Federal Court  Cour fédérale

Date: 20101214

Docket: IMM-1683-10

Citation: 2010 FC 1283

Ottawa, Ontario, December 14, 2010

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

SHONTEL DION JOHN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the *IRPA*), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) rendered on November 12, 2009, where it determined that the applicant was neither a Convention refugee nor a person in need of protection for the purposes of sections 96 and 97 of the *IRPA*.

[2] The applicant also filed a request for an extension of time pursuant to paragraph 72(2)(c) of the *IRPA*. Considering that the applicant's delay in filing her application for leave and judicial

review was a result of the Board sending its reasons to an incorrect address, the request for an extension of time is granted.

Background

[3] The applicant is a 22 year-old citizen of St.Vincent and the Grenadines. She alleges the following facts in support of her claim.

[4] In October 2000, when she was 12 years old, Nicodimus Ross approached her as she was on her way home from school and offered her money if she would agree to deliver marijuana for him. She agreed. This arrangement continued for some time. At one point, Mr. Ross invited her into his house and tried to rape her, but she managed to escape. On a subsequent occasion, in April of 2001, he did rape her.

[5] Initially, the applicant did not tell anyone about the rape because Mr. Ross had warned her that if she did, he would kill members of her family. However, soon thereafter, a neighbour told her mother that she had seen the applicant over at Mr. Ross' house on several occasions. The applicant's mother questioned the applicant, who then told her mother everything.

[6] The applicant's mother took the applicant to the police station to file a complaint against Mr. Ross. However, afraid to tell the truth, the applicant lied to the police and told them that she had not been raped. Nevertheless, the police arrested Mr. Ross and "kept him in custody," but released him shortly thereafter. A few days later, Mr. Ross approached the applicant at school and told her

that he would “get rid of” her if she said anything to anyone again. She told her mother about this. After the school year had finished, her mother made arrangements to have the applicant sent to Canada to live with her grandfather.

[7] The applicant arrived in Canada on June 24, 2001. She initially lived with her grandfather until he passed away, and then with her aunt. She never integrated into the school system in Canada and was not sponsored by a member of her family. She indicated that she did not find out about the possibility of claiming refugee protection until she was 19 years old. At the age of 19, she had become pregnant. She met a social worker at the CLSC (local community service centre) to discuss her pregnancy and the social worker informed her about the potential for seeking refugee protection. Shortly thereafter, on November 21, 2007, the applicant filed for refugee protection; her cousin assisted her with the administrative process of filing the necessary forms.

The decision under review

[8] The Board rejected the applicant’s claim after coming to the conclusion that she lacked credibility. It also concluded that she had not established that she would face a serious possibility of persecution, or that she would be personally subjected to a risk to her life, or to a risk of cruel and unusual treatment or punishment, should she return to St.Vincent.

Issues

[9] This application raises the issue of whether the Board’s determinations with respect to the applicant’s credibility and lack of well-founded fear were unreasonable.

[10] For the following reasons, the application for judicial review cannot succeed.

Standard of review

[11] For matters involving the assessment of evidence or the assessment of credibility, which are questions of fact, the applicable standard of review is that of reasonableness (*Dunsmuir v New-Brunswick*), 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]). Credibility determinations, which lie within the "heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence (*Siad v Canada (Secretary of State)* (1996), [1997] 1 FC 608, 206 NR 127 (CA) at para 24). The Court is not in as good a position as the Board to assess credibility and must not substitute its own view, even if an alternative determination appears preferable. It is also not the Court's function to reweigh the evidence. The Court's role when reviewing a decision against the reasonableness standard was described in *Dunsmuir*, above, at para 47 as follows:

> . . . 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.

Analysis

Did the Board err in its assessment of the applicant's credibility?

[12] The Board's adverse credibility determination consisted of three main findings: 1) that the applicant's testimony was neither straightforward nor spontaneous; 2) that the applicant's testimony

contained major contradictions; and 3) that the applicant waited over 6 years before claiming refugee status.

[13] I have concerns with the latter two of these findings.

[14] First, the contradictions. The Board indicated that in December of 2007, the applicant made a number of statements to a Citizenship and Immigration Canada immigration officer that were inconsistent with statements she later made in her Personal Information Form (PIF) and in her testimony before the Board. The first inconsistency pointed to by the Board was that, in talking to the immigration officer, the applicant only mentioned an attempted rape, while in her PIF and at the hearing the applicant spoke of two incidents: a first incident where Mr. Ross attempted to rape her and a second incident where he actually did rape her. While I agree that these statements may appear to contain a contradiction, when put into context, I am not sure that this alone provides a reasonable basis for an adverse credibility finding.

[15] When interviewed by the immigration officer, the question asked to the applicant was very general and did not invite a lengthy response: “In a few words, why are you claiming refugee status in Canada?” The note reporting the applicant’s answer is succinct and reads as follows:

> . . .
> Well he had threathened to kill me when I was 12 years old. And told me that if I went to the police he would kill any member of my family.
> Why would he threathened to me?
> He tried to rape me, and I told my mother about this, that is when he started to threathened me.
> How many times did it happen?

> Twice.
>
> [*Sic* throughout]
>
> . . .

[16] The applicant's answer is general, superficial and lacks specificity. Yet, the immigration officer did not ask for further elaboration. Perhaps it was not the officer's role to do so. In any event, in the context of this case, I think that one should be cautious before basing an adverse credibility finding on too close a reading of these preliminary interview notes.

[17] The applicant's PIF, which was completed less than a month after she was interviewed by the immigration officer, provides a much more detailed version of the events and is consistent with the testimony that she provided a year later at the hearing before the Board. On both occasions, the applicant reported two incidents: a first incident where Mr. Ross attempted to rape her, followed by a second incident where he actually did rape her.

[18] Equally troubling, if not more so, is the Board's determination that the applicant contradicted herself on the question of how and when her mother found out about Mr. Ross.

[19] In her interview with the immigration officer, the applicant stated, "He tried to rape me, and I told my mother about this". Meanwhile, in her PIF and during her testimony at the hearing, she indicated that it was a neighbour who drew her mother's attention to the fact that she had been visiting Mr. Ross' home. The Board saw a contradiction between these two accounts: according to one account, the applicant told her mother about Mr. Ross, according to the other, it was the

neighbour who told the applicant's mother about Mr. Ross. Upon closer inspection, however, it is quite apparent that the applicant's statements in this regard were not inconsistent.

[20] In her PIF and at the hearing, the applicant actually indicated that her mother had questioned her, after being informed by the neighbour that she had been visiting Mr. Ross. Upon being questioned by her mother, the applicant indicated that she then told her mother everything. The applicant's statements in her PIF and at the hearing were certainly more detailed and contextualized, but they were not inconsistent with the statement she made to the immigration officer: she had been consistent in saying that she told her mother about the incidents.

[21] I will now turn to consider the applicant's delay in claiming refugee status. The Board found that the long delay between her arrival in Canada and the time when she claimed refugee protection (a period of over six years) was incompatible with the attitude of a person who feared for her life. The Board's finding in this regard reads as follows:

> [18] The panel acknowledges the fact that the young girl, who was only 13 years of age when she arrived in Canada, was not able to take it upon herself to approach a lawyer or a community organization in order to obtain the necessary information. However, the panel considers that the fact of having waited all those years is incompatible with the attitude of a person who fears for her life.
>
> [19] The claimant has many family members in Canada, including a cousin who obtained refugee protection. She could have found out well before the time she did about the procedures to follow.
>
> [20] The panel considers that, on its own, this long delay in claiming does not undermine the claimant's credibility. However, examined in the context of all her evidence, it does undermine her credibility.

[22] The Board acknowledged that the applicant was very young when she came to Canada and that she was not in a position to seek advice and undertake proceedings to claim refugee protection. On the other hand, it found that the delay between her arrival and the time of claiming was too long. The Board based its finding on the fact that the applicant had several family members in Canada, including a cousin who had claimed, and who was granted, refugee status. The Board's adverse credibility determination in this regard was unreasonable.

[23] I agree that a delay in seeking refugee protection, although not determinative, is generally relevant to assessing the overall credibility of a refugee claim (*Huerta v Canada (Minister of Employment and Immigration)* (1993), 157 NR 225, 40 ACWS (3d) 487 (FCA)). There is a presumption that a person having a well-founded fear of persecution will claim refugee protection at the earliest opportunity. If they do not, the legitimacy of the subjective fear that they allege is called into question (*Singh v Canada (Minister of Citizenship and Immigration)*, 2007 FC 62, 159 ACWS (3d) 568, at para 24). This presumption makes sense in the context of an adult refugee who, upon entering Canada, is expected to be aware that in order to stay in Canada indefinitely, he or she will need to regularize their status. However, the mere existence of delay in claiming cannot always be construed as indicating an absence of subjective fear. The delay, and even more importantly, the reasons for the delay, must be assessed in the context of the specific circumstances of each case.

[24] In *Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324, 127 ACWS (3d) 329, at para 17, Justice Rouleau stressed that :

> The Board states correctly that while the delay is generally not a determinative factor in a refugee claim, there are circumstances

> where the delay can be such that it assumes a decisive role; what is fatal to the applicant's claim is his inability to provide any satisfactory explanation for the delay.
>
> [Emphasis added].

[25] The same principle was enunciated by Justice Pinard in *Gamassi v Canada (Minister of Citizenship and Immigration)* (2000), 194 FTR 178, 103 ACWS (3d) 815 (TD). I agree with my colleagues' assertions.

[26] I also consider that the comments of Justice Mactavish in *Basak v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1496, 143 ACWS (3d) 1084, where she considered a delay in claiming refugee protection in the context of a minor, are equally applicable to the present case. Justice Mactavish, at paras 11-12, indicated the following:

> Ms. Basak was 14 years old when she came to Canada. She spoke little or no English, had a grade eight education, and was clearly entirely dependent on those around her for protection. She could thus hardly have been expected to bring a refugee claim on her own. Indeed, the Board found that the delay in filing her claim for protection was due to a lack of diligence on the part of Ms. Basak's sister and her uncle-in-law.
>
> In such circumstances, it was, in my view, patently unreasonable for the Board to conclude that a delay on the part of others in advancing Ms. Basak's refugee claim was indicative of a lack of subjective fear of persecution on her part.

[27] In the current case, the applicant was sent to Canada when she was 12 years old and, since that time, she has received only a very minimal level of education. Initially, she was entirely dependent on her grandfather. After he passed away (some three years after her arrival) she began living with her aunt. No one in her family assisted her in regularizing her status. Instead, it wasn't

until she was informed of the possibility of filing for refugee protection by a social worker, when she was 19 years old, that she submitted her application for protection.

[28] There is no evidence as to when the applicant became aware that her cousin had been granted refugee status, nor is there any evidence regarding the circumstances surrounding the cousin's claim for protection. The mere fact that several of the applicant's family members were living in Canada says nothing about the applicant's knowledge of the potential for claiming refugee protection. What is clear is that no member of the applicant's family undertook to help her to regularize her status. It is important, in this case, not to lose sight of the applicant's profile.

[29] Ultimately, the Board did acknowledge that, "on its own, [the] long delay in claiming does not undermine the claimant's credibility." However, it concluded that when examined "in the context of all of her evidence, it does undermine her credibility." The Board did not point to any evidence that, in my view, renders it reasonable to conclude that the delay in this case undermines the applicant's credibility. This aspect of the Board's decision was unreasonable.

[30] Given the above, I consider that the Board's negative credibility finding, on the whole, was unreasonable. However, I do not consider that this is determinative in light of the Board's determination that the applicant also failed to establish the objective component of her fear.

Did the Board err in finding that the applicant had not established a well-founded fear?

[31] The Board's decision is certainly not a model of clarity. However, after having set out its reasoning with respect to the applicant's credibility, it further outlined other aspects of the

applicant's testimony that point to a lack of well-founded fear.

[32] First, the Board noted that despite the threats received by the applicant, her mother waited until the end of the school year before sending her to Canada and during that time, Mr. Ross did not attempt to carry out his threats. It also noted that the events occurred eight years ago.

[33] The Board then indicated that when asked why Mr. Ross wanted to kill her, given that she had denied to the police that he had sexually abused her, the applicant stated that he was afraid that she would end up talking. The Board then indicated that when asked if she thought she was still at risk, given that she had left eight years ago, the applicant answered that she did. The Board did not share the applicant's view and made the following comments:

. . .

> [26] However, according to the claimant's testimony, in 2001, despite the fact that her mother had reported Mr. Ross for having raped her, no charge was laid against him, which indicates police ineffectiveness in this area.
>
> [27] When asked to explain why, in light of the foregoing, Mr. Ross would fear being reported, since the police did not do anything, she answered that she did not know.

[34] The Board then arrived at the following conclusions:

> [28] The claimant did not establish that, should she return to Saint Vincent, she would face a serious possibility of persecution as a result of her membership in a particular social group, namely, women fearing gender-related persecution.

> [29] In addition, she failed to show that she would be personally subjected to a risk to her life, or to a risk of cruel and unusual treatment or punishment, should she return to Saint Vincent.
>
> [Emphasis added]

. . .

[35] Section 96 and subsection 97(1) of the *IRPA* both contain an objective component. Discussing the test to be applied under section 96, in *Pour-Shariati v Canada (Minister of Employment and Immigration)* (1994), [1995] 1 FC 767, 52 ACWS (3d) 621 (TD), the Court held at para 17:

> Before turning to the cases themselves, I would observe that a Convention refugee claimant must demonstrate a well-founded fear of persecution in the future to support a Convention refugee claim. In making a claim for Convention refugee status, an individual will often advance evidence of past persecution. This evidence may demonstrate that he/she has been subjected to a pattern of persecution in his/her country of origin in the past. But this is insufficient of itself. The test for Convention refugee status is prospective, not retrospective: for example, see Minister of Employment and Immigration v. Mark (1993), 151 N.R. 213 (F.C.A.), at page 215. The relevance of evidence of past persecution is that it may support a well-founded fear of persecution in the future. However, it is a finding that there is a well-founded fear of persecution in the future that is critical.

[36] In *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99, 155 ACWS (3d) 937, the Federal Court of Appeal emphasized the prospective aspect of the risk in the application of subsection 97(1), at para 15 it indicated:

> As such, a determination of whether a claimant is in need of protection requires an objective assessment of risk, rather than a subjective evaluation of the claimant's concerns. Evidence of past

> persecution may be a relevant factor in assessing whether or not a claimant would be a risk of harm if returned to his or her country, but it is not determinative of the matter. Subsection 97(1) is an objective test to be administered in the context of a *present* or *prospective* risk for the claimant.

[37] Nothing leads me to conclude that, in this case, the Board's assessment on that matter was unreasonable. Its conclusion is based on the evidence and its inference about prospective fear falls within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law."

[38] For all of the above reasons, and despite the sympathy that I have for the applicant, this application for judicial review cannot succeed.

[39] No questions were proposed for certification and none arise.

JUDGMENT

THIS COURT ORDERS that the request for an extension of time to file a time-limited application for leave and judicial review is granted and that it was therefore filed in a timely manner, and that the application for judicial review be dismissed.

"Marie-Josée Bédard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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