Federal Court  Cour fédérale

Date: 20121128

Docket: IMM-5466-11

Citation: 2012 FC 1380

Ottawa, Ontario, November 28, 2012

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

COLINDIA MASON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The main issues in this judicial review application brought by Colindia Mason, a citizen of St-Lucia, is whether the Refugee Protection Division (the Tribunal) erred in law when it determined on July 8, 2011 in a decision rendered orally, she was not a Convention refugee nor a person in need of protection under section 96 and section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), because her "evidence in areas crucial to the claim lacks credibility." The

Tribunal also found she had not supplied clear and convincing confirmation of the state's inability or unwillingness to protect her.

II. The applicant's fear

[2] The central element of the applicant's story was accepted by the Tribunal. On August 20, 2006 the applicant was stabbed in the back by a group of young women or girl gang members during a robbery at a beach concert she attended with her sister who was visiting her during a study break from the school she was attending in Canada. She went to the hospital, received a number of stitches and reported the incident to the police (Applicant's Record, p 189). On October 8, 2006 the police arrested one of the gang members who was identified by the applicant during a line-up.

[3] The documentary evidence filed by the applicant includes the following:

- A letter from the Royal Saint Lucia Police Force written by the Assistant Commissioner of Police at Police Headquarters in Casteles; and
- A newspaper article from the Star dated August 23, 2006 entitled "Girl Gangs on the rise? Sisters attacked on the beach". The Tribunal refused to admit the article in evidence.

[4] The police report confirmed "Colindia Mason of Massade, quarter of Gros Islet, reported to police about 10:15 pm on Friday, August 20, 2006 … a group of young women unknown to her attacked her wielding weapons causing injuries while simultaneously robbing her." It said an investigation was launched by a constable of the Gros Islet Police Station and that "pursuant to the investigation one of the perpetrators was arrested and charged for the offence of robbery with violence …while the others were being pursued without relent." It added that "according to the

complainant several threats had been levied against her as the trial date approached aimed at averting the course of justice and in furtherance to conceal the identity of the remaining perpetrators."

[5] In her Personal Information Form (PIF) the applicant indicated the following:

i. She stated her problems did not end at the police station because the gang learned that she had gone to the police, was branded as a snitch and was under constant threat.

ii. It took a year and a half for the case to came to trial with the accused's lawyer obtaining an indefinite adjournment on the grounds of late evidentiary disclosure by the Crown.

iii. She further stated the threats continued and was told she would not be around for the final trial. That is when she decided to leave for Canada.

III. The Tribunal's decision

1. The credibility findings

[6] As noted, the Tribunal ruled the evidence in areas central to her claim lacked credibility. The Tribunal was also of the view "numerous significant discrepancies remained inadequately explained at the hearing." Three examples where identified, all related to her experience after the stabbing occurred in August 2006.

[7] The first discrepancy related to what she knew about the gang's whereabouts and their hangouts. In her testimony, according to the Tribunal, she stated she did not know where the gang's hangouts were, only where they had come from. The Tribunal said this testimony was in "sharp

contrast" to what she had written in her PIF that "you knew where their hideout was and that it was close to the place where you took transportation to your work." The Tribunal concluded:

> When you were asked to explain this discrepancy, you stated that you were talking about where they came from rather than where they hung out or where their hideout was. I reject this explanation; I do not find it satisfactory in the circumstances. In my view, if you had the experience you allege and knew about the gang's hideout, then more likely than not, clear and un-contradicted evidence in this regard would have been provided to Canada's Immigration and Refugee Board.

[8] The second discrepancy was where she lived in Saint Lucia at times material to her allegations of risk of serious mistreatment and threats at the hands of gang members. The Tribunal noted in her testimony the applicant had relocated to her mother's house in order to obtain at least temporary safety. The Tribunal pointed out to the applicant in the residence section of her PIF "where in the Tribunal's view your mind was specifically turned to the time and the relevance of your places of residence at times crucial to your claim" shows she had one place of residence for "many years right until the time you left St Lucia."

[9] In her PIF the applicant had written she had resided at Massade, Gros Islet from November 1999 to April 2009. In her affidavit filed with the Tribunal, the applicant's mother stated she was a resident of Massade, Gros Islet. The Tribunal found:

> Your explanations in this important area, some of which flowed from examination which I consider to have been leading questions, were that your place of residence at your original home was what you considered your permanent place of residence, this was at your grandfather's place, and that your mother's home, which was the place where you went to for a short period of time before you left St. Lucia, was a temporary place. You also stated that you received mail at you original place of residence. I reject these explanations.

[10] The Tribunal added the following:

> I find that when you submitted your PIF, you were declaring it to be complete, accurate and true; you had representation at the time or at times material to the preparation of your claim and in preparation for the hearing. You have had representation by a counsel before you were represented by the current counsel, and this counsel is a barrister and solicitor having experience in the presentation of refugee claims. You have turned your mind to presenting the Board with amendments to your PIF and even proffered a new or additional narrative in the form of a letter, which for reasons already provided on the record, was not admitted into evidence.
>
> Therefore, I am of the view that if you had relocated in St. Lucia to save yourself from a fear of serious harm, then more likely than not, clear reflection of this would have been found in your PIF residence section.

[11] The third discrepancy related to how many gang members were arrested: The applicant testified on more than one occasion only one gang member was arrested and charged and was in fact one of the reasons why you did not believe that you were adequately protected by and served by the St. Lucia police and that she feared upon her return to her country of birth there would still be other gang members who would be upset and could seek retribution against you. The Tribunal pointed to an affidavit from her friend (Devon Jules) who stated that the gang members were later arrested and charged with assault and attempted robbery. The Tribunal concluded:

> Even though you cannot reasonably be expected to know whey another person makes certain declarations, whether in an affidavit or in any other form, I am left with crucial discrepancies in the body of material in front of me.
>
> Your explanation for this discrepancy was that you did not know why your friend referred to gang members in the plural, but insisted that there was only one gang member who was arrested. You added that the letter from the police also confirms this.
>
> Having reviewed all of the evidence in its totality and, in particular, the evidence and submissions that flowed in this area of the claim, I am not satisfied on the balance of probabilities that you have supplied sufficient credible evidence on which it may be found that

> the police were either unwilling or unable to provide adequate protection in the circumstances.

[12] It is to be noted that in a few paragraphs before the Tribunal had written:

> You have supplied material intended to corroborate the essential elements of your claim. You have submitted affidavits from a friend and your mother. I find these sources both to be proximate to you and not independent. As such, I find that they lack the necessary objectivity to permit the Division to place weight on their declarations. You indicated that your relationship with your mother was a good one and you stated that the affidavit from the other person is an affidavit from a friend. The friend's affidavit conflicts materially and crucially, in my view, with your testimony and the letter of your mother asked the police, the assistant commissioner of the police, to write with respect to how many gang members were arrested by the police.

[13] The Tribunal went on to state there was no independent corroboration from the courts on the police to support here allegations and explanations why no supporting documents supporting the multiple claims she made to the police. The Tribunal was not satisfied with her explanations (investigating officer on maternity leave and her mother's lack of success in obtaining appropriate documentation). The Tribunal then concluded it was not satisfied the applicant had provided sufficient explanations and corroboration were sufficient in the circumstances of her refugee claim and that based on the evidence before the Tribunal it had been established that the applicant continued to be threatened at times material to your decision to flee and time of alleged flight. The Tribunal did, however, recognize the letter from the police which referred to threats but went on to conclude the letter from the police was created upon the request of her mother to provide support for her allegations and noted the letter did not specify dates, periods or duration of the threats.

[14] The Tribunal went on to make a finding concerning the delay in making her refugee claim which was made six months after her arrival as a self-declared visitor in Canada.

[15] I mention the Tribunal refused, on the grounds of non-compliance with the 20-day notice, to enter into evidence an addition to her PIF for the purpose of illustrating the origins of the threats against her. She explained the police told her she would be needed to identify the girls from a line-up consisting of some of the gang members along with some other girls around the same description. It turned out at the line-up she was not behind a screen but face to face with eight girls. She was scared and only identified one of them.

[16] The applicant described how the threats started and continued. She reported some of the threats to the police who said the gang was in hiding and every time they went on a search they came back empty handed. She had anxiety attacks and saw a doctor.

[17] The Tribunal also refused to enter into evidence her sister's affidavit for the same reason.

[18] These documents had been provided to the Tribunal three days before the hearing.

[19] At the hearing the Tribunal refused to enter into evidence the newspaper article which was provided at the hearing.

IV. The position of the parties

1. That of the applicant

[20] Counsel for the applicant submits this judicial review application raises the following issues:

i. A breach of procedural fairness when the Tribunal refused to allow an amendment to her PIF because it was filed late under Rule 30 (3 days before the hearing).

ii. Did the Tribunal fixate on minor or peripheral omissions in evidence in making negative credibility findings?

iii. Did the Tribunal make selective use of documentary evidence and/or make erroneous findings with regard to state protection?

iv. Did the Tribunal err in finding the applicant's claim was not well founded due to her delay in making her claim?

2. That of the respondent

[21] Counsel for the respondent argues:

i. The claimant bears the onus of establishing, if she were to return to St. Lucia, she would face a serious risk of persecution.

ii. In this case, the applicant failed to provide trustworthy and probative evidence necessary to corroborate her allegations of persecution, a determination which falls well within the Tribunal's decision-making purview noting from *Dunsmuir* where a tribunal decides a question of fact the standard of review is reasonableness; a credibility finding is a properly factual determination. The Tribunal is entitled to significant deference.

iii. A review of the evidence shows the Tribunal made reasonable credibility findings and did not err in finding the applicant's documentary evidence did not corroborate her claim.

iv. The applicant showed a lack of subjective fear when she delayed six months after she arrived in Canada and only after her status as a visitor had expired.

v. The applicant failed to rebut the presumption of state protection.

V. Analysis and Conclusion

(a) The standard of review

[22] It is settled law that a breach of procedural fairness is gauged on the standard of correctness and findings of fact which is what a credibility finding is, as well as any other error of fact, gauged on the reasonableness standard.

[23] It is clear from the Supreme Court of Canada decision in *Dunsmuir*, the reasonableness standard requires this Court to grant significant deference to the Tribunal and unless the decision does not fall within a range of acceptable outcomes that are defensible in respect of the facts and the law, the Court is not to intervene.

(b) Conclusions

[24] For the following reasons this judicial review application must be allowed. As noted the Tribunal accepted the applicant had been stabbed by a group of young women or girl gang members; that she had made a complaint to the police who arrested one gang member whose trial

was indefinitely postponed, a trial in which the applicant was the main witness. The Tribunal also accepted the fact the police was searching for the other gang members.

[25] The main component of the applicant's fear was the threats she was receiving from the gang members. Yet, the Tribunal concluded the applicant had not established she continued to be threatened at material times.

[26] The Tribunal reached this conclusion finding the applicant's testimony not to be credible.

[27] It is settled law that credibility findings are findings of fact which command a substantial deference from this Court. However, a tribunal's credibility findings are not immune from review. The defects in the applicant's testimony must be central to her story; those defects must not be trivial or minute. The Court must consider whether the decision as a whole supports the tribunal's credibility findings.

[28] In my view, this is where the Tribunal erred. The evidence as a whole does not support the Tribunal's credibility findings.

[29] The Tribunal relied on three discrepancies to cast aside the applicant's central fear – a fear of the gang members who attacked her in respect of which she complained to the police. In this context, the defects in her testimony were minor and trivial. The Tribunal's decision cannot stand and the other issues raised must be deferred until a differently constituted tribunal has the opportunity to assess the applicant's well founded fear of persecution.

JUDGMENT

THIS COURT'S JUDGMENT is that this judicial review application is granted, the Tribunal's decision is quashed and the matter is remitted to a differently constituted tribunal for redetermination. No certified question was proposed.

"François Lemieux"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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