

Federal Court



Cour fédérale

Date: 20150820

Docket: IMM-6295-14

Citation: 2015 FC 994

Toronto, Ontario, August 20, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MARTIA ALTHIA ALLEN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

AMENDED JUDGMENT

I. Overview

[1] This is a judicial review of a decision [Decision] of the Refugee Appeal Division [RAD] confirming the determination of the Refugee Protection Division [RPD], pursuant to section 111(1)(a) of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [the Act], that the Applicant was not a Convention refugee or a person in need of protection. The RPD rejected the Applicant's claim for refugee protection on the basis of its credibility determinations and a

failure to rebut the presumption of state protection. On appeal, the RAD came to its conclusion "solely on its reasonable protection finding" and found it "unnecessary for the RAD to consider or comment on the RPD's negative credibility findings or on the Appellant's delay in claiming" (Applicant's Record [AR], p. 16).

[2] In my view, the RAD erred in its failure to independently engage with the documentary evidence on state protection. Rather than analyzing this evidence for itself, the RAD reviewed the RPD's conclusions deferentially, on a standard of reasonableness. As this Court has repeatedly concluded, and as I indicated in my reasons in *Brodrick v Canada (Citizenship and Immigration)*, 2015 FC 491 at para 33 [*Brodrick*], it is inappropriate for the RAD to administer the functions of a judicial review (*Geldon v Canada (Citizenship and Immigration)*, 2015 FC 374 at para 10; *Green v Canada (Citizenship and Immigration)*, 2015 FC 536 at para 26 [*Green*]; *Ngandu v Canada (Citizenship and Immigration)*, 2015 FC 423 at para 30).

[3] For the following reasons, I find the Decision to be unreasonable and would remit the matter to the RAD for redetermination by a different panel.

II. Facts

[4] The Applicant is a citizen of Jamaica. In the 2011 Jamaican general election, she was employed as a poll clerk in a riding contested by the People's National Party (PNP) and the Jamaican Labour Party (JLP). She alleges that both parties had recruited local criminal gangs, headed by Dons, to influence the outcome of the election. One of their methods was to provide

gang members with the identification of deceased voters in order to cast fraudulent ballots and inflate the votes garnered for their chosen candidate.

[5] Ms. Allen resided in the riding in which she was working as a poll clerk her whole life, and refused to cooperate with these schemes and turned away the fraudulent voters. As a result, she claims that she has received threats and harassment from gangs aligned with both the PNP and the JLP that aim to make an example out of her and dissuade others from doing the same in future elections (AR, p. 18).

[6] The Applicant maintains that she reported the harassment from these criminal gangs to the police, but they merely took her report and did nothing else. Furthermore, news spread that she had become "an informer", which exacerbated her danger given the brutality inflicted on those seen to be assisting law enforcement. If returned to Jamaica, the Applicant fears that she will "immediately be shot and killed, by members of the PNP and JLP Dons" (AR, p. 26).

[7] The Applicant applied for a Canadian Temporary Resident Visa, issued on June 5, 2012, and arrived in Canada on June 26, 2012. She made the underlying claim for refugee protection on January 28, 2014.

III. Analysis

[8] The Applicant argues that (i) this Court should review the RAD's selection of its standard of review relative to the RPD (aptly characterized by the Applicant as the "standard of

intervention") for correctness and (ii) the RAD erred by adopting a standard of reasonableness to review the RPD's findings on state protection. The Respondent contends these two points, and maintains that in any event, the RAD's reasons demonstrate that it considered the evidence before it independently.

A. *Should this Court review the RAD's selection of the standard of intervention for correctness?*

[9] As I indicated at the hearing, I also do not think it is necessary for the resolution of this case to resolve the Court's standard of review when assessing RAD's selection of its standard of intervention. This is for two reasons.

[10] Firstly, whether this Court determines that the Court's standard of review of the RAD's selection of its standard of intervention should be on the basis of reasonableness or correctness, it would not ultimately influence the outcome of this case, since, as I will explain below, under either standard the RAD's selection of reasonableness as the standard of intervention is inappropriate (*Green* at paras 25-26; *Meilina v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1233 at para 9).

[11] Secondly, I have recently provided my thoughts on the issue in *Brodrick* at paras 23-29, concluding that based upon the high threshold required to rebut the presumption of reasonableness when judicially reviewing exercises of statutory interpretation in a home statute, this Court's review of the RAD's selection of its standard of intervention should be reviewed for reasonableness. I see no compelling reason to depart from my conclusions on this issue.

Moreover, any further comments would not be of considerable value, as the Federal Court of Appeal will address the matter when it hears the appeal of *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*].

B. *Did the RAD err by adopting a standard of reasonableness to review the RPD's findings on state protection?*

[12] The reasons of the RAD are peppered with language indicating the panel was reviewing the RPD's findings regarding state protection in Jamaica deferentially. Indeed, it stated explicitly:

[13] ...The Appellant also submits that the RPD erred in its assessment of state protection in Jamaica. These errors deal with the issue of mixed fact and law. The appropriate standard of review on these issues is one of reasonableness. (AR, p. 9)

[13] Judges of this Court have indicated in several instances that reasonableness is an inappropriate standard of intervention for the RAD to apply when reviewing findings of mixed fact and law that are divorced from assessments of credibility (*Huruglica* at para 54; *Kurtzmalaj v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1072 at paras 33-34 [*Kurtzmalaj*]; *Meilina* at paras 1, 10-12).

[14] Unless the Respondent can show that an independent analysis was indeed conducted, or that the findings were in some way inconsequential, a failure to independently assess evidence for dispositive issues such as the availability of state protection or an internal flight alternative amounts to a reviewable error (*Huruglica* at paras 54-56; *Kurtzmalaj* at para 40; *Brodrick* at para 36).

C. *Do the RAD's reasons demonstrate that it assessed the state protection evidence independently?*

[15] A good portion of the hearing was spent arguing, what is in my view, the crux of this case – that is, despite purporting to apply a standard of reasonableness, do the reasons indicate that the RAD actually independently assessed the evidence for itself (*Hossain v Canada (Minister of Citizenship and Immigration)*, 2015 FC 312 at para 30)?

[16] It is true that the RAD cited a passage from a Report by the United States Department of State regarding the 2011 elections which stated that "...[u]nlike in the past, however, civil society activism and pressure from the private sector, churches and civic watchdogs made it difficult for either party to continue past practices of intimidation, lack of transparency and back room details" (AR, p. 14). The RPD, however, had cited the very same passage in its reasons (AR, p. 52). Further, the RAD adopted the RPD's findings from a *Freedom House* report that the relationship between politicians and organized crime has recently come under stricter scrutiny. To me, this mirroring in the reasons does not indicate that the RAD was conducting an independent assessment of the documentary evidence, inasmuch as reviewing the RPD's assessments.

[17] It does not elude me that the same *Freedom House* report mentioned above gave Jamaica a ranking of 2 for Political Rights in 2013 (with 1 being the best possible score and 7 being the worst). However, as the Applicant points out, other portions of the documentary evidence indicate that circumstances surrounding an election are dubious. For example, in the same *Freedom House* report cited by the RPD, a separate paragraph notes:

Powerful criminal gangs in some urban neighbourhoods maintain influence over voter turnout in return for political favors, which has called into question the legitimacy of election results in those areas.

[18] It is not for this Court to reconcile competing evidence to make factual findings on the adequacy of state protection – Parliament intended this be done by the RPD and the RAD. In performing this task, the RAD should not merely bless the findings of the RPD from afar, but must provide cogent reasons which enables this Court upon judicial review to determine what evidence the RAD itself found persuasive and trace the path of its reasoning (*Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at para 38).

[19] The Respondent further argues that the RAD's reasons indicate that it took a fresh look at the Applicant's evidence of filing a police report and their alleged refusal to act thereafter, and found it unpersuasive. The RAD noted a nuanced distinction between the Applicant's Basis of Claim form, which stated that "...[i]t's impossible to tell the good police officers from the bad ones..." and an affidavit submitted at a later stage which stated that "I went to the Stony Hill police station and made a report of the incident, but the police refused to act."

[20] The RAD concluded the following:

[26] The RAD finds, from the Appellant's own evidence, that the police were willing to assist her. They took a report of the threats. There is no persuasive evidence before the RPD or the RAD to find that the police refused to file her complaint. The RAD finds the Appellant submits a further explanation for her allegations that police protection is not available to her in Jamaica. This issue was canvassed at the hearing and the Appellant was given an opportunity to respond to questions put to her by the RPD and her counsel. The Appellant cannot use the pleadings to fill in the gaps

in an effort to explain away her testimonial failings. (Emphasis added)

[21] In my view, noting these inconsistencies is not enough to save the Decision for two reasons. First, the RAD clearly indicated that it was unnecessary to comment on or consider the RPD's negative credibility findings, and had come to its conclusion solely on the state protection issue. Second, even if I place weight on the RAD's finding in paragraph 26 above (despite the RAD's position not to question credibility), filing a police report is not a legal requirement for refugee protection, as Justice Zinn made clear in *Majoros v Canada (Citizenship and Immigration)*, 2013 FC 421:

[8] In its decision, the Board found that applicants failed to rebut the presumption of state protection because they had failed to provide sufficient information to the police after the various attacks to allow them to properly investigate and apprehend the persecutors, and did not make any complaint to any state authority that they were dissatisfied with the police response.

...

[13] One can only conclude from reading the Board's decision as a whole that it placed decisive emphasis on the applicants' attempts to engage the police, and lost sight of the real question of whether state protection in Hungary is adequate.

[14] The difficulty with the Board's emphasis on the actions of these applicants is this: the evidence on the record was that the persecution suffered by the applicants was from a right-wing movement, and that the particular acts of violence and harassment were perpetrated indiscriminately. As a result, one must ask: "What difference would it have made if the applicants had more diligently reported and followed up with the police, and the individuals responsible for the various acts of violence had been caught?" Based on the record, one can only conclude nothing, or at the very most very little would have changed: persecution against the Roma in Hungary is widespread and in most cases indiscriminate. As a result, the state would be offering no more "protection" than it did prior the particular acts of persecution. (Emphasis added)

[22] In other words, while the willingness of the police to take a report is indicia of adequate state protection, the analysis cannot end there. The RAD must still consider whether the state protection afforded to the claimant is adequate in the circumstances. The RAD must make this determination independently of the RPD, which it did not in this case.

[23] I note that Justice Kane in *Green* recently came to a similar conclusion regarding an inadequate state protection analysis for Jamaican refugee claimants (*Green* at para 43).

IV. Conclusion

[24] For these errors, I will send the matter back to the RAD for redetermination. The RAD may indeed ultimately reach the same result, but the Applicant should not be denied the proper appeal available to her under the law (*Aloulou v Canada (Citizenship and Immigration)*, 2014 FC 1236 at para 70).

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The matter is remitted to a differently constituted panel of the RAD for redetermination of the Applicant's appeal.
3. No costs will be awarded and there is no question for certification.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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