Federal Court  Cour fédérale

Date: 20130508

Docket: IMM-7403-12

Citation: 2013 FC 483

Ottawa, Ontario, May 8, 2013

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

NGESEUAKO HENGUVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 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 July 4, 2012 wherein the Board determined that the applicant is not a Convention refugee or person in need of protection.

FACTS

[2] The applicant is a 23 year-old citizen of Namibia. She alleges the following facts in support of her claim:

- After the applicant's grandfather passed away in November 2010, her eldest uncle became the new head of the family and he pressured her to marry her cousin. The applicant refused. She believed this cousin to be 50 or perhaps even 70 years old;
- This cousin began to visit the applicant constantly and ask her to marry him. On one visit, he asked if he could sleep with her. This made the applicant afraid, particularly because her cousin would often touch her inappropriately;
- The applicant went to the police in December 2010, but they told her they could not do anything to help her because they could not interfere with the traditional way;
- Because the applicant's family continued to pressure her to marry her cousin, she decided to come to Canada; and
- The applicant's uncles have told the applicant's mother that if the applicant does not marry her cousin as soon as she returns to Namibia, both she and her mother will lose the financial support of the family.

DECISION OF THE BOARD

[3] The Board based its negative decision on the following findings:

- Parts of the applicant's testimony were not credible;
- The applicant's fear of being ostracized by her family and not being financially supported by her uncle if she continued to refuse to marry her cousin was not sufficiently serious to amount to persecution. The Board noted that as a 22-year-old

adult it would be reasonable to assume that the applicant could find a job and live independently in Namibia if necessary;

- The applicant met both prongs of the test for an internal flight alternative [IFA], as on a balance of probabilities i) it was unlikely that her uncle and cousin would be able to locate her in Walvis Bay, which has a population of 42,015 and ii) it was not objectively unreasonable for the Board to expect the claimant to seek refuge in Walvis Bay; and
- Having considered the country conditions in Namibia and all the circumstances of the case, based on a balance of probabilities, adequate state protection would be available to the applicant if she were to return to Namibia.

ISSUES

1. Did the Board make an unreasonable finding regarding the lack of persecution faced by the applicant?
2. Did the Board misconstrue the legal test for an IFA?
3. Did the Board make an unreasonable determination regarding the availability of state protection?

STANDARD OF REVIEW

[4] The findings of the Board regarding the lack of persecution faced by the applicant and the availability of state protection are questions of mixed fact and law and are reviewable on the reasonableness standard (*Kemenczei v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1349 at paras 21-22). A reasonable conclusion is one that "falls within a range of possible,

acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

[5] The issue of the legal test for the availability of an IFA is a question of law and is reviewed on the correctness standard (*Onyenwe v Canada (Minister of Citizenship and Immigration)*, 2011 FC 604 at para 9).

ARGUMENTS AND ANALYSIS

1. **Did the Board make an unreasonable finding regarding the lack of persecution faced by the applicant?**

[6] The applicant argues that the Board unreasonably found that the treatment faced by the applicant did not amount to persecution. The Board failed to acknowledge that the forced marriage feared by the applicant was itself the harm that needed to be assessed, rather than the applicant's fear that she would be ostracized by her family. Moreover, the Board failed to take into account the cultural environment, her traditional family and the impact upon the applicant should she be ostracized from her family and community.

[7] According to the respondent, the evidence was not that the applicant would be forced into an unwanted marriage. Rather, she said in her personal information form narrative that she would be pressured by her family to marry her cousin and ostracized if she refused to do so. Thus, it was reasonable for the Board to find that the harm did not rise to the level of persecution.

[8] The Board's analysis of whether the applicant's fear could be considered persecution consisted of only the following two paragraphs:

> 20 There is general jurisprudence that to be considered persecution, the mistreatment suffered or anticipated must be serious and in order to determine whether particular mistreatment could qualify as "serious" it is necessary to examine how a claimant maybe [*sic*] harmed and to what extent the subsistence, employment, expression or exercise of that interest may be compromised. This approach has been approved in the courts, which equates the notion of a serious compromise of interest with a key denial of "a core human right".
>
> 21 It would appear from the claimant's testimony that if she refuses to follow her Uncle and marry her Cousin that she will "be ostracized and not supported by the Uncle." However, the claimant is twenty-two years old, an adult and it would be reasonable to assume that she could if necessary find a job and live independently in Namibia. The Board finds that this treatment is not serious enough to amount to persecution. In addition, the Board finds that being ostracized by her family, of which some are her agents of persecution, does not amount to persecution.

[9] In my opinion, in deciding whether the applicant's fear could amount to persecution, the Board failed to assess or even acknowledge that the applicant's primary fear was that she would be forced to marry her cousin. The ostracism the applicant alleged was a side issue flowing from her main fear of a forced marriage. The applicant stated in her personal information form narrative that her uncles told her she "had" to marry her cousin and that she was "disobeying tradition" by refusing to do so. She said she came to Canada because her family "kept pressuring" her to marry her cousin.

[10] I disagree with the respondent that being "pressured" to marry her cousin is not the same as being "forced" to do so. The *Oxford English Dictionary* (online: www.oed.com) defines the verb "pressure" as "[t]o apply pressure to, esp. to coerce or persuade by applying psychological or moral

pressure". Considering the totality of the evidence and this definition of the verb "pressure", I am satisfied that the applicant was indeed being "forced" to marry her cousin. As the Board did not address whether the direct harm of forced marriage amounted to persecution, I agree with the applicant that the Board's analysis on this point was unreasonable.

2. Did the Board misconstrue the legal test for an IFA?

[11] As for the Board's IFA finding, the applicant maintains the Board incorrectly articulated the test and erroneously incorporated the issue of state protection into its IFA analysis.

[12] The respondent asserts that the Board clearly relied on and applied the appropriate standard and test for an IFA and specific words and phrases should be read in context in a way to ensure harmony and internal consistency.

[13] At paragraph 24 of its decision, the Board correctly articulated the first prong of the test for an IFA (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA); *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (FCA));:

> 24 The leading case on IFA directs the Board to use a two-pronged test when considering an IFA. First, the Board must be satisfied that, on a balance of probabilities, no serious possibility of persecution exists, or, in this case, that a claimant would not be subjected personally, on a balance of probabilities, to a risk to life or a risk of cruel and unusual treatment or punishment or a danger of torture, in that part of the country where the IFA exists. […]

[14] However, in my view the Board misconstrued the test for an IFA. As the applicant underlines, the Board considered that the applicant had not approached the authorities in Walvis Bay for protection prior to leaving Namibia as part of its IFA analysis. In fact, the Board devoted five paragraphs of its IFA analysis to this consideration, which the Board identified as "an important IFA sub-issue". After looking at this "sub-issue", which the Board acknowledged overlapped with its state protection analysis, the Board concluded that it would not be objectively unreasonable for the Board to expect the applicant to seek refuge in Walvis Bay.

[15] It is trite law that the issue of state protection is distinct from the issue of an IFA. The Board's intermingling of these two questions in its application of the test for an IFA was incorrect.

[16] I also agree with the applicant that the Board erred by requiring that the applicant show that her uncle and cousin "would be able" to find her in Walvis Bay as part of its analysis, as this held the applicant to a higher standard than that of a "serious possibility of persecution".

3. Did the Board make an unreasonable determination regarding the availability of state protection?

[17] Finally, I am of the view that the Board also erred in its state protection analysis. The Board's conclusion that adequate state protection would be available to applicant if she were to return to Namibia and seek it was based on the following findings:

- The applicant's testimony regarding what happened to other victims of forced marriages and domestic violence was vague and the applicant's reasons for not going to the police more than once were not compelling; and

- The applicant did not utilize the avenues available to her to seek state protection before asking for international protection, such as complaining about the poor police service she received to the Police Commissioner of the Namibian Police, pursuing the matter through the criminal or civil courts, seeking help from government and non-government agencies, and moving to a women's shelter.

[18] As submitted by the applicant, the Board's state protection analysis failed to take into account the adequacy of the state protection available to the applicant to protect her from forced marriage. State protection need not be perfectly effective (*Hernandez v Canada (Citizenship and Immigration)*, 2007 FC 1211 at para 13, citing *Burgos v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1537 at para 36). However, any efforts undertaken by the government of Namibia to protect victims of forced marriage must actually translate into adequate state protection at the operational level (*EYMV v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at para 16). While the Board canvassed remedies available to women facing domestic violence, the Board failed to analyze whether the remedies available to victims of domestic violence are available to victims of forced marriage**.**

[19] Further, contrary to *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*, the Board found that the applicant would be able to access service and protection from non-governmental organizations, such as women's shelters and women's support groups. The fact that a claimant did or did not seek protection from non-governmental groups is irrelevant to the analysis of state protection. The jurisprudence of this Court is clear that the police force is presumed to be the main institution mandated to protect citizens and that other governmental or private

institutions are presumed not to have the means nor the mandate to assume that responsibility (*Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326 at para 15).

[20] Therefore, in my opinion the Board's state protection assessment was also unreasonable.

CONCLUSION

[21] This application for judicial review is granted, the decision is quashed and the matter is referred back to be re-determined by a differently constituted panel.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted;
2. The decision is quashed and the file is sent back to a differently constituted panel for re-determination; and
3. No question is certified.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7403-12
STYLE OF CAUSE:	*Ngeseuako Henguva v The Minister of Citizenship and Immigration*
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 2, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	TREMBLAY-LAMER J.
DATED:	May 8, 2013

APPEARANCES:

Cheryl Robinson	FOR THE APPLICANT
David Cranton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kranc Associates, Immigration Lawyers Toronto, Ontario	FOR THE APPLICANT
William F. Pentney, Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT