Federal Court  Cour fédérale

Date: 20120316

Docket: IMM-4748-11

Citation: 2012 FC 320

Ottawa, Ontario, March 16, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

CONNIE JUDY KAY WRIGHT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) which found that the applicant was not a Convention (United Nations' *Convention Relating to the Status of Refugees*, [1969] Can TS No 6) refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For the reasons that follow, the application is granted.

Facts

[2] The applicant is a citizen of Saint Vincent. She alleges fear of persecution by her ex-husband, Alrick Wright. The applicant states that Alrick began abusing her soon after they started living together. He was physically violent to her and would sometimes lock her out of the house. The applicant states that their relationship improved slightly after the birth of their first child, at which point he convinced her to marry him, but the abuse resumed after they were married.

[3] The applicant states that she tried to seek help from the police on multiple occasions. Each time they would not arrest her husband but would talk to him and tell him to treat the applicant better. On one occasion when her husband severely injured her leg the police told her to go to the hospital. They did not take her there nor lay charges.

[4] The applicant eventually fled the abuse and went to stay with her father. Her husband came to the house and threatened to kill the applicant and her family. The applicant decided to find work in the Grenadines and only returned home each month to see her family. In 2005, after her husband saw her on the street one day and attacked her, she decided she would never be safe and came to Canada in 2006. She remained here for several years before a friend informed her that she could make a refugee claim based on domestic violence. She made her claim in May 2010.

Decision Under Review

[5] In the reasons for its decision dated June 22, 2011, the Board found that the determinative issue was state protection, finding that the applicant did not rebut the presumption of state protection with clear and convincing evidence. The Board noted the Court's decision in *James v Canada*

(Minister of Citizenship and Immigration), 2010 FC 546, which canvassed documentary evidence in respect of state protection for victims of domestic violence in Saint Vincent. However, the Board found that the more recent evidence, namely subsequent to *James*, was mixed rather than entirely negative.

[6] In support of this finding the Board quoted at length from two Responses to Information Requests related to domestic violence in Saint Vincent, one from 2009 and one from 2008. The Board also quoted a long passage from the 2010 US DOS Report on human rights in Saint Vincent, finding the evidence in respect of state protection also to be mixed rather than entirely negative.

[7] The Board concluded that:

> In my view, it would be too problematic for the surrogate notion of refugee protection if grants of it were to occur in the face of documentary state protection evidence this mixed and in circumstances where the last clear chance the state was given to protect the claimant from the agent of persecution occurred as long ago as in this case – again, nearly 20 years ago, in the year 1992.

[8] The Board noted the applicant's testimony about what she had heard recently about police responses to domestic violence but found that this only added to a "mixed factual record" and was insufficient to rebut the presumption of state protection. The Board also found that the applicant's attempts to seek protection were not sufficient to prove an absence of state protection since they were so long ago. The applicant's claim was therefore rejected.

Standard of Review and Issue

[9] The issue before the Court is whether the Board's analysis of state protection was reasonable. It is settled law that the question of whether state protection is available is a question of mixed fact and law, to be reviewed on a standard of reasonableness; *James*, para 16.

Analysis

[10] In *James*, Justice Robert Mainville set aside a decision of the Board for selectively considering the evidence of state protection in Saint Vincent and failing to explain why the positive evidence outweighed the negative. Justice Mainville provided several examples of documentary evidence that state protection was not available and then stated the following:

> Though it is clear that the Panel's decision on the availability of state protection must be given deference, such deference is not absolute. As noted by Justice O'Reilly in *Lewis v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 282, [2009] F.C.J. No. 347 (QL) at paras. 8 to 10 [emphasis added]:
>
> > The Board found that the documentary evidence established adequate sources of state protection in St. Vincent for women in Ms. Lewis's circumstances. For example, the Board cited a report describing the role of the St. Vincent Family Court in protecting women from domestic violence. The Board also referred to laws aimed at protecting victims of family violence. However, Ms. Lewis claims that the Board failed to refer to the evidence showing the limited capacity of the Family Court to enforce its orders, the reluctance of police officers to take action in domestic violence cases, and the infrequency with which the laws that are supposed to protect women are enforced.
> >
> > The Minister argues that the Board is presumed to have considered all the evidence before it, even if the Board does not specifically cite it. I agree. However, here, the very documents relied on by the Board to find a presence of adequate state protection in St. Vincent also question the sufficiency of that protection. <u>In my view, the Board was</u>

> obliged to explain why it found that the favourable elements contained in the evidence outweighed the negative parts. In the absence of that assessment, I find that the Board's decision was unreasonable in the sense that it was not a defensible outcome in light of the facts and law: Dunsmuir v. New Brunswick, 2008 SCC 9, at para. 47.
>
> I note that Justices Yves de Montigny and John O'Keefe came to similar conclusions about the Board's treatment of evidence relating to state protection in St. Vincent in Hooper v. Canada (Minister of Citizenship and Immigration), 2007 FC 1359, [2007] F.C.J. No. 1744 (QL) and King v. Canada (Minister of Citizenship and Immigration), 2005 FC 774, [2005] F.C.J. No. 979 (QL), respectively.
>
> I agree with Justice O'Reilly on this matter, as well as with Justices de Montigny and O'Keefe in the two decisions referred to above, namely Hooper v. Canada (Minister of Citizenship and Immigration), 2007 FC 1359, [2007] F.C.J. No. 1744 (QL) and King v. Canada (Minister of Citizenship and Immigration), 2005 FC 774, [2005] F.C.J. No. 979 (QL). I add that this Court has come to similar conclusions on numerous occasions, notably, to name but a few, in *Alexander v. Canada (Minister of Citizenship and Immigration), supra* (Justice Harrington); *Jessamy v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 20, 342 F.T.R. 250, [2009] F.C.J. No. 47 (QL) (Justice Russell); *Myle v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 871, [2006] F.C.J. No. 1127 (QL) (Justice Shore); and *Codogan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 739, [2006] F.C.J. N0. 1032 (QL) (Justice Teitelbaum).
>
> Here the Panel was obligated to explain why it found that the favorable elements contained in the country documentation outweighed the negative parts. Having failed to carry out such an analysis, I have no hesitation finding that the Panel's decision was unreasonable.
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> [Emphasis in original]

[11] The Board acknowledged the Court's decision in *James* but found that the documentary evidence was not precisely as it was when *James* was decided and therefore concluded that the presumption of state protection had not been rebutted.

[12] The thrust of the Board's reasoning is that the decision in *James* was "some time ago", and at that time the documentary evidence regarding protection for victims of domestic violence was "entirely negative". The more recent evidence was, in contrast, "mixed", and therefore *James* could be distinguished. I reject this reasoning: *James* was decided in May, 2010, and the decision under review in *James* was made in September 2009. Furthermore, the evidence considered by the Board in *James* was just as "mixed" as the evidence before the Board in this case. In fact, the evidence was almost identical in its substance to the evidence in *James* which is unsurprising, given how little time had elapsed between the decisions.

[13] Thus, the Board is not permitted to rely on the passing of a year (May 18, 2010 to June 22, 2011) to circumvent the reasoning in *James*; rather, the Board was required to do what the Court instructed in that decision; consider the evidence in the record, determine whether the positive evidence outweighs the negative, and, importantly, explain the basis for that determination. I agree with the applicant that it is insufficient to merely state that the evidence "is mixed" and therefore the presumption of state protection has not been rebutted.

[14] In the case before me, the Board fails to engage with the documentary evidence to explain why it prefers the portions that indicate state protection is available; rather, the Board states it would be "problematic" to grant protection in the face of mixed evidence. Evidence regarding state protection is rarely unequivocal. To require an evidentiary record that is "entirely negative" is to place an impossible burden on claimants and is contrary to the jurisprudence of this Court.

[15] I note that in *Hooper v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1359,

cited in the above passage from *James*, Justice Yves de Montigny rejected the kind of reasoning similar to that employed by the Board in this case:

> The respondent argued that the Board did turn its mind to the existence of contradictory evidence, as evidence by its statement that the "documentary evidence is mixed" in the matter relating to domestic violence. But this is not enough, for a number of reasons…

[16] As in previous cases of this Court regarding Saint Vincent, there was considerable evidence before the Board that the state is unable to protect women from domestic violence. In order for the Board's decision to have the requisite justification, intelligibility and transparency to be considered reasonable, it needed to explain why the favourable evidence of state protection was preferred over evidence that the state is unable to protect.

[17] The respondent submits that the mixed nature of the evidence was not itself determinative; rather, it was considered together with the significant length of time since the applicant last sought protection. The respondent submits that since the evidence regarding protection for domestic violence victims is no longer predominantly negative, it was reasonable to emphasize that many years have passed since the applicant last sought protection. I agree that the applicant's attempts to seek protection are less probative because they occurred so long ago; however, as already discussed, the current documentary evidence is no less predominantly negative than it was in *James*. The Board still needed to consider the current evidence of whether protection would be reasonably forthcoming.

[18] Furthermore, the respondent's reliance on *J.N.J. v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1088, is misplaced. The Court found in that case that the

passage of time buttressed the conclusion that the applicant was no longer at risk of abuse by her mother, and not, as the respondent asserts, because state protection was available. In that case, the applicant had never approached the state for protection and the factual context of that case is far different from the one before the Court.

[19] Finally, I agree with the respondent that there were other errors in the Board's decision in *James* and therefore the Court's conclusion was not based solely on its findings regarding the treatment of the documentary evidence. However, that does not detract from the import of the reasoning or the relevance of those findings to this case. The error discussed by Justice Mainville regarding the documentary evidence of state protection was the same error committed by the Board in this case and there is no other basis for the Board's decision upon which it could be upheld. The application is therefore granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is referred back to the Immigration Refugee Board for reconsideration before a different member of the Board's Refugee Protection Division. No question for certification has been proposed and the Court finds that none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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