

Federal Court



Cour fédérale

Date: 20131218

Docket: IMM-9659-12

Citation: 2013 FC 1262

Ottawa, Ontario, December 18, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SHERISA SHERMIKA PATRICIA MODESTE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD or the Board], dated 17 August 2012 [Decision], which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a ten-year-old citizen of Saint Lucia who arrived in Canada with her mother on 11 December 2011. The Applicant's mother, Agatha Shermain Gabriel [Agatha] made a successful refugee claim based on gender-related persecution in the form of physical, sexual and psychological violence perpetrated by her common law husband, who is also the Applicant's father, and the failure of the state to protect her from that violence. Agatha claimed that her common law husband raped her at gunpoint, pistol whipped her, attacked her with a knife, beat her with a walking stick, and repeatedly threatened and assaulted her, and that the police failed to intervene despite many requests for help. Based on the evidence presented, the RPD found that Agatha's evidence was credible and that she is a Convention refugee. However, the Board determined that the Applicant was not a Convention refugee or a person in need of protection, as she had not personally been subjected to violence or threats.

[3] The Applicant's refugee claim was heard together with her mother's claim, and the Applicant's mother acted as her designated representative. Therefore, the Applicant did not give oral testimony at the hearing. Rather, the RPD member asked questions of Agatha relating to the Applicant's claim. Agatha testified that the Applicant and her father "were close," and that the Applicant had not been physically assaulted by her father, nor did she personally "have problems with anyone" in Saint Lucia (Transcript at p. 15-16). However, Agatha's Personal Information Form [PIF] stated that the Applicant had witnessed some of the violence of her father towards Agatha, and that both of them had been "forced to live like fugitives with the fear of being killed hanging over our heads each day" (PIF at para 2, 12). When asked at the hearing what the Applicant would have

to fear if she returned to Saint Lucia, Agatha replied: “She would have to fear losing her mother” (Transcript at p. 16).

DECISION UNDER REVIEW

[4] The RPD’s written reasons focused primarily on the claim of Agatha. The Board found that she was a credible witness and was persuaded that, on a balance of probabilities, she had been the victim of horrendous domestic violence over a prolonged period of time in Saint Lucia. The Board also found that Agatha had rebutted the presumption of state protection, as her oral testimony and the documentary evidence before the Board provided “clear and convincing proof that state protection in Saint Lucia is inadequate for victims of domestic violence.” While there is legislation in place to deal with domestic violence in Saint Lucia, the Board found that it was not being effectively implemented, and that Agatha had complained to police many times with no resulting arrest or charges against her common law husband. As such, the Board found that Agatha had met her burden of proof, establishing a serious possibility of persecution in Saint Lucia on a convention refugee ground related to her gender and membership in a particular social group as a victim of domestic violence, and was therefore a convention refugee.

[5] The Board then turned to the Applicant’s claim and provided the following reasons for rejecting it:

[42] The minor claimant was not physically harmed by her father while she resided in Saint Lucia. The principal claimant described the relationship between the minor claimant and her father as close. The principal claimant indicated that the minor claimant had witnessed the domestic violence but the minor claimant had been treated well by her father.

[43] The minor claimant has not met her burden of proof. There is insufficient evidence to support a finding that the minor claimant faces a serious possibility of persecution on a convention refugee [sic] ground should she return to Saint Lucia.

[44] Nor has sufficient reliable evidence been presented to establish on a balance of probabilities that it is more likely than not that the minor claimant would be subjected to a danger of torture or face a risk to life or a risk of cruel and unusual punishment upon her removal to Saint Lucia.

[45] The claims of the minor claimant are rejected. Sherisa Patricia Modeste is neither a convention refugee nor a person in need of protection.

ISSUES

[6] The Applicant raises the following issues in these proceedings:

- a. Was the Decision unreasonable, in that the RPD failed to consider whether the Applicant, as a minor female from Saint Lucia and the daughter of an individual found to have subjected Agatha to domestic violence, would face a risk of gender-based violence if returned to Saint Lucia?
- b. Did the RPD provide inadequate reasons for its conclusion that there was “insufficient evidence” to support the Applicant’s claim?

STANDARD OF REVIEW

[7] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new

developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48 [*Agraira*].

[8] The Respondent submits that the question of whether a claimant has a well-founded fear of persecution is reviewable on a standard of reasonableness (*Kulasingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 543 at para 23; *Guerrero Moreno v Canada (Minister of Citizenship and Immigration)*, 2011 FC 841 at para 7; *Jean v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1014 at para 9), and that determinations under section 97 are also reviewable on a standard of reasonableness (*Luna Pacheco v Canada (Minister of Citizenship and Immigration)*, 2012 FC 682 at para 12; *Guerilus v Canada (Minister of Citizenship and Immigration)*, 2010 FC 394 at para 9. I agree that the determinations at issue here are questions of mixed fact and law that are reviewable on a standard of reasonableness: *Dunsmuir*, above at para 53.

[9] With respect to the issue of inadequate reasons, in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*], the Supreme Court of Canada held at para 14 that the adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, “the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.” As such, this issue will be considered in the context of the reasonableness of the Decision.

[10] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

STATUTORY PROVISIONS

[11] The following provisions of the Act are applicable in these proceedings:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut

reason of that fear, unwilling to return to that country.

ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the

(iv) la menace ou le risque ne

inability of that country to provide adequate health or medical care.

résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ARGUMENT

Applicant

[12] The Applicant argues that the Decision was unreasonable because the Board failed to consider whether her profile as a minor female from Saint Lucia and the daughter of an abusive male placed her at risk of gender-related persecution if returned to Saint Lucia. The Board's findings regarding the violence suffered by Agatha and the absence of state protection made such an analysis mandatory in this case. The Applicant also argues that the RPD failed to provide adequate reasons for rejecting her claim.

[13] It is well-established, the Applicant argues, that if objective evidence demonstrates that a particular group is at risk, the RPD is required to determine whether the applicant fits that profile in assessing a claim under subsection 97(1) of the Act. The failure to conduct such an analysis is a reviewable error: *Alemu v Canada (Minister of Citizenship and Immigration)*, 2004 FC 997 at para 46, citing *Ramirez v Canada (Solicitor General)* (1994), 88 FTR 208 (FCTD), *Burgos-Rojas v Canada (Minister of Citizenship and Immigration)* (1999), 162 FTR 157 (FCTD), and *Kamalanathan v Canada (Minister of Citizenship and Immigration)* (2001), 15 Imm LR (3d) 55 (FCTD). Here, there was extensive evidence regarding the risk of violence faced by women and children in Saint Lucia, and of the inadequacy of state protection for victims of domestic violence, and this very evidence was accepted by the RPD in granting Agatha's refugee claim.

Notwithstanding this evidence, the RPD failed to consider whether the Applicant would face such a risk if returned to Saint Lucia.

[14] The RPD's explanation for rejecting this aspect of the Applicant's claim was that her father had not yet physically abused her. However, the determinative issue was whether there was a serious possibility that such harm would come to pass based on the Applicant's profile. In light of the horrific violence perpetrated by the Applicant's father against the Applicant's mother, and the inability of the state to protect women in Saint Lucia against such abuse, the failure of the RPD to answer this determinative question makes its ultimate conclusion unsafe and unreasonable.

[15] The Applicant argues that the reasons provided by the RPD are inadequate because they fail to explain in clear and unmistakable terms why the Applicant's profile as a minor female does not put her at risk of gender-related persecution. The explanation that there was "insufficient evidence" to support the Applicant's claim fails to indicate why this was the case and what evidence in particular was missing: *Gallardo v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1331 at paras 11-16; *Mohacsi v Canada (Minister of Citizenship and Immigration)*, [2003] 4 FC 771.

Respondent

[16] The Respondent argues that the Applicant has failed to demonstrate any error in the RPD's Decision. Rather, the Decision fully addresses the Applicant's risk, the reasons sufficiently explain the RPD's analysis, and the Decision itself is reasonable.

[17] The Applicant's mother testified that the Applicant had never been abused by her father, that the two had a close relationship, and that there was no one else the Applicant feared in Saint Lucia. Furthermore, there was no evidence that the Applicant objectively faced a risk of domestic violence in Saint Lucia. Before counsel for the Applicant made oral submissions, the RPD gave notice of its concerns regarding this aspect of the claim, and counsel failed to make any persuasive argument that the Applicant faced a legitimate risk of domestic violence.

[18] The Respondent argues that the RPD is not required to conduct separate analyses under sections 96 and 97 where no claims have been made or evidence adduced that would warrant such a separate analysis: *Valez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 923 at paras 46-48; *Sida v Canada (Minister of Citizenship and Immigration)*, 2004 FC 901 at para 15; *Kandiah v Canada (Minister of Citizenship and Immigration)*, 2005 FC 181 at para 16; *Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635 at paras 17-18 [*Brovina*]. Here, the evidence underlying both claims was the same: the Applicant witnessed her father's violence towards her mother, and there was country condition evidence that victims of domestic violence cannot access state protection in Saint Lucia. However, the Respondent argues, the Applicant did not establish that she herself faced a risk of domestic violence in Saint Lucia.

[19] As in *Brovina*, above, the RPD in this case made a "brief but defensible" finding that the Applicant faced no risk under section 97. That provision requires that the individual's removal "would subject them *personally*" to a danger or risk. Evidence regarding country conditions alone cannot establish such a personalized risk: *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1070 at para 25; *Ayaichia v Canada (Minister of Citizenship and*

Immigration), 2007 FC 239 at para 21-22. The Applicant failed to establish a tangible connection between her personal situation and the general prevalence of domestic violence in Saint Lucia. The onus was on the Applicant to establish her section 97 claim on a balance of probabilities (*Karsoua v Canada (Minister of Citizenship and Immigration)*, 2007 FC 58 at para 35), and the Applicant failed to meet that onus. The RPD's findings were therefore reasonable.

[20] The Respondent argues that the RPD's reasons meet the standard of justification, transparency and intelligibility. The governing principle in reviewing a decision on the standard of reasonableness is deference. The Court must not review reasons in a vacuum but rather in the context of the evidence, submissions and process. Reasons need not be perfect or comprehensive: *Newfoundland Nurses*, above, at paras 1, 14, 18; *Dunsmuir*, above, at para 47. Here, the Decision informs the Applicant why her claim was refused and how the RPD weighed the evidence leading to its conclusion. The reasons were therefore adequate: *Ragupathy v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151 at paras 13-15; *Via Rail Canada Inc. v National Transportation Agency*, [2001] 2 FC 25 (CA) at paras 17, 19.

ANALYSIS

[21] As counsel pointed out, this is a somewhat strange case in which the Applicant was not granted refugee protection when her mother was.

[22] It seems to me that the principal reason for this is that Agatha, the Applicant's mother, testified at the hearing that the Applicant and her father were close and he had not harmed the Applicant in the way he had harmed Agatha.

[23] A reading of the PIF places the evidence given by Agatha at the hearing in a slightly different light. In her PIF, Agatha said that:

Patrice Modeste has an uncontrollable desire for sex and violence after abusing alcohol and drugs. My daughter and I have been forced to live like fugitives with the fear of being killed hanging over our heads each day.

[24] Agatha also said in her PIF that:

My daughter developed an instinctive fear of Patrice such that, the mention or reference to him, generated visible unease to her.

[25] These statements are somewhat inconsistent with the statements made by Agatha in oral testimony and neither the RPD nor Applicant's counsel explored the issue with Agatha, so that it is difficult to understand what was the real relationship between the Applicant and her father.

[26] The applicant was 10 years old at the time of the hearing and it is of concern that her fate was in the hands of others who, perhaps, did not make clear what the real risk was.

[27] I think, however, that the RPD should have been alive to these concerns. The Board's reasons for rejecting the Applicant's claim are brief and, in my view, entirely miss what is of real concern in this case.

[28] It is true that the oral evidence from Agatha was that the Applicant had not been physically harmed by her father and that she had a close relationship with him.

[29] However, the evidence was also that the Applicant had been forced to witness the horrendous physical and psychological abuse of Agatha by her father. The record shows that that abuse was truly shocking and violent. The RPD acknowledges all of this and made no adverse credibility findings.

[30] What is left out of account, however, is the Applicant's having to live under these horrendous circumstances and to witness what was done to her mother, which was also a severe form of abuse of the Applicant by her father. And this is the risk that should have been assessed. For a child to have witnessed this kind of appalling violence is abuse of the child.

[31] The closeness between the Applicant and her father exacerbates the risks she faces. If returned, she would have to face a man who is violently abusive towards women and, if she is close to him, she will be forced to witness more of the same. This will again be violent abuse of the Applicant herself, even if her father does not harm her physically, and given the evidence, this man may well eventually turn upon his own daughter.

[32] The problem here is not that the RPD failed to consider the extremely disturbing country documentation on domestic abuse in Saint Lucia. The problem is that the RPD failed to understand that the Applicant had already been abused by her father when he made her witness the terrible things he did to Agatha, and that the Applicant faces a continuation of that abuse if she is returned to Saint Lucia. She will confront a father with whom she has had a close relationship, and who will, no

doubt, abuse his daughter again by exposing her to the extreme violence against others of which he is eminently capable.

[33] In fact, if she is returned to Saint Lucia, there is a real prospect that the Applicant may have to witness further violence by her father against her mother, as there is little chance the latter will let her return on her own. Agatha testified at the RPD hearing that her mother is unemployed and that “I don’t have anyone that I could send my daughter back to in St. Lucia right now”. This raises the frightening prospect that the Applicant, who is eleven years old, would have to live with her father, who has a demonstrated propensity for extreme domestic violence, or that to avoid this eventuality, her mother would have to return to Saint Lucia despite the risks she faces there.

[34] The Applicant is now eleven years old and her vulnerability is obvious. According to the country documentation, domestic violence against women and children is rampant in Saint Lucia and there is no adequate state protection. The personal risks to the Applicant of further exposure to her father are, in my view, terrifying. I think it was unreasonable of the RPD not to fully appreciate these risks and not to assess them under sections 96 and 97. In my view, this matter must be returned for reconsideration. As part of its reconsideration, the RPD will assume the following:

- (a) The Applicant has already been the victim of severe abuse at the hands of her father because she has been forced to witness the severe and degrading violence imposed upon her mother by her father in a household marred by drunkenness and violence;
- (b) The Applicant will again be exposed to her father’s violence;

- (c) There is no adequate state protection for women and children against domestic violence in Saint Lucia where such violence is rampant.

[35] The RPD should consider and assess the Applicant's claim under both section 96 and 97 of the Act and, in so doing, should also consider the dangers of the father harming her physically and psychologically through direct violence, in addition to what she faces by being exposed to his violence against others.

[36] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted RPD, in accordance with my reasons.
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9659-12

STYLE OF CAUSE: SHERISA SHERMIKA PATRICIA MODESTE v MCI

PLACE OF HEARING: TORONTO, ONTARIO

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**REASONS FOR JUDGMENT
AND JUDGMENT:** RUSSELL J.

DATED: DECEMBER 18, 2013

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