Federal Court  Cour fédérale

Date: 20160204

Docket: IMM-3232-15

Citation: 2016 FC 130

Toronto, Ontario, February 4, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

DEAN ALFRED FOSTER
ANNELIZE FOSTER
LUC FOSTER AND
KELSY FOSTER

Respondents

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a decision [Decision] by a member [the Member] of the Refugee Protection Division [the RPD] finding that the Respondents are Convention refugees. The Decision is dated June 29, 2015.

[1] For the reasons outlined below, I find that judicial review should be granted. The Member made a clear error of law with respect to state protection.

II. Background

[2] The Respondents, Dean Alfred Foster (50), Annelize Foster (40), Luc Foster (13), and Kelly Foster (19), are citizens of South Africa. They are white and allege a well-founded fear of persecution on the basis of their race.

[3] While the Respondents originally lived in Cape Town, they moved to a small rural community, Howick, in 2007. They allege that the move was driven by the high crime rate in Cape Town and their personal psychological problems.

[4] When the Respondents arrived in Howick, however, they allege that the situation was worse, particularly with regard to violence by black criminals and extremists towards white landowners. They claim that their dogs were poisoned by black locals, that they had been threatened, and that they felt the local police were corrupt and unable to protect them, so they sold their property and traveled to Canada.

[5] Three of the Respondents – Dean Alfred, Annelize, and Luc, their son – arrived in Canada on December 8, 2011, and made their claim for refugee protection four days later. That application was rejected on September 16, 2013 on the basis that the Respondents had no nexus with a Convention ground. They sought judicial review of that decision and, on December 18, 2014, by consent, it was sent back to the RPD for redetermination.

[6] Kelsy, the fourth Respondent and Dean Alfred's daughter, arrived in Canada on April 3, 2015, and applied for refugee status shortly thereafter. Until that time she lived with her mother, Nicoelen Burnett, in South Africa. While she did not participate in the first claim for refugee status, her claim was joined to the claims of the other Respondents in the redetermination.

III. Preliminary Matter

[7] At the hearing, the Applicant noted two errors in the style of cause, and requested the following corrections:

i. Respondent "Luc Foster" was indicated twice and one should be deleted; and

ii. Respondent "Kelly Foster" was listed incorrectly, and should be "Kelsy Foster".

[8] With the consent of the parties, I will allow the amendment to the style of cause to incorporate these corrections.

IV. Decision

[9] In a Decision delivered orally on the same day as their hearing, the Member found that the Respondents were Convention refugees pursuant to section 96 of the Act. He concluded first that they had established a nexus to a Convention ground – persecution on the basis of race – adding that they may have faced additional persecution because they were landowners and thus perceived as wealthy. The Member also found the Respondents and their narrative to be credible.

[10] "The only point that I disagreed on," the Member then stated to the Respondents, "which is a very significant point, is on your analysis of the adequacy of state protection in South Africa" (Application Record [AR], p 7). On this point, the Member first noted items in the National Documentation Package [NDP] on South Africa – the United States Department of State Report, which described South Africa as a constitutional multi-party Parliamentary democracy, and a Freedom House Report, which stated that South Africa ranks highly on a global comparison in terms of civil liberties and political rights – acknowledging that these pieces of documentary evidence place a high bar on overturning the presumption of adequate state protection.

[11] The Member also observed that, according to the NDP, authorities in South Africa maintained effective control over security forces, though there were numerous cases of abuse and the South African Police Force [SAPS] remained understaffed, ill-equipped, and corrupt, and poorly trained. That said, the Member noted that there was also evidence that police abuse and corruption were, to some extent, investigated and prosecuted.

[12] In terms of the Respondents' claimed status as a persecuted minority without access to state protection, the Member observed that while only 8.7% of the population is white, they make up approximately 40% of the judiciary, 52% of the country's advocates, 65% of the country's practicing attorneys, and 24% of the management of SAPS. On top of that, the NDP also found that it is rare for white South Africans to experience violence or discrimination from government authorities.

[13] The Member further noted that the Respondents never actually tested the adequacy of state protection in Howick because they believed that the local law enforcement were corrupt and may have been involved in the murder of a farmer. The Member accepted that, as Annelize had been a member of the police for 10 years in Cape Town, she had some knowledge of problems within the force. Ultimately, however, the Member decided to give more weight to the documentary evidence, instead of the Respondents' personal evidence (composed mainly of anecdotes and personal observations). He concluded that they "have not rebutted the presumption that adequate state protection exists in South Africa" (AR, p 12), repeating this finding twice more over the course of the Decision.

[14] Nonetheless, the Member then turned to the question of an Internal Flight Alternative [IFA]. He identified Cape Town as an option for the Respondents, stating that he must evaluate the IFA on the basis of two questions – is it safe to live in Cape Town, and is it unreasonable to ask them to relocate there?

[15] On the first branch of the IFA test, the Member stated that "I have already answered that in South Africa there is adequate state protection, at least based on the documentary evidence, and therefore that would apply to Cape Town as well" (AR, p 12). On the second branch, however, the Member found that it was not reasonable to ask the Respondents to relocate, largely due to a psychological assessment of Annelize and Dean Alfred Foster, which found that (a) both Annelize and Dean Alfred suffered from PTSD (b) Annelize suffered from depression and had attempted suicide and (c) effective treatment for any of these problems in Cape Town would be impossible since they were caused by a subjective sense of insecurity tied to life in South Africa.

[16] The Member also relied on the Respondent's subjective fears, determining that "even though I say adequate state protection exists in South Africa and that adequate psychological assessment can be given to you in South Africa, you do not have the logical assurance in your own minds, based on your own psychological makeup and your own past experiences, to be able to accept this" (AR, p 13). For these reasons, the Member concluded that it was not reasonable to require the Respondents to move to Cape Town, that it was not a viable IFA, and that the Respondents were Convention refugees.

V. Issues

[17] The Applicant argues that the Member made two reviewable errors, one in granting refugee status despite adequate state protection and the other in finding that Cape Town was bit a viable IFA for the Respondents.

[18] On the first error, the Applicant notes that in order to obtain Convention refugee status under section 96 of the Act, a claimant must (a) be subjectively fearful and (b) have an objective basis for that fear. To demonstrate that objective basis, the claimant must also rebut the presumption of adequate state protection (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*]). As described by the Federal Court of Appeal in *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 42 [*Hinzman*], without proof of inadequate protection, there can be no refugee claim:

> In determining whether refugee claimants have an objective basis for their fear of persecution, the first step in the analysis is to assess whether they can be protected from the alleged persecution by their home state. As the Supreme Court of Canada explained in *Ward* at page 722, "[i]t is clear that the lynch-pin of the analysis is

> the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded." [Emphasis in original] Where sufficient state protection is available, claimants will be unable to establish that their fear of persecution is objectively well-founded and therefore will not be entitled to refugee status.

[19] The Applicant contends that since the Member found that the Respondents had "not rebutted the presumption that state protection exists in South Africa", the analysis should have stopped there, and the Member's ultimate finding demonstrates an incorrect understanding of the test for Convention refugee status under section 96 of the Act. In other words, at the point that adequate state protection was found, the objective fear of persecution was found not to apply, which ends the section 96 claim, whatever the claimant's psychological (subjective) state. It was an error to of law to proceed any further.

[20] The Respondents reply that the Member made a reasonable finding that in their circumstances the Respondents did not need to test the adequacy of state protection. Because of their psychological profiles and prior first-hand knowledge of the South African police, the Member determined it was not reasonable for them to contact the authorities. The Respondents contend that the Member was justified in that finding considering their personal histories and the specific issues they had faced. In particular, Annelize's experiences as a police officer and the fact that the Respondents could not afford to hire private security were significant factors in the Member's conclusion, which was thus reasonable.

[21] As for the second error, the Applicant argues that the Member made an error of law in concluding that it would be unreasonable for the Respondents to relocate to Cape Town. The

error, the Applicant asserts, is that the Member interpreted and applied the second prong of the IFA test purely on the subjective concerns of the Respondents. The two-part IFA test, per *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 at 711, states that (i) there is no serious possibility of the individual being persecuted in the IFA area (i.e., Cape Town, in this case); and (ii) conditions in the proposed IFA must be such that it would not be unreasonable in all the circumstances for an individual to seek refuge there. In this case, the Member erred when he failed to consider all the circumstances present, focusing solely on the Respondents' subjective fear of moving to Cape Town.

[22] The Respondents counter that the Member reviewed the events which caused them to flee, Annelize's work history, the experiences of their friends and family, and their psychological profiles, and all of these together provided ample evidence to conclude that it would not be reasonable for the Respondents to seek an IFA in Cape Town. The Decision was not based solely on subjective concerns, but on a thorough review of the record, including a thorough assessment of the psychological report. To reverse the Member's IFA finding would amount to this Court simply reweighing the evidence.

VI. Analysis

[23] The first alleged error, which I find to be dispositive, relates to the determination of the legal test under section 96 of the Act and thus the standard of review is correctness (*Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 at para 9; *Barragan Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 502 at para 26). Under a correctness review, "a reviewing court will not show deference to the decision maker's reasoning process; it will rather

undertake its own analysis of the question" (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 50).

[24] When the legal test under section 96 of the Act is correctly determined, a finding of adequate state protection precludes refugee protection status (see, for example, *Ward* and *Hinzman*). As described by Justice Noel in *Sran v Canada (Citizenship and Immigration)*, 2007 FC 145 at para 11:

> It is well-established in the jurisprudence of this Court that where state protection is available, a claim for refugee protection cannot succeed. In other words, this Court has held repeatedly that the availability of state protection is determinative in refugee protection cases, and accordingly, if state protection is found to be available it is not necessary to address the other issues brought forward by a refugee claimant.

[25] The Member in this case found that the Respondents had not rebutted the presumption that adequate state protection exists in South Africa, repeating this conclusion three times. These are clear, unambiguous findings that state protection existed, and to carry on with further analysis in spite of these express statements constituted an error of law.

[26] The Respondents argue that when the entire record is read as a whole, one can infer that the Member had reasons – namely, their previous experiences with the police – to conclude that the Applicant were justified in avoiding the authorities. After a reading of the transcript with that direction in mind, however, the fact remains that the Member clearly and repeatedly indicated that the Respondents had not rebutted the presumption of state protection. As Justice Mosley stated in *Smith v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1283 at para 52, "[r]egardless of… subjective fear of persecution, the claimant must overcome the objective presumption that

the state could protect her." In continuing his analysis despite recognizing the presence of adequate state protection, the Member plainly misapplied the legal test for Convention refugee status.

VII. Conclusion

[27] In light of the above, this application for judicial review is granted. There are no costs or certified questions.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is granted. The matter is remitted back to the RPD for redetermination by a different member.
2. The style of cause is amended to (i) delete the duplicated Respondent "Luc Foster"; and (ii) correct the name of Respondent "Kelly Foster" to "Kelsy Foster".
3. There are no questions for certification.
4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3232-15
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v DEAN ALFRED FOSTER ET AL
PLACE OF HEARING:	EDMONTON, ALBERTA
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