

Federal Court



Cour fédérale

Date: 20210920

Docket: IMM-4089-20

Citation: 2021 FC 971

Ottawa, Ontario, September 20, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

**CHARMAINE FIRSTINA JEANTY
VINCE JROME SIMILIE**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Charmaine Firstina Jeanty and her 17-year-old son, Vince Jrome Similien, seek judicial review of a decision of the Refugee Appeal Division [RAD] dated August 4, 2020, which confirmed that their claim for refugee protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], should be rejected.

[2] This is the second application for judicial review of a RAD decision relating to Ms. Jeanty and Vince. By amended decision dated December 19, 2019, Mr. Justice Fothergill allowed their application for judicial review of the first RAD decision, principally on the grounds that the RAD's assessment of the adequacy of state protection was unreasonable (*Jeanty v Canada (Citizenship and Immigration)*, 2019 FC 453 [*Jeanty* 1]).

[3] In particular, Justice Fothergill found that the finding that Ms. Jeanty was no longer at risk of domestic violence because she was no longer married to her ex-husband, the agent of persecution, was contradicted by her previous experience and country condition reports. In addition, as regards the RAD's assessment of Ms. Jeanty's forward-facing risk, Justice Fothergill found that the RAD's finding that her ex-husband was no longer in the Bahamas and therefore no longer a threat to her was inconsistent with the uncontradicted testimony of two of Ms. Jeanty's sons that they saw their father in the Bahamas as late as 2017, thus after he had been deported back to Haiti in 2015.

[4] The matter was remitted to a differently constituted panel of the RAD. It is that panel's decision which is the subject of the present application for judicial review.

[5] In short, I find the decision of the RAD unintelligible as regards its assessment of the applicants' credibility and its determination unreasonable in relation to Ms. Jeanty's forward-facing risk as the RAD once again failed to address, one way or the other, the uncontradicted testimony of two of Ms. Jeanty's sons that Ms. Jeanty's ex-husband had returned to the Bahamas since being deported in 2015.

[6] I therefore allow the present application.

II. Facts

[7] Ms. Jeanty and Vince are citizens of the Bahamas. At 18 years of age, Ms. Jeanty became pregnant and was forced by her mother who was living in the United States at the time to marry the father of her yet unborn child so that the child not “be born out of wedlock”. Ms. Jeanty felt that she was not ready for marriage as she was too young, but she complied nonetheless with her mother’s wishes in late 2000 or early 2001 — the exact date of the marriage is not clear.

[8] Their first son, Victor, was born in the Bahamas in November 2001. The relationship between Ms. Jeanty and her husband was, however, a nightmare for her. During their marriage, Ms. Jeanty’s husband was physically, sexually and mentally abusive towards her, forcing Ms. Jeanty to send Victor to the United States in 2002 or 2003 to live with his grandmother so that he would not bear witness to such abuse.

[9] Ms. Jeanty finally built up the strength and courage to leave her husband a few months before the birth of their second child, Vince, in May 2004. She moved in with her aunt, but her husband would continue to come around their home and her workplace to harass her, seemingly trying to downplay his abusive conduct while pressing her to come back to him. Sometime after Vince’s birth, Ms. Jeanty took her son and went to live with her mother in the United States. However, the harassing telephone calls to her mother’s house continued, with her husband trying “to trick” Ms. Jeanty into returning to the Bahamas. She would refuse to even speak with him despite her mother’s pleas.

[10] In late 2004, Ms. Jeanty met an American citizen with whom she had a daughter, Senyah, born in the United States in March 2007. Ms. Jeanty eventually obtained a divorce from her abusive husband in 2009 and married Senyah's father. However, that relationship did not last long, and Ms. Jeanty returned to the Bahamas with her three children later in 2009.

[11] In the Bahamas, Ms. Jeanty's ex-husband resumed his harassment and abuse by telephoning her and coming by the home where she and her children were living. He assaulted her in June 2009, yet the police refused to get involved in what they considered to be a domestic dispute. The harassment continued to the point where Ms. Jeanty became exhausted from the constant fear of her ex-husband; she sent her three children to the United States to stay with their grandmother. Ms. Jeanty remained in the Bahamas, living with her sister and nephew — her sister's son.

[12] In 2010, Ms. Jeanty's ex-husband, a Haitian citizen, was deported from the Bahamas seemingly after he was found to have aggressively assaulted and seriously injured his then girlfriend. He crossed back into the Bahamas by boat and while he was back in the Bahamas, the harassment of Ms. Jeanty continued with threatening telephone calls and with her ex-husband coming by her apartment. On two occasions in 2011, someone tried to break into Ms. Jeanty's apartment, yet the police seemed uninterested to follow up on the report filed by Ms. Jeanty.

[13] In 2015, Ms. Jeanty's ex-husband was again deported back to Haiti after Ms. Jeanty presented her Final Judgment of Dissolution of Marriage to the Bahamian immigration authorities, thus forcing them to act in locating and removing her ex-husband from the Bahamas

as he was back in the country without status. Also in 2015, Senyah returned from the United States to live with her mom. The boys, Victor and Vince, followed soon thereafter, in 2016.

[14] Despite being removed to Haiti twice, Ms. Jeanty's ex-husband would continue to make, as late as February 2017, threatening telephone calls that made her feel unsafe. The family would find evidence of attempted break-ins of their home, hear strange noises and regularly notice people around their home at night.

[15] Although Ms. Jeanty had admittedly not seen her ex-husband face to face since 2009, Vince and Victor both testified during the Refugee Protection Division [RPD] hearing that they saw their father back in the Bahamas as late as March 2017.

[16] Ms. Jeanty and her three children left the Bahamas for Canada in April 2017 and sought refugee protection. Since coming to Canada, Ms. Jeanty learned that a man fitting the description of her ex-husband, although unidentified, came to her previous place of employment in June 2017 asking about her.

[17] Ultimately, the asylum claim of Victor and Senyah would be abandoned as they were American citizens with no fear of persecution in the event that they were to return to the United States.

A. *The RPD Decision*

[18] First, as regards Vince, the RPD found that, on a balance of probabilities, Ms. Jeanty's ex-husband had no interest in harming him, and thus Vince did not have a forward-facing risk of harm at the hands of his father.

[19] As regards Ms. Jeanty, the RPD found her testimony as to what she experienced at the hands of her ex-husband to be credible; the RPD did not contest the fact that Ms. Jeanty's ex-husband was sexually, physically, verbally and psychologically abusive towards her during their marriage. In reading the RPD decision, it seems that the RPD also accepted that Ms. Jeanty's ex-husband had returned illegally to the Bahamas after being deported in 2015; however, it equated the ability of the Bahamian immigration authorities to deport him, once alerted, with adequate state protection in favour of Ms. Jeanty. The RPD member stated:

[43] Although the principal claimant [Ms. Jeanty] states in her Narrative that she does not know whether [her ex-husband] is residing in Haiti or the Bahamas, Victor testified that he saw his father in the Bahamas in both February and March of 2017. Victor testified that, in March of 2017, [his father] asked Victor who his mother was dating. He testified that he did not tell his mother this and I accept that that is why this detail is not contained in her Narrative.

...

[46] In addition, I also find that there is state protection when it comes to [the ex-husband]. Although violence against women is a serious, widespread problem in the Bahamas, the law recognizes domestic violence as a crime separate from assault and battery, and the government generally enforced the law. However, women's rights groups have cited some reluctance on the part of law enforcement authorities to intervene in domestic disputes. While the police may not have taken the claimant's domestic violence issue seriously, in her experience, they certainly took the immigration issue seriously. [The ex-husband] is a citizen of Haiti; he was in the Bahamas illegally.

. . . [48] [The ex-husband] is in the Bahamas illegally. He has been deported twice. As soon as the principal claimant alerted the Department of Immigration about [her ex-husband], he was deported. The principal claimant received protection from the state. I acknowledge that [the ex-husband] has illegally returned to the Bahamas; however, no government is expected to guarantee perfect protection to all of its citizens at all times, as no state can guarantee perfect protection.

[Emphasis added; footnotes omitted.]

[20] In the end, the RPD found that there was insufficient evidence, on a balance of probabilities, to conclude on the existence of a forward-facing risk to the applicants at the hands of Ms. Jeanty's ex-husband.

[21] Finally, and as regards the fear that Vince would be recruited by criminal gangs, the RPD found on the balance of probabilities that gang leaders or local criminals did not threaten the boy's life and that there existed no evidence to suggest that he was being targeted at all for recruitment; any concerns in this regard were purely speculative.

B. *The RAD Decision under Review*

[22] The applicants submitted the following new evidence to the RAD for consideration:

- (a) police reports on the ex-husband's attack on Ms. Jeanty;
- (b) copy of Ms. Jeanty's photo identity document;
- (c) police report on the ex-husband's attack on his new girlfriend;
and
- (d) three newspaper articles on the issue of domestic violence in the Bahamas.

[23] The RAD accepted the three newspaper articles as new evidence in accordance with subsection 110(4) of the IRPA and the three criteria outlined in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*], and *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] (i.e., the evidence submitted must be credible, relevant and new).

[24] The RAD rejected the other pieces of new evidence as they did not meet the three criteria outlined in *Raza* and *Singh*. In addition, the RAD denied the applicants' request for an oral hearing pursuant to subsection 110(6) of the IRPA. The newspaper articles that were accepted as new evidence did not raise issues of credibility, were not central to the appeal, nor would they justify allowing or rejecting the refugee protection claim.

[25] In addition, the RAD found that the RPD was not obligated to consider "compelling reasons" in its analysis pursuant to subsection 108(4) of the IRPA as the RPD concluded that the applicants were not Convention refugees at the time of their departure from the Bahamas.

[26] Moreover, the RAD found that the RPD did not fail to assess past persecution at the hands of Ms. Jeanty's ex-husband. The RAD agreed with the RPD that it was speculative to find that the ex-husband was behind each of the incidents of harassment and the break-ins. The RAD considered that there was insufficient evidence to support Ms. Jeanty's belief that her ex-husband is actively looking for her in the Bahamas or that he even returned to that country after being deported in 2015.

[27] Finally, the RAD agreed with the RPD that there was no evidence that Vince was being targeted by violent gangs for recruitment.

III. Issues

[28] The applicants raise a number of issues, including those relating to the introduction of new evidence, whether the RAD should have considered the compelling reasons exception pursuant to subsection 108(4) of the IRPA, and whether the actions of the Bahamian immigration authorities in deporting Ms. Jeanty's ex-husband is evidence of adequate state protection as regards her continued fear of further abuse at the hands of her ex-husband. However, I need not deal with any of these other issues raised by the applicants as I find the RAD's determination on credibility to be unintelligible and its assessment of forward-facing risk to be unreasonable.

IV. Standard of Review

[29] The applicants submit that questions of procedural fairness are subject to the standard of correctness, however, do not clearly identify an issue of procedural fairness. In any event, it seems to me that the issues that have been identified should be reviewed under the lens of reasonableness as none of the exceptions to the presumption of a reasonableness standard of review applies in this case (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25 [*Vavilov*]).

[30] To determine whether the decision as a whole is reasonable, the reviewing court must ask “whether the decision bears the hallmarks of reasonableness — justification, transparency and

intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99).

V. Analysis

[31] We should first keep in mind the comments of Justice Fothergill in *Jeanty 1* as regards the first RAD decision. After outlining that the RAD considered the issue of state protection with respect to gender-based violence generally, he stated:

[21] I have considerable difficulty with the proposition that the Bahamian police would not regard an altercation between [the ex-husband] and Ms. Jeanty as a domestic dispute unworthy of their attention. They declined to investigate the assault that occurred in June 2009, even after Ms. Jeanty showed them her divorce papers. . . .

[22] I therefore conclude that the RAD’s assessment of the adequacy of state protection was unreasonable. The RAD acknowledged that there is a serious problem in the Bahamas regarding domestic violence and police impunity. Its finding that Ms. Jeanty is not at risk of domestic violence because she is no longer married to [her ex-husband] is contradicted by her previous experience and country condition reports. Its finding that [her ex-husband] is no longer in the Bahamas is inconsistent with the uncontradicted testimony of two of Ms. Jeanty’s sons that they believe they saw him there as recently as 2017. There is no dispute that [her ex-husband] has demonstrated a capacity to return to the Bahamas with relative ease, despite having been deported to his native Haiti.

[Emphasis added.]

[32] In its decision before me, the RAD made the following statements:

[30] The RPD determined the claim on both the issues of credibility and state protection. The RAD upholds the RPD’s decision on the issue of credibility. Therefore, the RAD need not consider the submissions made on state protection in its decision.

[Emphasis added.]

[33] Later, in assessing whether the RPD was obligated to consider compelling reasons, the RAD stated:

[38] The RPD would only be obligated to apply compelling reasons doctrine if it had found that the Appellants were Convention Refugees at the time of their departure. However, given that the RPD found that the Appellants' claim failed on credibility and state protection at the time of their departure from the Bahamas in 2017, the RAD finds that the RPD was not obligated to consider compelling reasons.

[Emphasis added.]

[34] Finally, the RAD concluded, in its summary at paragraph 47, that:

. . . While the RAD also accepts that the Principal Appellant endured an abusive relationship with her husband during and after their marriage, the RAD considers that the Principal Appellant has not seen or heard from the ex-husband in many years, and has not provided sufficient evidence to demonstrate that he has illegally returned to the Bahamas after 2015, and that he is presently looking for her. . . .

[Emphasis added.]

[35] First of all, I am somewhat at a loss to understand what the RAD was saying as regards Ms. Jeanty's credibility. There was no issue of credibility raised by the RPD. In fact, the RAD itself acknowledged the following, at paragraph 32 of its decision: "The RPD did not indicate any doubt or misgivings with regard to her credibility".

[36] If by credibility the RAD was alluding to Ms. Jeanty's assertions as to her forward-facing risk at the hands of her ex-husband, that is an issue of sufficiency of evidence, on the balance of

probabilities, and not an issue of the credibility of the claimant. In any event, even if the RAD was in fact referring to the issue of forward-facing risk, at no time in coming to the determination that there was insufficient evidence that the ex-husband had returned to the Bahamas after 2015 is any mention made of the evidence of the two boys that their father was seen in the Bahamas in 2017, despite the very specific comments of Justice Fothergill in *Jeanty 1*.

[37] It has now been well settled by this Court that where the RAD makes a finding yet remains silent on evidence pointing to the opposite conclusion, it may be inferred that it overlooked the contradictory evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at para 17; *Gill v Canada (Citizenship and Immigration)*, 2020 FC 934 at para 40; *Begum v Canada (Citizenship and Immigration)*, 2017 FC 409 at para 81; *Sbayti v Canada (Citizenship and Immigration)*, 2019 FC 1296 at para 60).

[38] Here, given that the testimony of the sons was specifically flagged by Justice Fothergill in *Jeanty 1*, I find it much more difficult to understand why the RAD did not specifically address such evidence prior to concluding as it did on the issue of the ex-husband's whereabouts. In addition, not only did the RPD outline the testimony of Ms. Jeanty's sons to the effect that they had seen their father in the Bahamas in 2017, the RPD seems to have accepted that the ex-husband had in fact returned after being deported in 2015. Nowhere does the RAD state why it is departing from a finding of the RPD.

[39] Although I accept that it was open to the RAD to find differently from the RPD on this issue and to come to the determination that the evidence did not support the fact that

Ms. Jeanty's ex-husband had returned to the Bahamas after being removed in 2015, I would have expected the RAD to at least have addressed the testimony of the boys to the contrary; Justice Fothergill's concerns went unheeded!

[40] Finally, as to whether the RAD should have considered the availability of state protection and whether the intervention by the Bahamian immigration authorities — rather than the police — constituted sufficient state protection, the fact remains that any decision by the RAD not to proceed with considering the issue of state protection could only be reasonably made after properly assessing either Ms. Jeanty's credibility or any forward-facing risk. As mentioned, the credibility of her story was never in doubt and the assessment of any forward-facing risk was simply unreasonable.

[41] Under the circumstances, I am allowing the present application for judicial review and remitting the matter back to the RAD for redetermination.

JUDGMENT in IMM-4089-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is returned for redetermination by a different panel of the Refugee Appeal Division.
2. There is no question for certification.

"Peter G. Pamel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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SIMILIEN v THE MINISTER OF CITIZENSHIP AND
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