Federal Court  Cour fédérale

Date: 20181102

Docket: IMM-1562-18

Citation: 2018 FC 1107

Toronto, Ontario, November 2, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

CLEMENCIA KAPUUO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 for judicial review of the decision of the Refugee Protection Division [Board], dated March 8, 2018 [Decision], which determined that the Applicant was not a Convention refugee or a person in need of protection. For the reasons that follow, this application is dismissed.

I. Background

[2] The Applicant, a citizen of Namibia from the Herero tribe, claims refugee protection based on the fear of her abusive stepfather. She was born in the small Herero village of Aminius, Namibia in 1987. Her father passed away and she was subsequently raised by her grandmother. After her grandmother passed away, she began to reside with her mother and her mother's new husband. At the age of sixteen, her stepfather began sexually abusing her, which started with fondling and touching, leading to rape when she was nineteen.

[3] The Applicant further claims that she informed her mother of the abuse, but both her mother and stepfather beat her for coming forward. When she was twenty-two, following a relationship with a boyfriend, the Applicant gave birth to a daughter who remains in Namibia and is cared for by her sister. At twenty-three years old, the stepfather coerced the Applicant into sleeping with his brother, verbally abused her, called her degrading terms and threatened to kick her out of the home if she didn't comply, while offering her money if she agreed. When she refused, he beat her and sexually assaulted her, leading her to leave home and seek refuge with her brother. When her mother and stepfather attempted to retrieve her, her brother made arrangements for her travel to Canada. She made no attempt to obtain state protection in Namibia, and claimed refugee protection in Canada upon her arrival in 2011.

[4] While the Board found the Applicant credible, it rejected her claim on the basis of two determinative issues: the availability of both state protection, and an internal flight alternative [IFA] in Walvis Bay.

II. Issues and Analysis

[5] The following issues are raised with respect to both state protection and IFA: whether there were errors in (i) the identification of the legal test, and (ii) the application of the facts to the test.

[6] The correctness standard applies to the review of the legal tests applied, and reasonableness to the application of the facts to the test, for both issues of state protection (per *Szalai v Canada (Citizenship and Immigration)*, 2018 FC 972 at para 27) and IFA (per *Juhasz v Canada (Citizenship and Immigration)*, 2015 FC 300 at paras 24–26).

A. State protection

(1) *Did the Board identify the correct test?*

[7] The appropriate test requires an assessment of the adequacy of state protection at an operational level. The analysis must focus not only on the efforts of the state, but on the actual results achieved (*Sokoli v Canada (Citizenship and Immigration)*, 2018 FC 1072 at paras 19–20, 23). I am satisfied that the Board identified the correct test.

(2) *Did the Board reasonably apply the facts to the test?*

[8] The Applicant argues that the Board failed to properly apply the facts to the test, because it considered only the state's efforts, and not the impact or results of those efforts. I am not persuaded of this, because the Board referenced various examples documenting implementation

of protection initiatives, rather than simple efforts. These include the enactment of legislation, implementation of programs, and prosecution under the law. As a result, the Board was satisfied that there was adequate state protection, finding that the documentary evidence "suggests that the state is making reasonable efforts to protect women from domestic violence and is effective in implementing its laws" (at para 24).

[9] A decision-maker does not err merely by mentioning a state's efforts to improve protection for its citizens. Rather, what matters is whether the decision-maker is aware of the distinction between efforts and operational adequacy, and addresses the latter (*Lakatos v Canada (Immigration and Citizenship)*, 2018 FC 367 at para 26).

[10] Here, the Board articulated that very distinction when it stated that the "panel is aware that when carrying out a state protection analysis it is not sufficient to rely solely on enacted legislation without considering whether the actual intent of the legislation is being implemented" (Decision at para 16).

[11] The Applicant also argues that, in arriving at its conclusion on the adequacy of state protection, the Board made selective references to the record, while ignoring contradictory evidence, and failed to cite the relied upon sources.

[12] While the Board did not mention every piece of evidence, it clearly acknowledged weaknesses in the justice system. This Court recognizes that state protection need not be perfect (*Soe v Canada (Public Safety and Emergency Preparedness*), 2018 FC 557 at para 118).

[13] As to the criticisms that the Board selectively referred to evidence (such as the 2017 United States Department of State Report), ignored contradictory evidence about the failure to enforce the law and completely overlooked other evidence from the National Documentation Package, the Board need not provide an exhaustive review of the weaknesses in every document. Justice Mosley made a similar observation in *Jean-Baptiste v Canada (Citizenship and Immigration)*, 2018 FC 285 [*Jean-Baptiste*] at paragraph 19:

> […] the RPD was not obliged to comb through every document listed in the National Document Package in the hope of finding passages that may support the Applicant's claim and specifically address why they do not, in fact, support the Applicant.

[14] Here, the Board provided a fair assessment of certain weaknesses and imperfections in the system, and engaged with the issue of violence and discrimination against women in Namibia. Its conclusions are supported by reading the evidence as a whole. Certainly, as in *Jean Baptiste*, the Board is not required to mention every document in evidence (at para 20).

[15] The Board also found that the claimant's burden of proof is directly proportional to the level of democracy in the state, finding Namibia to be a multiparty democracy, with a functioning police force and a good human rights record. All of these findings were open to the Board in light of the evidence.

[16] Finally, the Board noted that the Applicant never sought the assistance of the police. When asked about this, she responded that there was no point in doing so. The Board reasonably found that a claimant cannot rebut the presumption of state protection in a functioning democracy by asserting only a subjective reluctance to engage the state, as a claimant cannot

simply rely on a personal belief that state protection will not be forthcoming without testing it (*Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at para 33).

B. Internal Flight Alternative

[17] As with the first issue, I find that the Board both (i) identified the correct test, and (ii) assessed the facts under that test reasonably.

(1) *Did the Board identify the correct test?*

[18] To find an IFA, the Board must be satisfied, on a balance of probabilities, that (i) there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists; and (ii) conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable in all circumstances, including those particular to the claimant, for them to seek refuge there (*Thirunavukkarasu v Canada (Minister of Employment & Immigration)*, [1994] 1 FC 589). The Board noted that a claimant bears the burden of proof to show that they face a serious possibility, or a reasonable chance of persecution in the potential IFA area, in this case, Walvis Bay.

[19] The Applicant alleges that the Board elevated the first prong of the IFA test by assessing whether the agent of persecution “would” pursue the Applicant such that there “will” be persecution.

[20] It has been noted that the use of the word "would" is not necessarily fatal if the decision as a whole shows that the decision-maker understood and applied the correct test (*Talipoglu v Canada (Citizenship and Immigration)*, 2014 FC 172 at para 30). Here, I find that the decision-maker understood and applied the correct legal test with respect to both the first and second prongs of the test.

(2) *Did the Board reasonably apply the facts to the test?*

[21] As to the application of the IFA test to Walvis Bay, the Board considered whether it would be reasonable for the Applicant to relocate, considering her viability to travel safely to the IFA and to stay there without facing undue hardship. As to her abusive family, the Board found that the Applicant neither adduced persuasive evidence that her mother or stepfather possess the resources, wherewithal or interest to mount a search throughout Namibia, nor had they continued to pursue, contact or make inquiries about her during the years since her flight from Namibia.

[22] In *Kambiri v Canada (Citizenship and Immigration)*, 2013 FC 930 [*Kambiri*], the applicant, a young woman from Namibia fearing persecution by her stepfather, also argued that the Board committed an error in concluding that she had a viable IFA in Walvis Bay. In *Kambiri*, Justice Noël found that the board had "conducted a specific analysis with regard to the availability of state protection in Walvis Bay … [i]ts determination that on a balance of probabilities, it would not be possible for her stepfather to locate her at a great distance from his village, in a place where more than 40 000 people live is reasonable" (at para 30).

[23] Here, like in *Kambiri*, the Board considered both the evidence before it, and the Applicant's submissions, in determining that on a balance of probabilities, the Applicant's stepfather – the agent of potential persecution – would not pursue her in Walvis Bay, a considerable distance away. I find, as Justice Noël did, that the Board's conclusion on the first prong of the IFA test is reasonable.

[24] On the second prong of the IFA test, the Applicant contends that the Board unreasonably based its findings on its opinion that because the Applicant adapted to Canada, she could adapt to Walvis Bay, and that the Applicant could integrate into the culture and society of Walvis Bay without issue. She argued that the Board failed to address her complete personal circumstances, including her psychological state and other objective evidence of risks facing single women in Walvis Bay.

[25] This Court has determined that psychological evidence can be central to the reasonableness of a proposed IFA (*Cartagena v Canada (Minister of Citizenship and Immigration)*, 2008 FC 289 at para 11); here, the Officer considered the psychological report accordingly.

[26] In *Haastrup v Canada (Citizenship and Immigration)*, 2018 FC 711 [*Haastrup*] at paragraphs 26–27, Justice Strickland found that the Board's failure to consider a medical report containing information about the applicant's mental health in conducting the IFA analysis was a reviewable error. However in *Haastrup*, the Board made no mention of the medical report in its decision.

[27] Here, in contrast, the Board explained why the report was not persuasive and reasonably addressed the Applicant's particular circumstances.

III. Conclusion

[28] As the Board made no reviewable error on either issue raised, the application is accordingly dismissed. Neither party raised a question for certification. I agree that none arise.

[29] Despite this negative outcome, I acknowledge the Applicant's counsel's efforts in ably putting forward her client's position.

JUDGMENT in IMM-1562-18

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed.

2. No questions for certification were argued, and none arose.

3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1562-18
STYLE OF CAUSE:	CLEMENCIA KAPUUO V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 25, 2018
JUDGMENT AND REASONS:	DINER J.
DATED:	NOVEMBER 2, 2018

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