Federal Court  Cour fédérale

Date: 20151117

Docket: IMM-1075-15

Citation: 2015 FC 1279

Ottawa, Ontario, November 17, 2015

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

EMILY MERLIA JAMES
VALYN MARCELLA DANIEL (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. James was the victim of horrific domestic violence in her native Saint Lucia. She came to Canada with her minor daughter, Marcella, in order to seek asylum. Her refugee claim was dismissed on the grounds that she failed to avail herself of the state protection which was available to her in Saint Lucia. This is the judicial review of that decision of a member of the Refugee Protection Division of the Immigration and Refugee Board of Canada.

[2] Ms. James lived with one Randolf Joseph from 2007 to 2012. Mr. Joseph soon became madly possessive and jealous. He would beat her and rape her at will. He would also beat her daughter. However, there was no place for them to go.

[3] Although the physical, sexual and mental abuse was constant, three incidents deserve special mention. In 2008, she called the police. In a fit of rage, Mr. Joseph smashed the phone. The police did not come. She did not follow up.

[4] In 2010, she found herself pregnant from another man. Mr. Joseph came in to her work place and began punching her in public. She fell down and broke her leg. He threatened to kill all and sundry, were she to report the matter to the police.

[5] Finally, in February 2012, she told Mr. Joseph that their relationship was over. During the night, he placed a hot iron on her leg and then started to move the iron towards her face. He said he would make sure that no man would ever want her again. He stopped when she promised to stay. She went to the police the next day, but they said it was a domestic matter, not police business. At the hearing before the Refugee Protection Division, she testified that she then went to Human Resources, which in context appears to be a government office. The gentleman there recommended that Mr. Joseph be arrested. Ms. James replied:

> And I said to him, "no, I wouldn't do that." He tell me "are you sure?" He pleaded me. I said to him, "no, because if they arrest Randall now, when they drop him he will still come back very angry."

She was looking for advice other than an arrest, but none was forthcoming.

[6] Shortly thereafter, there was an incident in which a man chopped his girlfriend and child to death in a jealous rage. Mr. Joseph said that what that man did was too easy. He would make sure she suffered more before he killed her. It was then that she decided to come to Canada.

I. The Law

[7] As applied to Ms. James, section 96 of the *Immigration and Refugee Protection Act*, based on the United Nations *Convention Relating to the Status of Refugees*, provides that refugee protection is conferred on a person who, by reason of a well-founded fear of persecution as a member of a particular social group, is unable or by reason of that fear unwilling to avail herself of the protection of her home state.

[8] Ms. James is a member of a particular social group, women subject to domestic violence.

[9] In order to obtain Convention refugee status, she must be personally subjectively fearful and there must be an objective basis for that fear. The burden is upon her to persuade the decision-maker, not on a balance of probabilities that there would be persecution, but rather that there is a serious possibility of persecution of her or of similarly-situated individuals (*Rajudeen v Canada (Minister of Employment and Immigration)* (1984), 55 NR 129 (FCA), [1984] FCJ No 601 (QL)).

[10] Section 97 of the IRPA goes on to provide that persons who are not Convention refugees are nevertheless in need of protection if removal would subject them personally to a danger, believed on substantial grounds to exist, of torture, or to a risk to life or to a risk of cruel and

unusual treatment or punishment. Unlike section 96, the risk must be personal, and must be established on the balance of probabilities (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] FCJ No 1 (QL), per Mr. Justice Rothstein, as he then was).

[11] In accordance with the seminal decision of *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, [1993] SCJ No 74 (QL), a state is presumed to be capable of protecting its citizens. That presumption can be rebutted with "clear and convincing" evidence. There are a great many decisions of the Federal Court of Appeal which go on to say the more entrenched the democracy, the more difficult it is to overcome the evidentiary burden (*e.g., Canada (Citizenship and Immigration) v Kadenko* (1996), 143 DLR (4th) 532, [1996] FCJ No 1376 (QL)).

II. The Issues

[12] There are two issues:

a. Was the decision reasonable taking into account gender and child guidelines?

b. Should there have been a separate analysis and determination of the daughter Marcella's claim?

III. Judgment

[13] I find the decision unreasonable, without having to resort in any meaningful way to the gender and child guidelines of the Immigration and Refugee Board of Canada. Since I am granting Ms. James' judicial review, it is not necessary to consider whether her daughter

Marcella, who based her claim on her mother, also had a separate basis for seeking refugee status. However, nothing should prevent her from advancing that possibility when the matter is reheard.

IV. Analysis

[14] Although the member was certainly familiar with the general principles of state protection, his decision is somewhat boiler plate and fails to take into account the reality of life for women in domestic abuse situations in Saint Lucia. He held:

> I find state protection should reasonably be forthcoming and there would not be a serious possibility of persecution or harm if the claimants were to access the protection available to them in Saint Lucia.

He concluded:

> The onus is on her to prove that the state protection in Saint Lucia was inadequate by telling me that when she tried to access help or assistance from a higher ranking police officer, authority, or from an NGO such as a women's group, organization or shelter, none was reasonably forthcoming. I find that the claimant did not make a reasonable effort and take any course of action to seek protection to really test the effectiveness of the protection that was available to her.

[15] He obviously considered the failure of the police to respond to her call in 2008, and the attitude of the police officer in 2012, to be local failures, not representative of Saint Lucia as a whole. He did not realize that it is easier to provide state protection in a large country, such as Canada, where there is an internal flight alternative, than in a small country such as Saint Lucia where the agent of persecution might well live around the corner. As Mr. Justice Zinn said in

Corneau v Canada (Citizenship and Immigration), 2011 FC 722, [2011] FCJ No 918 (QL), at para 12:

> The Board's suggestion that the "local failures" to provide effective policing did not amount to a lack of state protection and the Board's determination that the failure in the applicant's case did not suggest a broader pattern of state inability or refusal to provide protection are also unreasonable. Saint Lucia is a small island nation with a population of approximately 174,000 and a police force (including coast guard) of 826 members. With such a small size it is difficult to accept that a failure in policing could truly be "local," especially given that the applicant lived in the capital, Castries.

[16] As held in *Zhuravlvev v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 3, [2000] FCJ No 507 at para 32 (QL), the issue of the internal flight alternative must be considered in relation to the state's inability or refusal to provide protection. This was not done.

[17] The member noted that Saint Lucia in recent years has strengthened its laws with respect to domestic violence. However, victims of domestic violence are not protected by mere words. There was considerable discussion as to how adequate or effective that protection must be. It was for the member, not for this Court, to determine the adequacy of that protection. However, not one word was mentioned of the affidavit of Flavia Cherry. At the time, she was chairperson of the Caribbean Association of Feminist Research and Action, and the delegate from Saint Lucia. This is a feminist organization with national networks in 17 Caribbean countries. Her evidence is quite damming. She submits there is no adequate state protection for women who are fleeing situations of domestic violence. Their complaints are not well received by the police, and the law does not adequately protect them. The country is so small that it is very difficult to hide from an abuser. She reports incidents where the police have dismissed the complaint entirely. The stigma

and discrimination of having been a battered woman is a great hurdle. She writes: "[t]here is the perception that domestic violence is a private matter, and even police officers may try to convince the victim to stay quiet, or to give the perpetrator a second chance." Her report goes on and on. The only safe place for women is the one government-operated shelter, which can only house five families and only for a short time. A target is easy to find. One may well be killed while court proceedings are ongoing. It is not necessary to have one's self killed in order to prove a point.

[18] There is a presumption that the decision-maker has considered the totality of the evidence before him when making findings of fact. Given that the affidavit of Ms. Cherry appears to contradict the member's conclusions in a very meaningful way, it was necessary to explain away that evidence. As Mr. Justice Evans, as he then was, stated in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425 (QL), which has been cited by the courts more than 1,000 times, at para 17:

> However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[19] It is easy for me to infer that the member overlooked this contradictory evidence, and to conclude that the decision was unreasonable.

JUDGMENT

FOR REASONS GIVEN;

THIS COURT'S JUDGMENT IS that:

1. The application for judicial review of the decision of a member of the Refugee Division, of the Immigration and Refugee Board of Canada, dated 5 February 2015, is granted

2. The decision is quashed and the matter is referred back to another member of the Refugee Protection Division for redetermination.

3. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1075-15
STYLE OF CAUSE:	EMILY MERLIA JAMES ET AL v MCI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 12, 2015
JUDGMENT AND REASONS:	HARRINGTON J.
DATED:	NOVEMBER 17, 2015

APPEARANCES:

Oluwakemi Oduwole (agent)	FOR THE APPLICANTS
Maria Burgos	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Johnson Babalola Barrister & Solicitor North York, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT