Federal Court  Cour fédérale

Date: 20121031

Docket: IMM-2546-12

Citation: 2012 FC 1271

Ottawa, Ontario, October 31, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

S.R.H. and N.S.H.

Applicants

and

THE MINISTER OF CITIZENSHIP AND 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 27, 2012, wherein the applicants were determined to be neither Convention refugees within the meaning of section 96 of the Act nor persons in need of protection as defined in subsection 97(1) of the Act.

[2] The applicants request that the Board's decision be set aside and the application be referred back to the board for redetermination by a different panel. Given that the Board found the applicants' evidence to be credible, the applicants submit it would be appropriate to direct that reconsideration be limited only to whether the applicants' claim falls within the section 96 and 97 definitions.

Background

[3] The principal applicant and her daughter are citizens of Barbados. They seek protection on the basis of fear of abuse at the hands of the principal applicant's husband.

[4] The principal applicant married her husband in 1992 and he soon became abusive and violent. He assaulted her after her surgery in 1993 and sexually assaulted her son from a previous marriage in the same year. The principal applicant visited the United States and returned to Barbados in 1994.

[5] Her abuser assaulted and raped her in 1995. The principal applicant's husband sexually assaulted her daughter at the age of two. The applicant was attacked by four friends of her abuser in 1998. She fled Barbados for the United States in 1998.

[6] The principal applicant and her daughter arrived in Canada on July 6, 2011 and made a claim for refugee protection. Their claim was heard by the Board on January 25, 2012.

Board's Decision

[7] The Board made its decision on February 27, 2012. The Board began by accepting the identities and nationalities of the principal applicant and her daughter and by summarizing their allegations.

[8] The Board identified the determinative issues as well founded fear and state protection. The Board held that while the principal applicant is in a bad marriage and was abused, she and her daughter did not have a well founded fear of persecution on a Convention ground in Barbados and that removal to Barbados would not subject them personally to a risk to their lives or a risk of cruel and unusual treatment or punishment or torture.

[9] The Board described the principal applicant's history with her abusive spouse and found that she had a "very subjective fear", but that there was insufficient evidence to support an objective basis for that fear, because there was little evidence her husband was still actively pursuing her and her daughter. The principal applicant did not have any direct contact with her husband since leaving Barbados in 1998. The Board gave little weight to the evidence from members of her church congregation that he was still looking for her.

[10] The Board found it unreasonable that the principal applicant had not filed a claim for refugee protection during her thirteen years in the United States. The Board then found that the principal applicant did not have a subjective fear.

[11] The Board went on to consider the issue of state protection. The Board found that Barbados was a democracy so the presumption of state protection applied. The Board canvassed the principles of state protection, including the burden of proof. The Board noted the principal applicant had complained to the local police about her husband on three occasions, but had pressed no charges. Her abuser found out about her complaints from a nephew on the police force and threatened to kill her. She claimed the Barbados police did not take complaints about domestic violence and abuse seriously.

[12] The Board acknowledged that the police in Barbados might be slow in responding to some cases and that the court system is overburdened. The Board pointed to documentary evidence showing serious efforts to combat violence against women, including several statutes, the criminalization of marital rape and statistics showing that a police report was created most of the time when the police were called regarding domestic violence.

[13] The Board found that adequate protection was available to the principal applicant. The Board noted the letter from the applicants' Barbados lawyer indicating he would seek a restraining order. This was never acted upon before the applicants left Barbados, but the Board found that they could seek a protection order in the family courts upon their return.

[14] The Board found that the applicants had not provided clear and convincing evidence to rebut the presumption of state protection. The applicants had not really tested the effectiveness of the protection available to them. Three attempts to seek protection over a number of years and the decisions not to seek protection orders or press charges do not constitute probative and reliable

evidence to disprove protection. The mere fact that the state's efforts to protect a claimant are not always successful does not rebut the presumption of state protection.

Issues

[15] The applicants submit the following points at issue:

1. Did the Board err in failing to consider the principal applicant's daughter's claim on its own merits?
2. Is the Board's finding regarding subjective fear intelligible and reasonable?
3. Are the Board's findings regarding an objective basis for the fear and state protection reasonable?

[16] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board adequately consider the principal applicant's daughter's claim?
3. Did the Board err in rejecting the applicants' claim?

Applicants' Written Submissions

[17] The applicants argue the Board's reasons contain no analysis of the principal applicant's daughter's claim. While the Board confirmed the daughter's claim is based on her mother's, this does not relieve the Board from the obligation of assessing whether the daughter faces a section 96 or section 97 risk from her father upon return to Barbados.

[18] The Board found the principal applicant had no well founded fear of persecution, but made no finding relating to her daughter's fear. The Board found that there was adequate state protection for the principal applicant as a woman facing domestic violence, but there was no consideration of the adequacy of protection of the daughter as a victim of child abuse. The applicants' counsel made specific submissions referring to the shortcomings of protection for victims of child abuse detailed in a response to information request. Corporal punishment is allowed in Barbados and the country has no family court. Violence and abuse against children remains a serious problem.

[19] The Board accepted the evidence that the principal applicant's daughter was sexually abused by her father and was therefore obliged to consider her claim separately. The Board did not take the special vulnerabilities of children into account and ignored the Chairperson's Guideline on Child Refugee Claimants. The Board made findings against the principal applicant that could not apply to her daughter since she had no control over them, such as not making a refugee claim in the U.S., the 1994 return to Barbados or failing to test state protection.

[20] The applicants further submit the Board's subjective fear finding was unintelligible, given that the Board came to opposite conclusions in different paragraphs. The finding was also unreasonable given that the Board made no adverse credibility findings and therefore accepted that the principal applicant was abused. The Board also did not accept the principal applicant's testimony that she had no knowledge that the U.S. grants refugee protection to abused women, but there was no evidence before the Board that this was the case.

[21] On the point of objective basis for a well founded fear, the applicants argue the Board gave insufficient reasons for discounting the evidence from members of the principal applicant's church congregation that her abuser would still harm her. The Board simply stated it gave little weight to this evidence and provided no justification.

[22] The applicants argue that the Board misconstrued the principal applicant's evidence regarding her efforts to obtain state protection. The principal applicant's evidence was not that she failed to press charges, but that they never came to her house. Her evidence about not pressing charges was in relation to the molestation of her son.

[23] The applicants argue the Board's state protection conclusion was based on a highly selective reading of the evidence in the Board's National Documentation Package (NDP). The applicants provided a list of relevant facts from the NDP helpful to the applicants' claim that were omitted from the Board's decision.

[24] Finally, the applicants argue that on judicial review, it is sufficient for the applicants to show the result might have been different absent the Board's errors.

Respondent's Written Submissions

[25] The respondent argues that a state protection finding is determinative of a refugee claim. The Board's finding on this point is reviewed on a standard of reasonableness.

[26] The Board acknowledged the country conditions evidence on state protection was mixed. The applicants had the onus of proving the Barbadian state was unwilling to protect them and the Board found they did not meet this onus.

[27] The Board reasonably found that the principal applicant had not established the lack of state protection through her complaints to the police. The excerpts provided by the applicants from the NDP demonstrate there are difficulties in responding to gender based violence and that protection available in Barbados is not always perfect. The Board acknowledged this in its decision.

[28] The Board did consider the principal applicant's daughter's claim. There was no requirement that a separate state protection finding be made. The country conditions excerpts referred to by the applicants do not negate the Board's finding that protection was available.

Analysis and Decision

[29] **Issue 1**

What is the 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).

[30] Assessments of the adequacy of state protection raise questions of mixed fact and law and are reviewable on a standard of reasonableness (see *Hinzman v Canada (Minister of Citizenship and*

Immigration), 2007 FCA 171 at paragraph 38, [2007] FCJ No 584). Similarly, the weighing of evidence and the interpretation and assessment of evidence are reviewable on a standard of reasonableness (see *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045 at paragraph 38, [2009] FCJ No 1286).

[31] 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 at paragraph 59, [2009] 1 SCR 339). 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).

[32] **Issue 2**

Did the Board adequately consider the principal applicant's daughter's claim?

The principal applicant's daughter's claim was based on sexual assault by her father who is the principal applicant's husband. Thus, both mother and daughter had the same agent of persecution but there was different conduct by the husband and father towards each. The Board did not do a separate analysis for the daughter's claim for protection but based the daughter's claim on her mother's claim.

[33] I also agree with the principal applicant that her daughter's claim was not properly considered. There was no mention of the Chairperson's Guidelines on Child Refugee Claimants.

There was no consideration of any country conditions evidence relating to child victims of abuse. There was no analysis of those factors that would apply to the principal applicant but not to her daughter, such as the return to Barbados in 1994. Given the Board's acceptance of the principal applicant's allegations that her daughter was an independent victim of their abuser, a full analysis of her claim was clearly warranted. This position is fully supported by the jurisprudence of this Court (see *PDB v Canada (Minister of Citizenship and Immigration)* 2011 FC 1042, [2011] FCJ No 1335).

[34] The failure of the Board to carry out a separate analysis of the daughter's claim, on the facts of this case, was unreasonable.

[35] **Issue 3**

Did the Board err in rejecting the applicants' claim?

The Board, in paragraph 9 of its decision, stated, "Based on this testimony, I find that the Claimant has a very subjective fear . . .". In paragraph 11 of its decision, the Board stated, "Accordingly, I find that the Claimant does not have a subjective fear.". The applicants state these conclusions are contradictory. As well, the applicants state, relying on the Federal Court of Appeal, that it is foolhardy to doubt subjective fear without an adverse credibility finding. There was no adverse credibility finding made in this case (see *Shanmugarajah v Canada (Minister of Employment and Immigration)*, 34 ACWS (3d) 82, [1992] FCJ No 583).

[36] The Board found that the applicants did not have an objective basis for their fear because it gave little weight to the evidence from members of her church congregation that her husband had

communicated a threat to kill the principal applicant. There is no explanation as to why the Board gave this evidence little weight.

[37] I am of the view that the Board's findings on the applicants' subjective fear and the objective basis for the fear to be unreasonable.

[38] With respect to the Board's finding that state protection was available for the applicants, I would note the following points.

[39] The applicants have submitted that the Board selectively referred to documentary evidence in order to make its finding that state protection was available to the applicants. The Board is presumed to have considered all of the evidence before it (see *Oprysk v Canada (Minister of Citizenship and Immigration)*, 2008 FC 326 at paragraph 33, [2008] FCJ No 411). However, the more important the evidence that is not mentioned, the more willing a court may be to infer from silence that the tribunal made a finding of fact without regard to the evidence (see *Pinto Ponce v Canada (Minister of Citizenship and Immigration)*, 2012 FC 181 at paragraph 35, [2012] FCJ No 189).

[40] The excerpts from the NDP raised by the applicants are extremely significant. The 2009 study the Board relied upon for domestic violence statistics included findings such as "perpetrators and potential perpetrators are aware and emboldened by the knowledge that they will likely escape prosecution", "[r]espondents found fault generally with the adequacy of state responses", and "[t]he

police are untrained in methods of dealing with reports of domestic violence, such that male and female victims are often ridiculed when reporting crimes to stations".

[41] The Board stated that the principal applicant did not press charges against her husband. However, a review of the transcript shows that the statement that she did not press charges related to the sexual assault of the principal applicant's son, not to the principal applicant's telephone calls to the police when she was assaulted. On these occasions, the police told her they would come to her house but they never did.

[42] The Board did not do a state protection analysis for the principal applicant's daughter. I would simply note the extent of protection for children in Barbados as outlined at pages 290 and 291 of the certified tribunal record.

[43] While the Board did not completely fail to mention negative aspects of the country conditions evidence, these omissions are very serious as they go to the heart of the applicants' contention that state protection is unavailable for victims of domestic violence. The Board's silence on these facts rises to the level described in *Pinto* above, and I therefore infer the Board made its finding without regard to these facts. As a result, the Board's finding that state protection was available to the applicants was unreasonable.

[44] As a result of my findings, I am of the view the application for judicial review must be allowed and the matter referred to a different panel of the Board for redetermination.

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

JUDGMENT

[46] **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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