Federal Court  Cour fédérale

Date: 20150226

Docket: IMM-5888-13

Citation: 2015 FC 248

Ottawa, Ontario, February 26, 2015

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

ERZSEBET ORSOS

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated August 9, 2013, which found that the applicant was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For the reasons that follow the application is granted.

[2] The applicant is a 25 year old Romani citizen of Hungary who claims to have a well-founded fear of persecution on account of her Roma ethnicity and her experiences as a victim of domestic and gender-based violence.

[3] The applicant was orphaned as a child. She was raised in foster care and government institutions until the age of 19. While attending school and in government care, the applicant was mistreated and discriminated against because of her Roma ethnicity. the applicant attempted suicide on two occasions and saw a psychologist for approximately seven years.

[4] At the age of 19 the applicant was out of government care, and due to a lack of money and places to go, slept on the streets for two nights. At this time she met Lazslo Zombori, a pimp and nightclub worker who took the applicant into his home. In order to avoid being forced into prostitution, the applicant agreed to a relationship with Mr. Zombori; however, that relationship soon turned violent and the applicant suffered emotional and physical abuse at the hands of Mr. Zombori.

[5] The applicant became pregnant, and soon after, in September 2010, Mr. Zombori and his brother came to Canada and made refugee claims on account of their Roma ethnicity. Two weeks later, the applicant arrived in Canada and made her refugee claim at the airport. Shortly thereafter, her daughter was born.

[6] Mr. Zombori continued to abuse the applicant in Canada. He locked the applicant in their apartment and threatened to abduct their child. After seeking help from a friend, the police came

to the apartment and separated the applicant from Mr. Zombori. In November, 2012, Mr. Zombori was deported back to Hungary. Since that time, the applicant has spoken to Mr. Zombori on one occasion, when he threatened to kill the applicant if she returned to Hungary.

[7] The Board found the applicant to be entirely credible, but denied her claim on the basis that she failed to rebut the presumption of state protection.

II. Issues and Standard of Review

[8] This case raises two issues; whether the Board's decision satisfies the *Dunsmuir v New Brunswick*, 2008 SCC 9, criteria of justification, transparency, and intelligibility; and secondly, whether the Board erred in finding that the applicant failed to rebut the presumption of state protection.

[9] It is axiomatic that a court exercising judicial review authority over a tribunal is to accord deference to findings of fact, as well as to questions of interpretation where the tribunal is interpreting its home statute: *Dunsmuir*; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36. Further, a reviewing court is to read the decision below with a view to upholding it; perfection in the reasons is not the standard of review. *Dunsmuir* at para 47 teaches that a reviewing court inquires into the qualities that make a decision reasonable, "referring both to the process of articulating the reasons and to outcomes." As Justice Abella wrote in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14, the reasons "must be read together with the outcome and serve the purpose of showing whether the result falls within the range of acceptable outcomes." The

reasons, when read as a whole and in the context of the record, must demonstrate the reasonableness of the decision.

[10] Having these principles firmly in mind, the decision below does not meet the criteria of justification, transparency, and intelligibility and is set aside.

III. Analysis

[11] The Board accepted the applicant's evidence as credible. Orphaned, institutionalized and abused as a child, the 19 year old applicant of Roma ethnicity fell into the control of sex-traffickers in Hungary.

[12] The sole issue for the Board was state protection. After having correctly stated the legal test regarding state protection, the Board held that the applicant had failed to rebut the presumption of state protection. The Board relied on the assistance that the applicant received during her life in Hungary to indicate that state protection was available. Specifically, the Board considered the applicant's institutionalization in an orphanage and the provision of psychological services following attempted suicides as evidence of state protection. The Board also relied on the fact that a children's aid worker, as part of a government institution, accompanied the applicant to a job interview as evidence of state protection. When urged by counsel not to consider these institutions as elements of the state protection analysis, the member simply stated "I disagree." The Board also reasoned that the applicant failed to rebut the presumption of state protection because she did not approach her sister, who was living in Hungary, for help.

[13] The Board's decision is unclear as to how the child psychologist, the children's aid worker, or the applicant's sister could have provided the applicant with state protection after she was abused by Mr. Zombori, and became a victim of sex-trafficking. These agencies had no responsibility for her once she reached the age of majority. Further, no reasons were provided as to why the Board chose to depart from established jurisprudence as to the agencies and mechanisms of the state that are relevant to the analysis of state protection.

[14] The Board continued the state protection analysis. After noting that 85 % of the Roma population was unemployed, the Board wrote:

> She was educated, she probably has more education, then the other 85%, and she falls into that other bracket. And she was not unique in the institution; she was part of the general population. That speaks to state protection.

[15] It is not clear, nor does the Board elaborate on, how the applicant's education speaks to state protection.

[16] The Board also noted that there is "general distrust of police" and "very few Roma victims of domestic violence have initiated legal actions against their abusers, because of their state of mind." However, the Board, without explanation, went on to find that "this claimant is different." The Court is left to speculate that with this statement, the Board was suggesting that the applicant should have initiated a legal action of some sort, and that this action would have constituted state protection. However, this suggestion does not align with the facts accepted by the Board with respect to the applicant's experience as a victim of sex-trafficking, nor with the

jurisprudence governing when state protection is adequate. The capacity to initiate some form of legal action is not a surrogate for state protection.

[17] The Board concluded by rejecting the "aspect of the lack of state protection from the point of view of the domestic abuse in Hungary, as well the lack of state protection because she was a Roma" because she did "get help through her life, for 19 years."

[18] The state protection analysis, broadly speaking, is directed to an assessment of the institutional capacity and willingness of a state to provide an adequate level of physical protection to its nationals. An applicant need not seek state protection if the evidence indicates it would not reasonably have been forthcoming: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689. In *Muntyan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 422 at para 9, Justice Russel Zinn reiterated that there is no legal requirement on refugee claimants to seek state protection, although in most cases it may be practically necessary to do so in order to provide "clear and convincing evidence" that the state is unwilling or unable to protect. However, "where persecution is widespread and indiscriminate, a failure to report mistreatment to the authorities is of doubtful evidentiary significance". In the present case, the Board did not analyze whether seeking state protection was, given the applicant's circumstances, a reasonable option.

[19] When the applicant's circumstances involve domestic violence, *R v Lavallee*, [1990] 1 SCR 852, the Supreme Court of Canada has outlined specific considerations that must be taken into account, including what the applicant "reasonably perceived, given her situation and her

experience." The test is therefore subjective and objective. Although an applicant's subjective fear is not determinative of the question of state protection, the jurisprudence requires that an applicant's perception be considered in light of the general country conditions: *Aurelien v Canada (Minister of Citizenship and Immigration)*, 2013 FC 707, para 13. As set out in the Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (Gender Guidelines), a claimant's steps in seeking state protection must be assessed with regard to "the social, cultural, religious, and economic context in which the claimant finds herself." Here, the Board gave little consideration to the country conditions of Hungary, and gave no consideration to the applicant's subjective fear or the contextual factors as outlined in the Gender Guidelines. The Board therefore erred in its state protection analysis.

[20] The Board went on to draw support from the failure of the applicant to seek state protection in Canada:

> To compound the problem… it is another thing not to have evidence of domestic abuse in Canada and not provide it. There is no evidence, no evidence provided.

[21] No explanation was provided by the Board as to why it required evidence of domestic abuse in Canada as a means of rebutting the presumption that state protection was available in Hungary. It seems too obvious to note that it is unreasonable for the Board to situate its state protection analysis in the context of state protection in Canada when the applicant is fleeing Hungary. Nor is it apparent why the Board would require evidence of domestic abuse in Canada given that the Board accepted the claimant's evidence as credible.

[22] Further, the provision of basic social services to an orphan is not state protection.

[23] The Board dismissed the claim on the basis of section 96 of *IRPA*; however, it also conducted a brief section 97 analysis. Although the Board found the applicant to be credible and to have been forced into prostitution and trafficked to the Netherlands, the Board reasoned that she faced a risk no different than the rest of the population in Hungary. The Board concluded:

> And there is nothing provided, other than her testimony, which like she says, she was victimized but she was also helped by the institution, so I am not persuaded by the claimant's allegations.

[24] It is once again unclear why the Board was "not persuaded" by the claimant's allegations, having found the applicant to be credible. The reasoning is, respectfully, inconsistent. There is no analysis whether under-age Roma women face the same risk of being enticed into prostitution and sex-trafficking as the general population. As I noted in *Lin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 39, para 13, "[t]o meet the standard of transparency, reasons must link, if not explicitly, then implicitly or by logical consequence or context, the conclusions to the evidence." Here, there is no discernable path of reasoning between the facts as found and the outcome that meets the transparency criteria.

[25] There are several passages in the decision which counsel for the Minister of Citizenship and Immigration, properly conceded, could not be explained, or the relevance of which remains unknown. The criteria of intelligibility is not met.

[26] When the Supreme Court of Canada said in *Newfoundland Nurses* that reasons were to be read with a view to understanding, they did so with the criteria of *Dunsmuir* in mind - that reasons be intelligible and transparent, and the outcome justifiable in light of the record and law. Simply put, a reviewing court must be able to understand how and why the result was reached.

The Supreme Court's decision does not invite speculation or surmise on the part of a reviewing court, authorize copious re-reading of the evidence by the Court so as to reach its own conclusion, nor is it licence to turn a blind eye to errors in logic or to re-align the evidence with the appropriate legal tests. This understanding of *Newfoundland Nurses* turns the principles of deference and standard of review on its head, as they cumulatively amount to a reviewing court making its own decision on the merits of the case, something which is manifestly not its role.

IV. Conclusion

[27] No amount of deferential reading can give to the decision the justification, transparency and intelligibility required by the jurisprudence.

JUDGMENT

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

There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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