Federal Court  Cour fédérale

Date: 20181221

Docket: IMM-2459-18

Citation: 2018 FC 1300

Ottawa, Ontario, December 21, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

CLARETHA KAUHONINA

Applicant

And

MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a failed refugee claim. In it, the Applicant raises difficult questions arising from domestic abuse. She challenges the refusal's two determinative issues of state protection and internal flight alternative [IFA]. Due to flaws in the analyses of both issues, her claim will be sent back for redetermination.

I. Background

[2] The Applicant is a citizen of Namibia, where she claims to have a well-founded fear of persecution arising from several years of physical and sexual violence at the hands of her ex-boyfriend. She highlighted the following two particularly severe incidents of abuse, in her refugee claim that led to her departure from Namibia.

[3] In December 2010, the Applicant's ex-boyfriend severely beat her when she decided to leave him for having been unfaithful to her. The Applicant reported this incident to the police after receiving medical treatment. The police apparently did not act because they did not want to interfere in a family matter, telling the Applicant it was acceptable for a man to sexually assault his romantic partner, and that a husband cannot rape his own wife.

[4] After leaving the police station, the Applicant went to live with her aunt in another part of the town in which she lived, but she continued to be harassed by her ex-boyfriend. One day, in March 2011, he attacked her from behind while she was waiting at a bus stop, this time with five accomplices. She was badly beaten. The Applicant claims that during this incident, her ex-boyfriend threatened to kill her if she did not return to him, or if she reported him to the police again.

[5] The next month, the Applicant left Namibia for Canada. Since then, she has not been in touch with her ex-boyfriend.

[6] Since arriving in Canada, the Applicant became involved in another abusive relationship, sought psychiatric care for mental health issues, received assistance from a women's shelter, and gave birth to two children, both under the age of five.

II. Decision under review

[7] In a decision of the Refugee Protection Division of the Immigration and Refugee Board [Board], the Board found the Applicant to be credible, but rejected her claim based on dual findings of (i) state protection and (ii) IFA.

[8] On the first issue, the Board noted that the applicant bore the burden of demonstrating the inadequacy of state protection in Namibia. In order to satisfy this burden, the Applicant was required to demonstrate "clear and convincing" evidence that state protection was inadequate. The Board noted that this burden increases proportionately to the democratic development of a country. The Applicant was required to exhaust all avenues of protection or demonstrate why she should not have been required to do so in the circumstances.

[9] Although the Board acknowledged mixed results in obtaining protective orders through the legislation, it determined that the level of state protection in Namibia was adequate due to the efforts made by the government to protect victims of domestic violence, including through the rule of law and its recourses, such as recently adopted legislation addressing domestic abuse.

[10] The Board also found that despite her ability to do so, the Applicant failed to take adequate steps to seek state protection. In arriving at this conclusion, the Board noted that the Applicant failed to follow up on her police report because she did not believe her complaint would be taken seriously.

[11] In its IFA analysis, the Board set out the test for establishing whether a viable IFA exists, and determined that one indeed existed in Walvis Bay. The Board found no persuasive evidence that the Applicant's ex-boyfriend had the means or interest to search for her throughout Namibia after seven years apart.

[12] The Board concluded that the Applicant failed to demonstrate a serious possibility of persecution on a balance of probabilities in Walvis Bay, and that it would not be unreasonable for her to relocate there, given her profile, familiarity with the cultural norms in the location, knowledge of the languages used in Walvis Bay, and her adaptability.

III. Standard of review

[13] While correctness applies to the review of the legal test for both state protection and IFA (*Kapuuo v Canada (Citizenship and Immigration)*, 2018 FC 1107), the Applicant does not challenge the legal test itself. Rather, she challenges the Board's findings that there is adequate state protection, and a viable IFA. These two determinations both involve questions of mixed fact and law, and thus are subject to a reasonableness standard (*Valencia v Canada (Citizenship and Immigration)*, 2018 FC 1013 at para 16).

IV. Analysis

i. State Protection

[14] The Applicant argues that the Board's conclusion of adequate state protection overlooked contradictory country condition evidence indicating the prevalence of gender-based violence, despite government efforts to curb it (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at para 17 [*Cepeda*]).

[15] I do not agree. The Board considered the prevalence of violence against women in Namibia, the failure to fully implement laws protecting women, and the difficulty of obtaining protective orders, weighing the contradictory evidence before arriving at its conclusion on the adequacy of state protection. Moreover, the Board is not obliged to explicitly mention every piece of evidence in the record (*Cepeda* at para 16). Indeed, the Board is presumed to have considered all of the evidence contained in the record (*Kahumba v Canada (Citizenship and Immigration)*, 2018 FC 551 at paras 41–45).

[16] The Applicant also argues that the Board unreasonably determined that the Applicant failed to take sufficient steps to seek state protection. In particular, the Applicant argues that the Board failed to address her ineffective attempt to seek state protection through the police. The Applicant cites the recent decision in *A.B. v Canada (Citizenship and Immigration)*, 2018 FC 237 in support of her argument.

[17] On this point, I agree with the applicant. The Board did not explain how state protection was effective when the applicant attempted to seek it out: when the Applicant sought assistance after being beaten, the police sent the applicant away, saying that hers was "a domestic matter". The Applicant was then beaten again, more severely, by the same man, this time with five accomplices.

[18] Having found the Applicant to be credible, the Board failed to engage with this disturbing pattern of abuse, in finding that state protection was effective. Nor did the Board engage with the evidence regarding the treatment that the Applicant received from police officers in its finding that it was unreasonable for her not to take further steps to engage state protection, including the statement regarding domestic matters and rape. In my view, the Board needed to address both the reaction of the police and the subsequent incident in its reasons before finding adequate state protection. Failing to address either was unreasonable.

ii. IFA

[19] The Applicant contends that the Board unreasonably assessed the second prong of the IFA test, stating that it made findings about education levels, employment and housing in Walvis Bay without providing specific references to contradictory evidence or the Applicant's profile as a single, and abused mother. In doing so, the Board failed to do what *Cepeda* requires.

[20] Furthermore, the Applicant points to her treatment for mental health issues since 2017. The Applicant argues that the decision was unreasonable because the Board failed to take these

particular circumstances regarding mental health into consideration during the second prong of the IFA test.

[21] I am again persuaded by the Applicant's position. While the Board stated that it considered the current profile of the claimant, it did not acknowledge her profile as a single mother of two young children. The Board also failed to engage with the psychiatric report, and thus may have ignored or overlooked evidence about the mental health of the Applicant, and treatment that she had been receiving for over two years at a major hospital in Toronto. The Board did not mention the staff psychiatrist's diagnosis, or prognosis, which discussed the various mental health issues affecting the Applicant, and what the doctor felt would await her in Namibia should she return. Of course, the Board might have had an issue with the psychiatric report and its findings, but one would not know given the silence in the reasons on this evidence.

[22] Two examples of similar past errors in IFA situations occurred in (i) *Cartagena v Canada (Citizenship and Immigration),* 2008 FC 289 [*Cartagena*] at para 11, where Justice Mosley held that "psychological evidence is central to the question of whether the IFA is reasonable and cannot be disregarded", and (ii) in *Okafor v Canada (Citizenship and Immigration),* 2011 FC 1002 [*Okafor*], where Justice Beaudry adopted *Cartagena* for the same error.

[23] Here, like in *Cartagena* and *Okafor,* the Board failed to take into account the Applicant's personal circumstances and mental health issues within the second prong of the IFA test, rendering the decision unreasonable.

V. Conclusion

[24] The application for judicial review is allowed. The decision is quashed and the matter is returned for reconsideration by a newly constituted Board.

JUDGMENT in IMM-2459-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The decision of the Refugee Protection Division is set aside, and the matter remitted for redetermination by a different Board.
3. No questions for certification were argued, and none arise.
4. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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