Federal Court Cour fédérale

Date: 20160810

Docket: IMM-5467-15

Citation: 2016 FC 915

Ottawa, Ontario, August 10, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

SYBRINA LORINE JOHN
AARON OWEN HAZELWOOD JR
ARALINE SHATERA HAZELWOOD

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review under section 72(1) of the *Immigration and Refugee Protection Act* [IRPA] of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] dated November 10, 2015, determining Sybrina Lorine John [the Principal Applicant], and her two children [collectively the Applicants]

were not Convention refugees and were not persons in need of protection, and therefore rejecting their claims [the Decision].

[2] The RPD accepted the evidence of all three Applicants, and made no finding negative to their credibility either specifically or generally.

[3] Their evidence was to the effect that the Principal Applicant was born in St. Vincent in 1972. In 1993, she met the father of the two children with whom she is claiming refugee protection, a person of Antiguan nationality. The pair fell in love and the Principal Applicant agreed to move to Antigua. The Principal Applicant had a first born child (she is unsure as to the father's identity), who currently lives in St. Vincent. The couple had fraternal twins in 1997; the fraternal twins join in this claim.

[4] The Principal Applicant alleges her spouse was emotionally and physically abusive to her and the children. She alleges in one incident, he used a machete and attacked her – she has a scar on her ankle from this incident. The Principal Applicant went to the Antiguan police at the time; the police told her if she had had sex with her spouse, this would not have taken place. The Principal Applicant's fear of her spouse increased, because of his threats and his promises to find her and hurt her should she leave him and go back to her family in St. Vincent. She testified that her spouse has family members who are gang members in St. Vincent. The police turned the Principal Applicant away at least two more times when she sought their help in Antigua.

[5] The Principal Applicant eventually escaped by sending the twins to live with relatives in St. Vincent while she traveled to Canada in 2005. The Principal Applicant had no status in Canada for several years, until she was informed of Legal Aid; she sought the help of a lawyer at that time and filed a refugee claim in 2012.

[6] The spouse however went to St. Vincent looking for the Principal Applicant and uttering threats of cutting off her head. After spending two years in St. Vincent, the twins were eventually sent to live with their aunt in Antigua. The spouse abused them both emotionally and, particularly his daughter, physically. The daughter has scars from the abuse, namely from her father burning her with a hot iron on her wrist. Police were of no assistance.

[7] Eventually in 2008, the Principal Applicant was able to bring the twins to live with her in Canada.

[8] In terms of the standard of review in this matter, in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." It is well established that reasonableness is the standard of review applicable to findings of weight of the evidence: *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA) at para 4; *Bueso Trochez v Canada (Citizenship and Immigration)*, 2013 FC 1014 at para 25.

[9] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[10] The Applicants raised four issues: 1) an erroneous finding that there was "no evidence" that the spouse had relatives who were gang members in St. Vincent; 2) a failure to properly assess a report of a psychologist; 3) inadequate assessment of state protection; and 4) failure to apply the *Gender Guidelines*.

[11] In my respectful opinion the determinative issue is the first. There was evidence that the spouse had relatives in St. Vincent who were gang members. This evidence was provided in the oral testimony of the Principal Applicant in response to questions asked by the RPD itself.

[12] In the absence of any finding or suggestion that the Applicants lacked credibility, it is trite law that their evidence must be accepted as truthful: *Maldonado v. Canada (Minister of Employment and Immigration)* (1979), [1980] 2 F.C. 302, [1979] F.C.J. No. 248 (F.C.A.) (QL) [*Maldonado*] at para 5, which stands for the proposition that a refugee claimant's allegations are presumed to be true unless there are reasons to doubt their truthfulness:

> [20] Further, in evaluating credibility, it must be borne in mind that a refugee claimant's allegations are presumed to be true unless there are reasons to doubt their truthfulness (*Valtchev v. Canada (Minister of Citizenship and Immigration)* (2001), 208 F.T.R. 267,

> 2001 FCT 776 at para. 6 (F.C.T.D.); see also *Maldonado v. Canada (Minister of Employment and Immigration)* (1979), [1980] 2 F.C. 302, [1979] F.C.J. No. 248 (F.C.A.) (QL) [*Maldonado*]).

[13] I am therefore compelled to conclude that the RPD's finding in this respect constituted a finding contrary to and in the face of evidence before the RPD. Notwithstanding the able efforts of Minister's counsel to persuade me otherwise, I cannot overlook this mistaken finding. Not only was it wrong on its face, but it formed the first of a three-sentence logical progression analysis which concluded with a two-fold finding: that there was insufficient evidence that 1) the Applicants "would face any difficulties" should they return to St. Vincent, and that 2) "the police in Saint Vincent, whom they have never approached, would not protect them".

[14] Counsel for the Minister correctly categorized this decision as ultimately one of state protection. However, it is not apparent that is how the RPD viewed this case. State protection is not mentioned except in the conclusory words of the last clause of one sentence, quoted above. It is not analyzed in any meaningful manner. I recognize the need for clear and convincing evidence, and the presumption of state protection, and that the onus is on the Applicants to rebut the presumption. I agree there is no formula for assessing the adequacy of state protection at the operational level (the proper test in my view), but and with respect, the RPD carried out no analysis of state protection at all. Not that the RPD has to deal with every piece of evidence, but here it made no reference whatsoever to the country condition material showing problems with state protection in the domestic violence context. More fundamentally, even if what is recorded might pass for an assessment of state protection (which in my view it does not), it was fatally

flawed at its outset by a denial of the threat itself, namely that the spouse had relatives in St. Vincent who are gang members.

[15] I am unable to tell what the RPD would have concluded but for its mistaken view of the evidence and its erroneous and unsupported "no evidence" finding. It is not safe to rely upon it.

[16] I am required to stand back and review the decision as an organic whole, appreciating that judicial review is not a treasure hunt for errors. On that basis it is my view that the decision is not justified on the facts and law, and is therefore unreasonable per *Dunsmuir*. Therefore, it must be set aside and re-determined by a differently constituted panel.

[17] Having come to this conclusion, it is not necessary to deal with the other issues re the psychologist's report and the Gender Guidelines. However, in connection with the psychologist's report, the RPD appears to have rejected the psychologist's report on grounds that were directly and recently criticized by the majority of the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (*Kanthasamy*). The RPD states at paras 13-14 of the Decision:

> [13] The panel, however, does not find [the psychotherapist's] assessment to be persuasive evidence and determines that [the psychotherapist] is in no position to state categorically that the PC's mental and emotional state <u>are the result of</u> her alleged problems in Antigua.
>
> [14] (…) The panel finds that, although the PC may be suffering from anxiety and depression, this <u>may or may not be related to the causes</u> described by the PC in her evidence. Accordingly, the panel gives the psychological assessment, no weight.
>
> [emphasis added]

[18] In *Kanthasamy* at para 49, the Supreme Court rejected this approach to psychological reports:

> And while the Officer did not "dispute the psychological report presented", she found that the medical opinion "rest[ed] mainly on hearsay" because the psychologist was "not a witness of the events that led to the anxiety experienced by the applicant". This disregards the unavoidable reality that psychological reports like the one in this case will necessarily be based to some degree on "hearsay". Only rarely will a mental health professional personally witness the events for which a patient seeks professional assistance. To suggest that applicants for relief on humanitarian and compassionate grounds may only file expert reports from professionals who have witnessed the facts or events underlying their findings, is unrealistic and results in the absence of significant evidence. In any event, a psychologist need not be an expert on country conditions in a particular country to provide expert information about the probable psychological effect of removal from Canada.
>
> [emphasis added]

[19] Neither party proposed a question to certify and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision of the RPD is set aside, the matter is remanded to a differently constituted panel of the RPD for re-determination, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5467-15
STYLE OF CAUSE:	SYBRINA LORINE JOHN ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 6, 2016
JUDGMENT AND REASONS:	BROWN J.
DATED:	AUGUST 10, 2016

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