Federal Court  Cour fédérale

Date: 20150316

Docket: IMM-5465-14

Citation: 2015 FC 328

Ottawa, Ontario, March 16, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**WILLIAMS KAVIHUHA AND
GLADYS UNAANI KAKUNDE AND
MATJIUA UAKOTOK KAKUNDE
(AKA MATJIUA UAKOTOKA KAKUNDE)**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants are challenging a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board], concluding that they are not Convention refugees or persons in need of protection. They submit that they were denied procedural fairness and natural justice because their counsel was incompetent.

Background

[2] The applicants are all citizens of Namibia. The adult members of the family, Williams and Gladys, were married in June 2007, and their daughter Matjiua was born on October 23, 2010.

[3] In early November 2010, a man named David threatened to rape Matjiua because in Namibia it is believed that raping babies is a cure for HIV/AIDS. David made physical threats against the adult applicants as well as constant telephone threats, both on their home phone and cell phones. They reported the threats to the police and the case is still under investigation.

[4] On or about December 11, 2010, David came to their home while they were away and stole Matjiua's clothing. He called them later and threatened to kill all three of the applicants. In March 2011, the applicants moved from their house because they feared for their lives.

[5] In May 2011, they reported the matter to police. They entered Canada on May 9, 2011, and made inland claims for refugee protection the next day.

[6] The applicants retained Toronto lawyer Tricia Simon to assist them in seeking refugee protection (including filing the PIF) and representing them at the Board hearing.

[7] The applicants met with Ms. Simon once at her office for the preparation of the PIF, which was filed on June 6, 2011. The PIF narrative lacks detail and includes the statement that the applicants would "provide full evidence at [the] hearing."

[8] In or around June 2013, the applicants moved to Saskatchewan, on the recommendation of Ms. Simon, and she was advised of their new contact information. The applicants attempted to contact Ms. Simon by telephone on several occasions, but they were told that she was either busy or unavailable. Ms. Simon never returned their calls and messages.

[9] The applicants were notified by the Board of their hearing date. Ms. Simon did not contact them about being notified about the hearing date nor did she meet with or speak to them in preparation for the hearing, as she had previously agreed to do.

[10] The applicants traveled to Toronto for their hearing before the Board on May 6, 2014. They met Ms. Simon for the second time on the day of the hearing, at the Board's offices, but say that they had no opportunity or time to discuss their claim with her prior to the hearing. When asked by the Board which of the adult applicants would testify as the main witness, Ms. Simon indicated that "it doesn't matter" and the Board directed Williams to testify first. Ms. Simon did not submit any documentary evidence to the Board prior to or at the hearing, although the applicants had provided her with some. Williams himself submitted some newspaper articles to the Board. When Ms. Simon was asked by the Board why she had not submitted this documentary evidence, Ms. Simon stated:

> Well there's been a little bit of a – what happened is I was not properly retained from a financial perspective, and so I was waiting for the clients to properly retain me to complete the work on the file. And then when I was properly retained I think was, what? Actually I'm still not properly retained but I'm still here. [emphasis added.]

[11] The transcript of the hearing reveals that it was quite brief and Ms. Simon's offered what can only be charitably described as a perfunctory submission following the testimony.

[12] The Board found that Williams was not credible. He was not able to remember relevant dates about when the telephone threats started and in response to questions by the Board, he provided dates that preceded the birth of Matjiua. He also was unable to recall how he knew that David had HIV/AIDS. The Board acknowledged that he may have been nervous and gotten those dates mixed up, but he also made further errors about subsequent incidents (e.g. the alleged break-in and assault) such that did not "provide any measure of reliability that could have assisted negative inferences drawn regarding his hesitance when answering questions or inconsistencies between his testimony and the PIF narrative."

[13] The Board found that Gladys was more credible but she never saw David. The Board also notes that she testified that she thought they could live in Walvis Bay, Namibia, the city where Williams was born. In fairness, it is not clear that her evidence was that the family could live there without risk to Matjiua, because she does go on to testify that "this [raping of babies] is happening everywhere."

[14] The Board further found that the applicants had failed to rebut the presumption of state protection. Specifically, the Board acknowledged that "child abuse is a serious problem in Namibia and that there are those who believe that raping a baby can cure HIV/AIDS," but found that such crimes are prosecuted if reported, and that there are a wide range of support services for

women and children who are victims of abuse. The Board found that the government's legislation and efforts are being implemented, albeit imperfectly.

[15] On August 8, 2014, the applicants, through new counsel provided Ms. Simon with Williams's affidavit filed in this application and advised her that they had commenced an application for leave and judicial review on the basis that her incompetence caused a breach of natural justice and procedural fairness. She was provided with an opportunity to respond to that affidavit but has not done so. Accordingly, I accept as truthful the applicants' account of their interactions with Ms. Simon.

[16] Following the granting of leave to judicially review the decision, the applicants chose to represent themselves, and they discharged their new solicitor.

Issue and Analysis

[17] The only issue is whether these applicants were denied procedural fairness and natural justice due to the incompetence of their counsel.

[18] Refugee claimants have a statutory right to be represented by counsel during Board proceedings. The applicants submit that legal counsel are required to act with reasonable care, skill and knowledge: *Nagy v Canada (Minister of Citizenship and Immigration)*, 2013 FC 640 [*Nagy*] and that incompetence of counsel will cause a breach of natural justice if it can be shown that the counsel's acts or omissions constituted incompetence and that this resulted in a miscarriage of justice: *R v G.D.B.*, 2000 SCC 22 at para 26.

[19] With regard to the performance component of the legal test, the applicants submit that they have provided evidence to support their allegations of incompetence or negligence and that Ms. Simon was given an opportunity to respond to the allegations and explain her conduct, but she has not done so.

[20] The applicants cites several analogous cases where there was a breach of procedural fairness because counsel did not assist a claimant in preparing for their hearing, provide details to supplement or support a PIF, or enter supporting documentation into evidence: See for example *El Kaissi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1234, *Galyas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 250, and *Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51. The applicants submit that they were incompetently represented by Ms. Simon because she failed to properly prepare herself or the applicants for the hearing, to advise them of the applicable legal test, the evidence required to make out their claim, to obtain and file corroborative and additional supporting documentation, or to have adequate knowledge of their claim. The applicants submit that Ms. Simon did not exercise reasonable care in representing them.

[21] With respect to the prejudice component of the test, the applicants note that the Board found that there were inconsistencies between Williams's testimony and PIF narrative and that he was unable to recall relevant dates. They argue that if he had been adequately prepared by Ms. Simon, he would have been in a better position to answer the Board's questions and inconsistencies would have been properly addressed at the hearing.

[22] The Board also found that the applicants did not provide sufficient corroborative and objective documentary evidence to rebut the presumption of state protection. The applicants submit that they expected Ms. Simon to have documentary evidence in support of their claim, so her incompetence meant that they could not present critical evidence pertaining to state protection. In short, they say that Ms. Simon's lack of preparation led to a negative credibility finding against the applicants and the cumulative effect of her conduct was inherently prejudicial.

[23] The respondent submits that there is insufficient evidence of incompetence. First, it is argued that Ms. Simon was not given a reasonable opportunity to respond as the affidavit stating that there had been no response was sworn only four days after the notice had been sent to Ms. Simon. There is little merit in this submission. Ms. Simon was provided with the materials filed in this application and a release from her former clients permitting her to respond to them if she chooses. Although the applicants are no longer represented by their Saskatoon counsel, she would have been under a duty to the court to advise if anything was ever received, and the court has not been advised that Ms. Simon has responded.

[24] Secondly, the respondent notes that the applicants did not make a complaint to the law society or governing body and it submits that the case law advocates that a law society complaint should be filed or at the very least, adequate notice must be given so that counsel has an opportunity to respond. The authorities cited by the respondent *(Pusuma v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1025 at paras 55-56 and *Nuenz v Canada (Minister of Citizenship and Immigration*, [2000] FCJ No 555 (FCTD) at para 19), do not explicitly require

that a law society complaint be made; rather, the issues that have to be considered by the court are whether the complaint is *bona fide* and whether the former counsel had an opportunity to respond. This may be adequately demonstrated where, as here, the applicants provide adequate notice to their former counsel.

[25] The respondent further submits that even if there was a breach, it is not reasonably probable that the result would have been different. The respondent points out that the Board made several negative credibility findings, which were central to the applicants' claim. The respondent likens this to *Nagy* where the court found that, despite the incompetence of her counsel, the applicant's evidence was not credible and her application was dismissed.

[26] Lastly, the respondent notes that the Board reviewed country condition evidence about Namibia and even if there was a failure of counsel to seek and present documentary evidence, its conclusion was not based on any lack of such documentary evidence.

[27] There is a reason competent counsel meets with and prepares witnesses for their testimony. This is especially the case where, as here, the process is new and in a foreign country. Where, as here, the relevant events occurred years before the hearing, it is only common sense that memory will not be as sharp on dates of those events if the witness has not had an opportunity to review those facts with counsel. Here, on the evidence of the applicants, there was no such opportunity. I add that it is no answer for counsel to assert that she was waiting to be "properly retained." Ms. Simon acted for these applicants in making their claim and if she was not prepared to do a competent job representing them because of a lack of a financial

retainer, then she ought to have removed herself as counsel of record. I do not accept the respondent's submission that the result would necessarily have been the same in regards to the credibility finding had the solicitor done a competent job of representing these applicants.

[28] I am also unable to agree that the result was, at least in part, dependent on the lack of the documents that counsel ought to have obtained herself or advised her clients to obtain. It is impossible to reach that conclusion without seeing what those documents are.

[29] For these reasons, this application must be allowed. The applicants would be well advised to retain counsel for the redetermination and, at a minimum, ask that it be held in Saskatoon, where they now reside, and not in Toronto.

[30] The parties were asked if they had a question to propose for certification but only the applicants proposed a question, which was more in the nature of a plea to the court. No question is certifiable on these facts.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed, the decision of the Board rejecting the applicants' claims for protection is set aside, their applications are to be determined by a differently constituted panel, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5465-14
STYLE OF CAUSE:	WILLIAMS KAVIHUHA ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	JANUARY 22, 2015
JUDGMENT AND REASONS:	ZINN J.
DATED:	MARCH 16, 2015

APPEARANCES:

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Marcia E. Jackson	FOR THE RESPONDENT

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