Federal Court		Cour fédérale

Date: 20101125

Docket: IMM-4573-09

Citation: 2010 FC 1186

Ottawa, Ontario, November 25, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

SHERLINE SAMANTHA GILBERT
SHERWIN GILBERT (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated August 7, 2009, wherein the applicants were determined not to be Convention refugee or persons in need of

protection under sections 96 and 97 of the Act. This conclusion was based on the Board's finding that state protection was available to the applicants in St. Lucia.

[2] The applicants request that the decision of the Board be quashed and the claim remitted for reconsideration by a differently constituted panel of the Board.

Background

[3] The applicants, Sherline Samantha Gilbert and her minor son, Sherwin Gilbert, citizens of St. Lucia, entered Canada in 2004. The principal applicant alleges that she fears for her life at the hands of her ex-boyfriend, Shawn Octave, who she alleges repeatedly physically and sexually assaulted her and has threatened to kill her.

[4] The principal applicant alleges that her ex-boyfriend, the father of her second child, physically assaulted her on three occasions between September and December 2001 and also sexually abused her and once threatened to kill her. After the final assault, she went to the police but they told her they would not get involved in love affairs business. The principal applicant moved out but her ex-boyfriend continued to harass her and the police would not help. The principal applicant moved back in with her ex-boyfriend but in March of 2002, while drunk, he physically assaulted her saying, "your sister murdered my brother, and you think you can go free?" (The applicant's sister had in fact killed Mr. Octave's brother in March of 2001). After that assault, the applicants moved in with the principal applicant's mother and her ex-boyfriend continued to harass them and beat the minor applicant. On two occasions, the mother reported the ex-boyfriend to the police but they did

nothing. Then the ex-boyfriend seemed to disappear for a while and the applicant thought he had left for good.

[5] The principal applicant came to Canada temporarily in May of 2004 to help a friend recover from brain surgery. Once back in St. Lucia, the ex-boyfriend returned and assaulted the applicant, pressing a gun to her and ordering her to move back in with him within one week or be killed. The principal applicant moved in with her mother and then some friends. She fled to Canada on December 12, 2004.

[6] After arriving in British Columbia, the principal applicant lived with a Canadian friend she had met in St. Lucia who had offered to help her obtain status. The friend did not help and then the principal applicant moved to Toronto where she has resided since. In November of 2007, she was introduced to a lawyer and filed a claim for refugee protection.

Board's Decision

[7] The Board considered the principal applicant's delay in claiming asylum and her counsel's explanation for that delay. The Board concluded that the delay was significant, three years, and undermined the principal applicant's allegation that she faces serious harm if she returns to St. Lucia. This, however, was not a determinative factor for the Board.

[8] The Board felt that the principal applicant had ultimately failed to establish that her fear was objectively well-founded. The primary considerations were whether adequate state protection

existed in St. Lucia and whether the principal applicant had taken all reasonable steps to avail herself of that protection. The Board looked at the documentary evidence and found that St. Lucia is a democracy with an independent judiciary and a hierarchical police force. There is a complaint and redress process for allegations of police misconduct or ineffectiveness.

[9] The Board noted that violence against women remains a problem, but that increased recognition of the problem has lead to better protection for victims. The Board then discussed the various institutional resources available to victims and recent improvements to the police force's handling of domestic abuse. It was acknowledged that problems with reporting continue, as many victims are often reluctant to report or take other action or that they report abuse, but then recant, and that police response is less effective on the next occasion. The Board considered the principal applicant's evidence that state protection was inadequate, but noted that the articles submitted were either old or not dated and in the end, preferred the Board's own documentary evidence as being more up-to-date and reliable.

[10] The Board then considered the principal applicant's evidence of her attempts to obtain protection. She had problems recalling some of the events and the Board noted some inconsistencies. The Board also considered that the principal applicant had not made any attempts to obtain any of the police reports made on her account. Her explanation was that it would have cost too much, but the Board found it an unreasonable explanation, given that she had counsel representation. The Board also considered the advice in the Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (the Guidelines) to be more accepting of

these claims and to consider evidence of similarly situated women. The principal applicant could not offer any such evidence. In the end, the Board determined that the principal applicant had not rebutted the presumption of state protection and rejected the applicants' claims.

Issues

[11] The issues are as follows:

1. What is the standard of review?

2. Did the Board breach its duty of fairness with respect to the minor applicant by not rendering a separate decision in his regard?

3. Did the Board err by finding that the delay meant that the principal applicant lacked a subjective fear?

4. Did the Board err by ignoring vital evidence or making selective use of documentary evidence?

Applicants' Written Submissions

[12] The applicants submit that it was a reviewable error for the Board not to devote any analysis to the minor applicant's specific claim. The minor applicant had a different factual situation and made a separate claim.

[13] On the merits, the applicants submit that the Board did not give adequate reasons for rejecting the principal applicant's explanation for her delay in filing. She did not know what to do when she arrived in Canada and was completely reliant on others.

[14] With regard to state protection, the applicants submit that the Board failed to make reference to documentary evidence from its own sources which indicate that there is no effective protection for women victims of violence. The Board settled for documentary evidence of the intentions to curb the problem, but failed to consider whether such steps are yielding positive results. The Board should have considered whether there was capacity at the St. Lucia women's shelter. The police were patronizing toward the principal applicant and did not assist her. Protection was not forthcoming. Furthermore, the Board unreasonably rejected the applicants' documentary evidence. If it had concerns about the date of an article, it could have brought that to the applicants' attention. The other documents were from 2006 or 2008, not 2002 or 2003 like the Board stated. Finally, it was unreasonable for the Board to conclude that the principal applicant should have obtained police reports. Her evidence was that she tried but could not afford the cost. Moreover, the Guidelines advise the Board not to insist on documentation to support the claims of abused women.

Respondent's Written Submissions

[15] The respondent submits that the applicant's and her minor son's claims were based on the same facts from a shared life in St. Lucia. The Board's rules require that such claims of family members be joined. Moreover, the minor applicant did not submit any narrative with his PIF. The

only evidence regarding his situation that the applicants now raise comes from the principal applicant's own PIF and then it was only mentioned briefly. The Board did not err in considering the claims together and in any event, the finding of state protection applies equally to both applicants.

[16] The Board did not make a determinative finding with regard to the principal applicant's delay. The finding of state protection was the only determinative finding and was fully determinative of the claim.

[17] The Board's finding with regard to state protection was reasonable. The Board did not ignore contradictory evidence and acknowledged that violence against women remains a problem. The Board clearly recognized that there were some inconsistencies among the sources of evidence. In order to ensure that it had all relevant information, the Board asked the principal applicant if she was aware of any women in a similar situation. It asked this question pursuant to the Guidelines. Upon weighing the evidence before it, the Board found that although not perfect, the preponderance of evidence suggested that there was adequate protection.

Analysis and Decision

[18] **Issue 1**

What is the standard of review?

Ultimate refugee determinations of the Board are reviewable against the standard of reasonableness (see *Kaleja v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 252 at paragraph 19 and *Sagharichi v. Canada (Minister of Employment and Immigration)* (1993), 182 N.R. 398 (F.C.A.), [1993] F.C.J. No. 796 at paragraph 3). As such, the reviewing court inquires into the qualities that make a decision reasonable, concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. The court will also be concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47).

[19] With respect to matters of procedural fairness, the standard of review is correctness.

[20] **Issue 2**

Did the Board breach its duty of fairness with respect to the minor applicant by not rendering a separate decision in his regard?

The applicants' contention is that the Board was required to render a separate decision and reasons for the minor applicant's refugee claim. Yet, the applicants do not contend that it was improper for the Board to have joined the applicants' claims.

[21] Indeed, the present case invoked the automatic joiner provision encapsulated in Rule 49 of the *Refugee Protection Division Rules*, SOR/2002-228.

[22] The Board was required to join the claims unless an application was made under Rule 50(2) to sever. No such application was made and the claims of the principal applicant and her minor son which, after all, were both based on the same alleged fear, were properly joined.

[23] The applicants have not brought forth any authority or rule to support an assertion that the Board was required to render separate decisions and reasons with respect to joined claims.

[24] Nevertheless, the applicants raise the somewhat technical argument that the cases needed to be considered differently because while the principal applicant's claim for protection was based on being an abused woman, her son's claim was based on child abuse. I do not find this argument persuasive. At no time during the proceeding did the principal applicant or her counsel make the submission that her son's claim should be treated as being substantially different on that ground.

[25] I also keep in mind that the applicants have raised this as a breach of procedural fairness, but have not pointed to anything during the process which was unfair. Certainly, the Board afforded the applicants every opportunity to make their case prior to and during the hearing. Consequently, it can only be characterized as a procedural matter to the extent that the reasons were inadequate.

[26] An alleged inadequacy of reasons must be severe enough to occasion prejudice on an applicant's right to judicial review (see *Za'Rour v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1281, 321 F.T.R. 120 (Eng.) at paragraphs 19 and 20). In the present case, the Board's reasons are clear enough that there can be no confusion as to why the Board came to the

conclusion it did. The joined claims of the applicants were rejected on the basis that state protection was available for them. It was not an error for the Board to consider implicitly that the minor applicant would and could avail himself of that same protection from the agent of persecution.

[27] The applicants note that the Board's decision often referred to the claimant in the singular. While this may have been an error or a typographical error, I cannot hold that it amounts to a breach of procedural fairness. What is more, the applicants clearly pinned their case on the strength of the principal applicant's testimony and only mentioned the minor applicant fleetingly. The applicants did not present a separate identifiable case for protection with respect to the minor applicant individually and it was clear that his case was dependent on the principal applicant, whose claims, narrative and testimony were the sole focus of the hearing. Moreover, during the hearing, counsel for the applicants referred to the principal applicant as the claimant singular several times (see certified tribunal record, pages 250 and 304). In the end, I cannot find any mistreatment of the case or unfairness caused by the Board's decision. I would not grant judicial review on this ground.

[28] **Issue 3**

Did the Board err by finding that the delay meant that the applicants lacked a subjective fear?

The applicants must fail on this issue as the reasons for decision clearly reveal that the Board did not make such a finding.

[29] It is well settled that the Board can and often should consider delay as a factor which potentially undermines a refugee claimant's alleged subjective fear (see *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.), [1993] F.C.J. No. 271). The Board discussed and considered the delay, as well as the principal applicant's explanation for that delay. It was not entirely satisfied that the delay was sufficiently explained and held that the delay thus undermined the principal applicant's allegation with respect to having a subjective fear. This was not the same as a finding that the principal applicant lacked subjective fear, which would have been in and of itself a determinative finding negating a claim for asylum.

[30] In any event, the finding with respect to delay became moot. No final determination was made with regard to the principal applicant's subjective fear and the determination was made on the basis that the applicants' fear was not objectively reasonable because adequate state protection existed.

[31] **Issue 4**

Did the Board err by ignoring vital evidence or making selective use of documentary evidence?

The assertion that vital evidence was ignored is the only issue here.

[32] An allegation that the Board made selective use of the documentary evidence does not amount to an error as the Board is indeed expected to use its expertise to glean the most relevant aspects from the evidence and thus is expected to be selective.

[33] However, where the Board fails to mention the substance of critical documentary evidence which runs contrary to the conclusion it reaches, the reviewing court will be more likely to infer that that conclusion was made without regard to the evidence (see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1993), 157 F.T.R. 35, [1998] F.C.J. No. 1425 (F.C.T.D.) (QL)). If the court finds that the substance of such contrary evidence was discussed by the Board, this ground of review is not made out. The court will not entertain requests to intervene when an applicant's position merely amounts to a disagreement with the manner in which the Board weighed the evidence.

[34] It is the substance of the contrary evidence on state protection which must have been considered, not the particularities of any specific article. It is trite law that the Board is presumed to have taken all of the evidence into consideration and need not mention all pieces or even any specific piece of evidence, provided that a review of the reasons suggests that the Board considered the totality of the evidence (see *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.), *Ortiz v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1163, *Ali v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 242).

[35] The applicants refer to one of the Board's own documents, "Shadow Report for St. Lucia on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)", a 2006 report which clearly takes the view that violence against women is a critical issue. While the article stays focused on violence against women, it is not directly focused on inadequate state response. The article considers that perpetrators are often sent to prison, leaving their female victims

unable to provide for themselves with insufficient state assistance. It also condemns police for failing to guarantee protection from domestic perpetrators.

[36] The only other article raised by the applicants is a newspaper article regarding a woman who was stabbed to death in her home.

[37] I cannot conclude that the substance of these articles relevant to the determination of state protection was ignored by the Board. The Board undertook a principled and balanced discussion of state protection for victims of domestic abuse in St. Lucia. It did not omit discussion of negative aspects and because its discussion of those negative aspects included substantially the same topics raised by the articles and raised now by the applicants, I cannot say that those articles or their substance was ignored. The Board was not required to refer in its reasons to the specific articles raised now by the applicants. The Board did acknowledge the substance of those articles when it held that:

1. Violence against women remains a problem (decision, paragraph 13);

2. Some police are still at times reticent to intervene (decision, paragraph 13);

3. Victims withdrawing claims or recantations may lead to less effective police response on the next occasion (decision, paragraph 15); and

4. Domestic violence is a serious issue in St. Lucia (decision, paragraph 17).

[38] Again, because the Board acknowledged these problems, I cannot intervene in the decision on the ground submitted by the applicants, namely, that this evidence was ignored. It was not ignored.

[39] The application for judicial review must therefore be dismissed.

[40] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[41] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

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,	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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	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) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
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 themself 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 inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

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