Federal Court  Cour fédérale

Date: 20120528

Docket: IMM-7225-11

Citation: 2012 FC 649

Toronto, Ontario, May 28, 2012

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

LYNETTE ALMINA FREDERICK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board] dated October 6, 2011 wherein the Board determined that the applicant is not a Convention refugee or person in need of protection.

BACKGROUND FACTS

[2] The applicant is a citizen of Saint Vincent born on September 15, 1963 and of limited education. She claims refugee protection because she fears her ex-boyfriend, Glendon Lewis [Lewis]. She worked selling fruit in Saint Vincent and St. Maarten.

[3] She alleges that, on May 18, 2008, Lewis beat her so severely that she required hospitalization for three days. On her release, she went to stay with a friend for a few days, following which she went to St. Maarten. Fearing that Lewis could find her in St. Maarten, she fled to Canada, arriving on December 3, 2008.

[4] She claimed refugee protection on January 29, 2010. Her claim was heard on October 3, 2011 and the Board gave its reasons orally at the conclusion of the hearing; the written reasons were signed three days later.

THE DECISION UNDER REVIEW

[5] The Board found that the applicant had failed to credibly establish the central elements of her claim. Specifically, the Board found that there was no credible proof that Lewis existed, had beaten and threatened her, or was still looking for her now. Although the applicant had provided a copy of a hospital report, the Board gave it no weight because it did not contain a logo or the correct name of the hospital and it contained blue ink despite being an obvious photocopy; the Board also

doubted its authenticity because the applicant had testified that someone else obtained it for her and brought it to Canada, but she was unable to recall who or to explain how a third party had been able to obtain her confidential medical records without anything to show that she had given permission for them to do so.

[6] The Board also found that it was unable to determine whether the applicant was in fact in Saint Vincent on the date of the alleged assault. This uncertainty was based on conflicting information in both her Personal Information Form [PIF] and her testimony about when the applicant was in Saint Vincent and when she was in St. Maarten. The inconsistency in the applicant's answers persisted even after the Board took a short recess to allow the applicant's counsel to walk her through the PIF to try and clarify where she was on what dates.

[7] Turning to the letters provided by the applicant to corroborate her claim, the Board acknowledged that the letters corroborated the alleged assault. However, the Board also noted that neither letter mentioned Lewis trying to find the applicant at any time since she fled, despite both letters being fairly recent at the time of the hearing.

[8] At this point, approximately halfway through the hearing and despite having affirmed that her PIF was true, correct, and complete, the applicant informed the Board that her eldest daughter, Handra Jackson [Handra], was not in Tortula as stated in the PIF, but was in fact in Canada and had filed a separate refugee claim. Handra's claim also named Lewis as the agent of harm and the same counsel represented both Handra and the applicant. Nonetheless, counsel never informed the Board that the two claims were related or sought to join them, and there was no evidence from Handra,

either in the form of a letter or by calling her as a witness, to support the applicant's claim. Counsel suggested that the Board could join the claims at that time, but the Board declined to do so because the applicant had already provided approximately two hours of testimony. The Board drew a significant negative inference about the applicant's credibility from her failure to inform it about Handra's arrival or her refugee claim earlier.

[9] The Board drew a further negative inference from the applicant's delay in claiming refugee protection. Despite having a friend suggest that she file a refugee claim shortly after she arrived in Canada on December 3, 2008, the applicant waited approximately 16 months to file her claim. The Board rejected her explanation that she did not file a claim because she was afraid that she would be sent back to Saint Vincent.

[10] The Board also noted that the applicant had never reported the incident of May 18, 2008 and found that, based on this failure and the circumstances of her claim, she had failed to rebut the presumption of state protection. In the alternative, the Board found that the applicant had an internal flight alternative [IFA] in either Georgetown or Fancy, noting that the only reason why she said that she would not be able to seek refuge within Saint Vincent was that the country is very small.

[11] The Board therefore found that the applicant was not a Convention refugee or person in need of protection.

ISSUES

1) Did the Board err by refusing to adjourn the applicant's hearing to join her claim with that of her daughter?

2) Is the credibility determination reasonable?

3) Is the IFA determination reasonable?

STANDARD OF REVIEW

[12] The specific issue of the Board's failure to join two claims as described in Rule 49(1) was considered by this Court in *Randhawa v Canada (Minister of Citizenship and Immigration)*, 2007 FC 485, 312 FTR 179. In that decision, the issue was reviewed on the correctness standard because it was considered a question of the Board's interpretation of the *Rules* set out in the regulations to the Act.

[13] However, *Randhawa* was written before the Supreme Court of Canada decided in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 that a body's interpretation of it's home statute or the regulations thereto is reviewable on the reasonableness standard. The Supreme Court recently revisited this statement to say that a body's interpretation of its home statute will always require deference unless it falls into one of the categories that require the correctness standard, such as constitutional issues or questions of law of general importance (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654). Therefore, I will review the first issue on the reasonableness standard.

[14] The Board's credibility determination attracts deference and is therefore reviewable on the reasonableness standard (see *Mejia v Canada (Minister of Citizenship & Immigration)*, 2009 FC 354, 2009 CarswellNat 898). Similarly, its IFA determination is also reviewable on the reasonableness standard (see *Castillo Mejia v Canada (Minister of Citizenship and Immigration)*,

2010 FC 530, 2010 CarswellNat 1386). As the IFA finding is sufficient to dispose of this application, I do not need to examine the state protection finding.

ANALYSIS

1. **Did the Board err by refusing to adjourn the applicant's hearing to join her claim with that of her daughter?**

[15] The Board's procedure is governed by the *Refugee Protection Rules*, SOR/2002-228. Rule number 49(1) of those *Rules* states that "The Division must join the claim of a claimant to a claim made by the claimant's spouse or common-law partner, child, parent, brother, sister, grandchild or grandparent." Based on this Rule, the applicant submits that the Board committed a reviewable error by failing to adjourn the hearing and join the claims.

[16] The respondent points to Rule 69(b), which allows the Board to change the requirement of a Rule. Citing *Chiwara v Canada (Minister of Citizenship and Immigration)*, 2011 FC 188, 2011 CarswellNat 352, the respondent argues that Rule 69(b) allows the Board to deviate from the mandatory requirement in Rule 49(1) as long as it explains the reasons for doing so. Because the Board's reasons are clear, the respondent argues that the refusal to adjourn and join the claims was reasonable. The Board could not reasonably have joined the claims, as it would have had to either preserve the applicant's testimony up to that point on the record despite the unfairness to Handra of doing so, or else remove the two hours of testimony from the record and severely impact its ability to assess the applicant's credibility. Given this difficult situation, as well as the applicant's failure to bring Handra's claim to the Board's attention in a timely manner, the respondent submits that it was

reasonable for the Board to refuse to join the claims and to delay the remainder of the applicant's hearing until Handra's claim was ready to be heard.

[17] I agree. Both Handra and the applicant were represented by the same counsel, who is experienced in immigration matters and who knew that the two files were related. Counsel was presumably aware of the potential prejudice, if any, of not joining the files, and should have informed the Board that they should be joined. Yet he failed to do so and when the Board asked counsel why he had not joined them he replied "Probably because I wasn't aware of the contents in terms of preparing the client for hearing" and repeatedly stated that the Board could join them at that time.

[18] This reply is unsatisfactory. The applicant and Handra have different family names and filed their claims independently and on different dates, so the Board was not in a position to realize that their claims were related unless one or both of the claimants informed it of the connection. In these circumstances, it was incumbent on her counsel to inform the Board that the claims ought to be joined and to do so before the hearing was underway; experienced counsel such as the applicant's representative at the hearing should also have been aware of the requirement to raise allegations about procedural fairness – such as those about the Board's failure to join the claims – at the earliest possible opportunity (see *Mohammadian v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 371, 185 FTR 144). Having failed to inform the Board that the files should have been joined, and the applicant having failed to do the same despite amending her PIF many times, they cannot now complain. Although the applicant suggested at the hearing that she should not be held responsible for her counsel's failure, this Court has held that "the general rule is that you do not

separate counsel's conduct from the client. Counsel is acting as agent for the client and as harsh as it may be the client must bear the consequences of having hired poor counsel" (see *Jouzichin v Canada (Minister of Citizenship and Immigration)* (1994), 52 ACWS (3d) 157, 1994 CarswellNat 1592). As the respondent noted, joining the two claims at that point in the hearing would have caused significant delay and could have resulted in an unfair hearing for Handra.

[19] This issue was considered in *Randhawa*, in which my former colleague Justice Blais, now Chief Justice of the Federal Court of Appeal, held that:

> The rule of automatic joinder implies that the authorities are aware of the family relationship. If neither the applicant nor his daughter-in-law mentioned the relationship uniting them, and they arrived in Canada separately and filed their claims at least one year apart, how could the authorities proceed to join the proceedings?
>
> Indeed, the applicant could have taken the initiative following his granddaughter's arrival in Canada, and requested their claims be joined, which he did not do. In fact, in the absence of automatic joinder, rule 50 provides [that a party may make an application to join claims.]
>
> As the family relationship was mentioned for the first time at the applicant's hearing before the panel, namely after his daughter-in-law and granddaughter's hearing, it was too late to join the claims. [At paras 27 to 29]

[20] These comments apply equally to the application before me. Therefore, I find that the Board's refusal to join the two claims was reasonable.

2. Is the credibility determination reasonable?

[21] The applicant submits that the credibility determination is unreasonable. More particularly, she submits that the Board failed to consider her evidence, both at the hearing and in her PIF, that

friends and family have told her that Lewis is still looking for her as well as the evidence that Lewis attacked her daughter in 2010.

[22] The applicant also disputes the Board's rejection of her hospital report. She argues that the Board was required to reference the external knowledge on which it relied in finding the report to be fraudulent, citing *Ramalingam v Canada (Minister of Citizenship and Immigration)* (1998), 77 ACWS (3d) 156, [1998] FCJ No 10.

[23] Finally, the applicant claims that the Board ignored the report from a Canadian doctor, which confirmed that she has scars consistent with her allegations.

[24] The respondent submits that the credibility determination was reasonable. In particular, the respondent submits that the Board reasonably discounted the evidence about the attack on Handra since it was not mentioned in the applicant's PIF despite the PIF being amended at the hearing; the respondent argues that this aspect of the credibility determination is particularly reasonable given the absence of any corroborating evidence from Handra even though Handra is in Canada and is represented by the same counsel. I agree with the respondent.

[25] Although the Board made no mention of the Canadian medical report, the report did not corroborate her allegations but merely confirmed that she bore scars of an unspecified age that could have been made by blows from a blunt object. As to the medical report from Saint Vincent, contrary to the applicant's submission, the Board raised several concerns about the report in addition to the change in the hospital's name. It was not unreasonable to discount it. Further, the hospital report

from Saint Vincent is irrelevant to the issue of whether Lewis is looking for the applicant now, which is the central question in her claim.

[26] The Board reasonably discounted the evidence about the attack on Handra. This Court has affirmed repeatedly the reasonableness of drawing a negative credibility inference from the omission of significant elements from the PIF (see, for example, *Esteban Zeferino et al v Canada (Minister of Citizenship and Immigration)*, 2011 FC 456, [2011] FCJ No 644). In this instance, not only did the applicant fail to mention the alleged attack on Handra despite amending her PIF several times, but she failed to provide any corroborating evidence from Handra even though Handra is in Canada and represented by the same counsel, who admitted at the hearing that he was aware that the two claims are related. I cannot fault the Board for disbelieving the allegations in these circumstances.

[27] The negative credibility finding is further bolstered by the fact that neither of the letters that the applicant did provide make any mention of Lewis looking for the applicant, even though they were written only shortly before the hearing. Further, the applicant failed to explain the lengthy delay in seeking refugee protection. Therefore, I find the credibility determination to be reasonable.

3. Is the IFA determination reasonable?

[28] The applicant submits that the Board ignored her testimony that Saint Vincent is so small that Lewis would be able to find her anywhere, and that she even feared he would find her in St. Maarten.

[29] The respondent cites several decisions that deal with the test for whether a refugee claimant has an IFA and submits that the applicant failed to demonstrate that she would be in danger in either Georgetown or Fancy. The respondent notes that the Board found insufficient credible evidence to establish that Lewis is still looking for the applicant.

[30] I agree. Although Saint Vincent is a small country and one in which it is relatively easy for refugee claimants to establish the lack of an IFA, the Board's IFA determination is intertwined with its finding that the applicant was not credible. The only evidence the applicant provided on the issue of IFA was her testimony, and even if the Board had found her testimony to be credible, it was mixed. It is true that the applicant testified that Saint Vincent is a small country, but when the Board asked her whether she could relocate to Fancy or to Georgetown, she only answered that she had never been to Fancy and had been to Georgetown a long time ago.

[31] This evidence is clearly insufficient to establish danger to the applicant in either of these cities. The IFA determination is therefore reasonable. As the availability of an IFA is determinative of the applicant's claim, it is not necessary for me to examine the state protection finding (see *Guzman Lopez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 990, 2010 CarswellNat 4409).

[32] For these reasons, the application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7225-11
STYLE OF CAUSE:	*Lynette Almina Frederick v The Minister of Citizenship and Immigration*
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