

Federal Court



Cour fédérale

Date: 20120116

Docket: IMM-2783-11

Citation: 2012 FC 53

Ottawa, Ontario, January 16, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

GREGORY THOMAS

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review submitted in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], challenging the decision rendered by the Immigration and Refugee Board [IRB] on March 31, 2011, determining that

Gregory Peter Justin Thomas (G. Thomas) is not a Convention refugee or a person in need of protection under sections 96 and 97 of the *IRPA*.

[2] The panel appointed Robert Naylor from the Programme d'accueil et d'intégration des demandeurs d'asile [PRAIDA] to represent the interests of G. Thomas under Guideline 3: Child Refugee Claimants.

[3] It should be emphasized that G. Thomas's aunt Lalitha also testified before the IRB as his guardian.

[4] For the reasons that follow, this application for judicial review is dismissed.

II. Facts

[5] G. Thomas is a 15 year old teenager and a citizen of Saint Vincent. In 2002, he witnessed his mother's murder. After that incident, he and his older sister were put in the care of their aunt Eleanor.

[6] In October 2008, G. Thomas left Saint Vincent to live with his aunt Lalitha in Canada.

[7] In March 2009, G. Thomas claimed refugee protection, alleging that he had witnessed his mother's murder in 2002. At that time, an immigration officer questioned him about his fears and the reasons for seeking asylum in Canada.

[8] At the IRB hearing, G. Thomas changed the grounds for his refugee claim. He now alleges that he fears his aunt Eleanor, her spouse (Anton) and his cousins because they abused him.

[9] The IRB rejected G. Thomas's refugee claim, finding that he lacked credibility and that he failed to submit the necessary evidence in support of his claim. The panel also considered that he could enjoy sufficient protection in Saint Vincent and had failed to rebut this finding. Finally, the panel determined that there was an internal flight alternative [IFA] for G. Thomas throughout Saint Vincent.

III. Legislation

[10] Section 96 and subsection 97(1) of the *IRPA* read as follows:

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

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) 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.

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 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.

IV. Issues and standard of review

A. Issues

[11] The Court must address the following two issues:

1. Did the IRB commit an error by finding that G. Thomas has failed to establish that he is a Convention refugee or a person in need of protection?

2. Is the IRB's decision that G. Thomas failed to rebut the presumption of state protection in Saint Vincent and that an IFA exists reasonable in this case?

B. Standard of review

[12] The applicable standard of review for weighing the credibility of an applicant is reasonableness (see *Mejia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 354, [2009] FCJ No 438 at para 26; and *Zarza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 139, [2011] FCJ No 196 at para 16).

[13] The IRB's decision on the refugee claim submitted pursuant to sections 96 and 97 of the *IRPA* must be assessed on a standard of reasonableness because it is a question of mixed fact and law (see *Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1292 at para 10). The same is true for the IRB's decision on state protection and the IFA (see *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 106 at para 10).

[14] The Court wishes to emphasize that 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" (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Position of the parties

A. Position of G. Thomas

[15] In his memorandum, G. Thomas contended that he is a member of the social group composed of abused and abandoned children in Saint Vincent. He filed in the record what he considers medical evidence in support of his claim.

[16] G. Thomas alleges that the IRB committed a serious error when it wrote the following in its decision: “[f]inally the claimant has a sister who is of age, who is in Saint-Vincent and with whom he could possibly reside” (see page 9 of the Tribunal Record).

[17] He also maintains that the IRB based its decision on elements that were irrelevant and not determinative of his refugee claim.

[18] According to G. Thomas, the IRB was overzealous in its analysis of the evidence because it sought contradictions while ignoring certain evidence in order to undermine his credibility. It is necessary to rely on real contradictions or discrepancies in an applicant’s testimony (see *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444). The IRB is required to refer to all of the evidence before it (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425).

[19] G. Thomas claims to have been abused by his aunt, her spouse (Anton) and his cousins ever since his mother's death. Even if the IRB refused to accept this version of the facts, which seems plausible, it should have given him the benefit of the doubt unless there was a valid reason to believe that his account was not credible (see *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593).

[20] G. Thomas alleges that his medical reports confirm his problems and that his removal to Saint Vincent would cause him substantial distress. Removal to Saint Vincent would be nothing less than catastrophic for his mental equilibrium given that he has been receiving adequate care in Canada (see *Melchor v Canada (Solicitor General)*, 2004 FC 372).

[21] G. Thomas submits that he presented a coherent and credible picture of his real situation in Saint Vincent.

[22] Furthermore, he states that he is a member of a particular social group, that of abandoned children. Consequently, if he is returned to Saint Vincent, he will easily become a victim of threats and persecution again. The behavior of his family members in Saint Vincent could produce in him a fear of persecution that falls within the definition of Convention refugee.

[23] G. Thomas also claims that the IRB did not base its findings of fact on the standard of balance of probabilities. The IRB committed a reviewable error by imposing a higher standard of proof.

[24] G. Thomas submits that he established the existence of a reasonable fear of persecution. By applying the balance of probabilities test to his objective fear of persecution, the IRB committed an error that warrants the Court's intervention.

B. Position of the respondent

[25] The respondent argues that G. Thomas's fear is unfounded. The panel nevertheless carried out a full analysis of all of the evidence submitted on the new allegations of risk based on the abuse G. Thomas allegedly suffered from at the hands of his aunt and her spouse, a man named Anton.

[26] The panel began by finding that these new allegations by G. Thomas lacked credibility and that the evidence submitted could not justify the claim.

[27] The respondent emphasizes that the panel questioned G. Thomas at length to try to obtain specifics on his new allegations. Apart from one incident, G. Thomas did not submit any new evidence or concrete examples of the abuse he alleges to have been a victim of.

[28] With respect to the incident, the panel wrote the following: "[h]e did refer to one incident where he was running away from his aunt and she allegedly threw a stone at him. The claimant has a visible scar on his forehead. Unfortunately we do not have any medical documentation in support of his claim, plus his account was that he was running away, so it does not make sense that a rock hit his forehead" (see page 7 of the Tribunal Record). The respondent contends that this finding is reasonable in view of the facts.

[29] The respondent states that the IRB simply did not have evidence on which to rely to determine that the abuse, which was alleged for the first time during the hearing, exists. The lack of credibility finding is reasonable and based on the evidence submitted before the IRB.

[30] In addition to finding that G. Thomas lacks credibility; the IRB found that he failed to demonstrate that the state of Saint Vincent was unable to provide him adequate protection.

According to the IRB, this element is essential for the acceptance of a claim under section 97 of the *IRPA* (see *Canada (Attorney General) v Ward*, [1993] SCR 689 at pages 724-725).

[31] In this case, the respondent emphasizes that the authorities in Saint Vincent took action with respect to the murder of G. Thomas's mother. Furthermore, the respondent notes that G. Thomas received help from Marion House, a home that helps children experiencing difficulties.

[32] The respondent also maintains that the applicant's memorandum did not challenge this finding by the panel.

[33] The respondent also alleges that refugee claimants have the burden of demonstrating that there exists no internal flight alternative in another part of their country of origin. It was therefore up to G. Thomas to establish that he would face a substantial risk of persecution if he were to return to his country of origin and that the IFA is objectively unreasonable (see *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706; and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589).

[34] In this case, the applicant did not attack the IRB's findings with respect to the IFA.

[35] In short, the respondent argues that G. Thomas failed to establish the unreasonableness of the IRB's decision. The humanitarian and compassionate grounds raised by G. Thomas are not sufficient to grant him Convention refugee or person in need of protection status.

VI. Analysis

1. Did the IRB commit an error by finding that G. Thomas failed to establish that he is a Convention refugee or a person in need of protection?

[36] The Court notes that the IRB did not commit an error when it found that G. Thomas had failed to establish that he is a Convention refugee or a person in need of protection.

[37] The applicant alleges that he is a member of a particular social group, that of abandoned children in Saint Vincent. It is clear from reading the hearing transcript and the record that G. Thomas submitted only a letter from Marion House that was incomplete (the panel received only the first of the two pages) and had obviously been tampered with because the consultation date had been modified. It talks about a 9 year old boy seen for the first time in May 2007. However, the evidence in the record clearly indicates that G. Thomas was born in 1996; he therefore would have been 11 years old in 2007. This first page of the report deals exclusively with G. Thomas's physical

and mental state but only in relation to his mother's death. There is no mention of the abuse suffered at the hands of his aunt Eleanor and her family.

[38] A close reading of the testimony transcript leads the Court to find that the IRB did fail to mention certain elements of the new claim (see pages 17 to 19 of the transcript). In fact, it states the following:

BY REFUGEE PROTECTION OFFICER (to person concerned)

Q. Anyone else?

A. My cousins.

BY PRESIDING MEMBER (to person concerned)

Q. And what are their names?

A. Calvin and Jimmy.

- Jimmy.

Q. And what did you suffer?

A. Like, one day, like in the morning, I went to sleep, the rest of the day I won't eat for nothing.

- Okay.

Q. What did you suffer from your aunt Elenor's boyfriend Anton?

A. Like, I, I would just be there sitting and wonder and then he would just came, started arguing, yelling, hitting me, for no reason.

- It's like arguing, yelling, hitting, I didn't hear the last thing.

A. Yeah and just arguing for no reason.

- Okay.

Q. And your cousins Calvin?

A. Okay, they use to fool me to do things I didn't wanna do.

Q. Like what?

A. Like smoking, drinking.

Q. Did you ever need medical attention for anything that was caused by your aunt Elenor...

A. Yeah.

Q. ...her boyfriend Anton...

A. I used to...

Q. ...or your cousins Calvin and Jimmy?

A. ...I used to have a thing right there.

- Okay. So injury.

Q. When did you get that?

A. Like, I can't remember that.

- Okay.
- Q. And, and how did you get that?
- A. By a st..., like a rock.
- A rock, okay.
- Q. Tell me what happened?
- A. It's like, she was beating me and then after I tried to run...
- Q. So you..., when you say she, what to do you mean?
- A. Aunt Elenor.
- Okay.
- A. And then after I try to run, then after she take the rock and like, pelt it after me and then after he catch me right there.
- Q. So you were running away and she threw a rock at you but it hit your head?
- A. Yeah.
- Q. And do you remember approximately when, when that was?
- A. No.
- Q. Was it right before you left? Was it right after you mom passed away?
- A. Right af..., I think it's right after my mom passed away.

[39] Regarding the scar, the Court is of the view that the IRB's finding is unreasonable, as the hearing transcript indicates, because it was the Board member who stated "[s]o you were running away and she threw a rock at you but it hit your head" whereas G. Thomas stated the following: "And then after I try to run, then after she take the rock and like, pelt it after me and then after he catch me right there." He also stated the following: "It's like, she was beating me and then after I tried to run . . .". This is an important distinction and the IRB nevertheless found a lack of credibility concerning this element, among others. Moreover, it failed to mention the following allegation by G. Thomas, who was at most thirteen years old at the time: "Okay, they use to fool me to do things I didn't wanna do. . . . Like smoking and drinking" (see above excerpt).

[40] The Court identifies another error in the IRB's analysis, that is, the finding that his older sister could take him in when she lives with the aunt who allegedly abused him.

2. *Is the IRB's decision that G. Thomas failed to rebut the presumption of state protection in Saint Vincent and that an IFA exists reasonable in this case?*

[41] Even if the above-mentioned errors could undermine the validity of the decision, the Court must dismiss the application for judicial review on the ground that no argument was submitted by G. Thomas with respect to a foreseeable failure of state protection or with respect to the validity of an IFA. The Court must therefore find that the IRB's analysis in this respect was reasonable.

VII. Conclusion

[42] Justice Nadon emphasized the following in *Chowdhury v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1591 at paras 8 and 9:

[8] It is obviously not sufficient, in order to obtain leave and to succeed on the merits, to simply assert that, for example, the Board erred in fact and in law. It is necessary for an Applicant to demonstrate in what way the Board erred. In order to do so, an Applicant must deal with the evidence presented before the Board and then attempt to persuade the Court that the Board committed an error in rendering its decision.

[9] If one reads the Applicant's memorandum of argument, one comes to the conclusion that no such attempt by the Applicant has been made. . . .

[43] The Court notes that no argument in G. Thomas's memorandum challenged the validity of the IFA or state protection. It is impossible for us to allow G. Thomas's application for judicial review. Therefore, the IRB's decision is confirmed; G. Thomas is therefore not a Convention refugee or a person in need of protection under sections 96 and 97 of the *IRPA*.

[44] However, it is important to note, as the IRB did, that the facts in this case militate strongly in favour of filing the appropriate application under the Act as soon as possible. Despite our sympathy for G. Thomas and his aunt Lalitha, we cannot allow this application for judicial review because the IRB did not commit an error that warrants our intervention. The best interests of this child must be protected as soon as possible using the appropriate recourse.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. the application for judicial review is dismissed; and
2. there is no question of general interest for certification.

“André F.J. Scott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2783-11

STYLE OF CAUSE: GREGORY THOMAS
v
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

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AND JUDGMENT:** SCOTT J.

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