Federal Court  Cour fédérale

Date: 20121029

Docket: IMM-804-12

Citation: 2012 FC 1253

Ottawa, Ontario, October 29, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

LULU LERATO TSIAKO
ALVIN KATLEGO TSIAKO

Applicants

and

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*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated December 21, 2011, wherein the applicant was determined to be neither a Convention refugee within the meaning of section 96 of the Act nor a person in need of protection as defined in subsection 97(1) of the Act.

[2] The applicant requests that the Board's decision be set aside and the application be referred back to the Board for redetermination by a different panel.

Background

[3] Lulu Lerato Tsiako (the principal applicant) and her son are citizens of Botswana. They fled due to fear of violence at the hands of the principal applicant's abusive ex-partner.

[4] The principal applicant was in a relationship with her ex-partner beginning in 2003. The relationship was initially happy, but he turned abusive. The couple's inability to have a child was a source of conflict. Her partner began drinking and turned violent, and the abuse included assault, rape and death threats.

[5] The principal applicant complained to the police but was told it was a family matter which did not warrant intervention. She and her son decided to flee Botswana. They arrived in Canada on August 6, 2010. Their hearing before the Board was on October 28, 2011.

Board's Decision

[6] The Board made its decision on December 21, 2011. The Board summarized the applicants' allegation and identified state protection and internal flight alternative (IFA) as the determinative issues in its negative decision.

[7] The Board considered and rejected the possibility that the principal applicant's son would be able to acquire South African citizenship and therefore be ineligible for protection.

[8] The Board identified inconsistencies in the evidence of both the principal applicant and her son in relation to the availability of state protection and to the son's occupation. The Board found that the principal applicant's fear of persecution was not well founded since she provided no evidence the agent of harm was still actively pursuing her.

[9] The Board set out the principles of state protection and found that the principal applicant had not rebutted the presumption of protection, as the police responded to the vandalism of her automobile and laws against rape in Botswana are effectively enforced, with reference to the U.S. Department of State report.

[10] Finally, the Board found it was reasonable for the principal applicant and her son to seek refuge elsewhere within Botswana. Since there was no evidence the agent of harm was still pursing the principal applicant or would be willing to travel to Francistown or Maun, an IFA was available. Therefore, the applicants' claim was rejected.

Issues

[11] The applicants submit the following points at issue:

1. Did the Board err in its finding on state protection?

2. Did the Board err in its failure to apply Guideline 4, *Women Refugee Claimants Fearing Gender-related Persecution*? (the Gender Guideline)?

[12] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in its failure to apply Guideline 4, *Women Refugee Claimants Fearing Gender-related Persecution*? (the Gender Guideline)?

3. Did the Board err in its state protection findings or in its IFA findings?

Applicants' Written Submissions

[13] The applicants submit that reasonableness is the appropriate standard of review.

[14] The Board did not provide reasons for preferring the country conditions evidence indicating state protection was available to that indicating it was unavailable. This is a reviewable error. The United States Department of State report relied on by the Board also identified violence against women as a continuing problem, but the Board merely cherry-picked the parts of the report favourable to its conclusion.

[15] The Board made no reference to the Gender Guideline. This is proof the guideline was not considered. The Board's questioning during oral testimony also did not take the guideline into consideration.

Respondent's Written Submissions

[16] The respondent submits the appropriate standard of review is reasonableness.

[17] The respondent emphasizes that the Board accepted the credibility of the principal applicant and her son but rejected the claim on state protection and IFA. There is no evidence the principal applicant asked the state for protection aside from the vandalism of her car which was investigated by the police. Even if the local police did not provide adequate protection, this does not establish a lack of protection for the state on the whole.

[18] IFA findings are findings of fact and should be given deference. The applicants provided no evidence to refute the IFA.

[19] The respondent argues the Board did properly consider country conditions evidence, including contrary evidence. The principal applicant alleged she had experienced abuse from her partner starting in 2004 but only went to the police when her car was vandalized in 2010.

[20] The Court has made clear that a failure to explicitly mention the Gender Guideline is not necessarily an error. The Board was appropriately sensitive and courteous during the hearing. A proper application of the Gender Guideline does not dictate a certain result. Even if the Board erred in explicitly discussing the Gender Guideline, the determinative findings were with respect to state protection and an IFA and would therefore have been unaffected by this error.

Analysis and Decision

[21] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[22] The weighing of evidence and the interpretation and assessment of evidence are reviewable on a standard of reasonableness (see *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045, [2009] FCJ No 1286 at paragraph 38).

[23] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[24] **Issue 2**

Did the Board err in its failure to apply Guideline 4, *Women Refugee Claimants Fearing Gender-related Persecution*? (the Gender Guideline)?

The Gender Guideline is a very important tool for the Board to use in evaluating refugee claims rooted in domestic violence. However, the principal applicant has not pointed to any discrete error in the decision which is the result of a failure to apply that Guideline. Furthermore, the Guideline is most important when assessing credibility, which played little role in the outcome here.

[25] The respondent is correct that the Board need not explicitly mention the Guideline (see *Shinmar v Canada (Minister of Citizenship and Immigration*, 2012 FC 94 at paragraph 19, [2012] FCJ No 100). Upon reviewing the decision and the transcript of the hearing, I can find no insensivity or impermissible reasoning pertaining to the principal applicant's status as a victim of domestic violence. Therefore, the applicants' argument on this point fails.

[26] **Issue 3**

Did the Board err in its state protection findings or in its IFA findings?

The applicants argue that the Board failed to explain why it preferred the country conditions evidence favourable to a finding of state protection over that not favourable to such a finding, since evidence of both types were contained in the US Department of State report. The applicants point to excerpts from the report indicating that spousal rape is not recognized as a crime and other evidence that Botswana is not adequately enforcing its laws prohibiting other forms of abuse.

[27] The Board is presumed to have considered all of the evidence before it (see *Oprysk v Canada (Minister of Citizenship and Immigration)*, 2008 FC 326 at paragraph 33, [2008] FCJ No 411).

[28] It is to be noted that when the principal applicant went to the police about her car, the police attempted to help her.

[29] Because of my finding on IFA in the next paragraph, I will not deal further with the state protection issue.

[30] It is important to remember that the Board also made a finding that the applicants had two different IFAs in Botswana. These findings were not questioned by the applicants. Accordingly, this is sufficient to defeat the claim for refugee protection as a person cannot be considered to be a refugee or a person in need of protection if a valid IFA exists for him or her in his or her own country. The onus rests with the applicants to show that the IFA is not valid. They have not done so.

[31] As a result, the application for judicial review must be dismissed.

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

JUDGMENT

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

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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.

FEDERAL COURT

SOLICITORS OF RECORD

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