to the applicant to rebut that presumption with clear and convincing evidence that the Guyanese authorities would not be forthcoming with serious efforts to protect her.

[11] The Board found that the applicant had not rebutted the presumption. In considering the country conditions documents, the Board found that they were mixed and inconclusive, since some of the text indicated Guyana's domestic violence protection mechanisms were inadequate, while other parts indicated reasonably functional protection was available for women fearing domestic violence.

[12] The Board excerpted the full text of a 2008 response to information request on domestic violence in Guyana (the RIR), as well as the relevant portion of the 2008 United States Department of State human rights report (the DOS report).

[13] The Board also noted that the state had made efforts to protect the applicant on five occasions, although they were inadequate. The Board indicated it had accepted all the documentary evidence, which pointed to a mixed picture. The Board also noted that the applicant had not made any effort to seek protection in the past several years and that local police failures in themselves do not amount to a general lack of state protection.

[14] The Board stated that home states are not required to provide effective or guaranteed protection, but only need to make serious efforts at protection. Therefore, the Board found that the applicant had not established a clear and convincing case that the state would not be reasonably forthcoming with such efforts. The Board rejected the applicant's claim.

Issues

[15] The applicant submits the following points at issue:

1. Was the decision made pursuant to legislation inconsistent with section 7 of the *Canadian Charter of Rights and Freedoms*?
2. Did the Board apply the wrong test for Convention refugee status?
3. Did the Board violate the principles of natural justice?
4. Did the Board fail to consider all of the evidence?

[16] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board err in rejecting the applicant's claim?

Applicant's Written Submissions

[17] The applicant argues that sworn testimony is presumed to be true and that her testimony has not been impugned in any way. The documentary evidence indicates there is a well-founded fear of persecution given the backdrop of country conditions in Guyana. The applicant argues she was not given police protection.

[18] The applicant argues the Board overlooked evidence showing the lack of police protection. Any evidence that indicates it is safe for a woman to be in Guyana when a gang member has threatened to kill her is due to media bias. It was unfair for the Board to focus on documents showing Guyana is safe as opposed to the documents of the applicant. The Board also ignored letters from the applicant's daughter indicating that Guyana was unsafe for her.

Respondent's Written Submissions

[19] The respondent argues that the appropriate standard of review is reasonableness.

[20] The respondent argues that it is an accepted principle that the test is not absolute state protection and that even the most effective, well-resourced and highly motivated police forces will have difficulty providing effective protection. The test is whether state protection is adequate. It was up to the Board to weigh the evidence and determine whether there was sufficient clear and convincing evidence that state protection was unavailable.

[21] The respondent argues the Board considered both the negative and positive evidence. The respondent characterizes the applicant's arguments as only pertaining to the weighing of evidence.

Analysis and Decision

[22] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[23] Assessments of the adequacy of state protection raise questions of mixed fact and law and is also reviewable against a standard of reasonableness (see *Hinzman, Re*, 2007 FCA 171, [2007] FCJ No 584 at paragraph 38).

[24] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[25] **Issue 2**

Did the Board err in rejecting the applicant's claim?

The respondent's position in this proceeding is that the proper test for state protection is whether such protection was adequate.

[26] The Board's decision, however, frequently invokes the "serious efforts" of a state to provide protection. This concept is invoked at least ten times in its decision, including in its stating of the test for refugee status:

> According to refugee protection law, home states only need to provide adequate protection and do not have to provide perfect protection: in other words, home states only need to make serious efforts at protection and do not have to provide *de facto* effective or *de facto* guaranteed protection.

[27] The use of the phrase "in other words" in the passage is incorrect: "adequate protection" and "serious efforts at protection" are not the same thing. The former is concerned with whether the actual outcome of protection exists in a given country, while the latter merely indicates whether the state has taken steps to provide that protection.

[28] It is of little comfort to a person fearing persecution that a state has made an effort to provide protection if that effort has little effect. For that reason, the Board is tasked with evaluating the empirical reality of the adequacy of state protection.

[29] This Court has affirmed this interpretation of state protection repeatedly. In *Lopez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1176, [2010] FC No 1589, Mr. Justice Roger Hughes made this clear (at paragraph 8):

> Another error of law is with respect to what is the nature of state protection that is to be considered. Here the Member found that Mexico "is making serious and genuine efforts" to address the problem. That is not the test. What must be considered is the actual effectiveness of the protection.

[30] In *Garcia Bautista v Canada (Citizenship and Immigration)*, 2010 FC 126, [2010] FCJ No 153, Mr. Justice Michel Beaudry indicated the same principle (at paragraph 10):

> First of all, it weighed the evidence of criticisms of the effectiveness of the legislation against evidence on the efforts made to address the problems of domestic violence. This is not enough to ground a finding of state protection; regard must be given to what is actually happening and not what the state is endeavoring to put in place (*A.T.V. v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1229, 75 Imm. L.R. (3d) 215 at paragraph 14).

[31] Most recently, Madam Justice Catherine Kane confirmed the same principle in *Ferko v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1284 at paragraph 44:

> The test is not 'perfect' state protection, but adequate state protection. Still, mere willingness to protect is insufficient; state protection must be effective to a certain degree: *Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210, 97 Imm LR (3d) 243 at para. 47.

[32] On this point, therefore, the Board clearly misstated the law. I will still, however, consider whether the Board's consideration of the evidence would have reasonably led to a finding of adequate protection had the Board properly stated the test.

[33] The Board repeatedly described the country conditions documents as "mixed" in their conclusions on state protection, since "some of the text in the most recent documents indicates that Guyana's domestic violence state protection mechanisms are inadequate" but "other text in the same recent documents tells a different story and indicates Guyana has reasonably functional state protection mechanisms".

[34] With all due deference to the Board in its consideration of evidence, I believe that the Board's error in stating the proper legal test for state protection is also reflected in its finding that the evidence is "mixed". That is, the country conditions evidence is really a mix of (1) clear statements that state protection is inadequate and (2) descriptions of various efforts made by the Guyanese state.

[35] For example, the RIR includes these statements:

- domestic violence in Guyana is widespread;
- at least one out of every three women in Guyana has reportedly been a victim of domestic violence; and
- some victims are still unaware of their rights and may be too afraid to file a report; when victims do file a complaint, police sometimes offer little support.

[36] It also includes these "serious efforts":

- there are NGOs providing services to victims of domestic violence;
- there is legislation prohibiting domestic violence;
- the police receive training on protecting victims; and

- the government launched a national policy on domestic violence.

[37] The DOS report included these statements:

- rape is a problem and pervasive in Guyanese society;
- ineffective police and prosecutors resulted in few charges and fewer convictions;
- domestic violence and violence against women, including spousal abuse, is widespread and crossed racial and socioeconomic lines;
- anti-rape legislation was frequently not enforced because of a lack of willingness of victims to press charges.

[38] It also included these "serious efforts":

- spousal rape has been criminalized by a new law;
- domestic violence is illegal and subject to criminal and civil penalties;
- the national police force has established domestic violence units;
- there is a shelter for victims of domestic violence; and
- sexual harassment is illegal.

[39] When state protection analysis is properly applied, it is clear that the "serious efforts" listed above are not proper evidence of the adequacy of state protection. A law on the books or a training session for police may not lead to the outcome of adequate protection. Evidence of adequacy is that which indicates whether or not a given law actually functions to protect citizens or whether police training has resulted in a real difference in police behaviour.

[40] The Board justified its decision on the basis that the evidence on state protection was mixed, but at no point in its decision did the Board identify any document or statement indicating that the evidence on the adequacy of state protection was mixed. Rather, the Board saw the mixed result being due to evidence of inadequate state protection being counter-balanced by evidence of serious efforts. As I have described above, the latter category of evidence does not speak to the proper test for state protection. Therefore, even with the best attempt to supplement the Board's reasons, I cannot find them reasonable.

[41] It is also puzzling why the Board referred multiple times to the applicant's failure to seek protection "in the past several years", given that the applicant has been in Canada since July 2007.

[42] It is not this Court's role to reweigh evidence and my comments should not be taken as speaking to the weight of any particular piece of evidence. Rather, the issue here is that the Board misunderstood the proper test for state protection and its evidentiary findings were sufficiently tainted by that misunderstanding that I cannot disentangle them.

[43] This decision is unreasonable because it conflicts with the *Dunsmuir* above, value of justification, as its state protection finding is neither reasonably justified by reference to the proper legal test nor by reference to properly considered evidence.

[44] In my view, on the facts of this case, the applicant has rebutted the presumption of state protection.

[45] I would therefore grant the application for judicial review and return the matter to a different panel of the Board for redetermination.

[46] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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.
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	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(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) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Loftus Cuddy	FOR THE APPLICANT
Catherine Vasilaros	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Loftus Cuddy Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT