Date: 20080403

Docket: IMM-3273-07

Citation: 2008 FC 427

Toronto, Ontario, April, 3, 2008

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

LEWY ROSEN BENJAMIN SUKHU
EUNICE SUKHU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicants seek judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), rendered on July 25, 2007, wherein the Board determined that they were not Convention refugees or persons in need of protection. Their claim for refugee protection was based on their membership in a minority group in Guyana, namely, the Indo-Guyanese.

[2] For the reasons that follow, I have determined that this application for judicial review must succeed.

FACTS

[3] The applicants are Indo-Guyanese citizens of the Republic of Guyana. They claim that they have always been harassed and insulted for being Indo-Guyanese by Afro-Guyanese, who form the majority in this country.

[4] More specifically, in March 2001, they were threatened by a group of Afro-Guyanese and chased to their home when they were passing out flyers and encouraging voters to register and vote for the People's Progressive party.

[5] On July 28, 2002, Mrs. Eunice Sukhu was sexually assaulted at gun point by her supervisor at work. He threatened to kill her and her family if she ever spoke about the rape. Despite those threats, the applicant went to the police station with her husband to report the incident. The police officers refused to help her and sent them to another police station. They went to three different police stations but none of them provided any assistance. The same night, her husband saw one of the police officers to whom Mrs. Sukhu had tried to report the rape drinking with the same supervisor who raped her. Therefore, they believe that the supervisor bribed the police to ignore their complaint.

[6] On July 31, 2002, Mrs. Sukhu returned to work where she made a complaint to the head office of the company. Two weeks later, she followed up with the head office but was advised that

there would be no further investigation. When she submitted a letter of resignation on August 15, 2002, her supervisor rejected it and threatened her.

[7] On October 2, 2002, she took her annual leave of absence from work to visit family in the United States in order to recover from her depression and suicidal thoughts. On October 12, 2002, she returned to Guyana as she was worried about her daughter and her husband who had stayed in Guyana.

[8] The same day, thieves broke into her house; her husband was severely beaten and she was assaulted. After taking her husband to the hospital, Mrs. Sukhu went to the police station. The police officer took her to a room but, instead of recording her denunciation, he sexually assaulted her. He then told her to leave the police station and go home. She did not report the rape as, by this point, she had lost faith in the police authorities.

[9] On October 18, 2004, Mrs. Sukhu and her husband traveled to Trinidad to apply for a Canadian visa through the Canadian Embassy in Port of Spain. She obtained a six-month visitor visa but her husband did not obtain one.

[10] The applicant therefore left Guyana and arrived in Canada on October 24, 2004. In May 2005, her application for an extension of her visitor visa was rejected. Her husband arrived in Canada in August 2005. They left their daughter in Guyana with relatives; she is Christian but she dresses as a Muslim in order to avoid violence or kidnapping.

[11] The applicants claimed refugee protection on July 14, 2006 but their applications were rejected on July 25, 2007.

THE IMPUGNED DECISION

[12] In a two-page decision, the Board member found that the applicants' fears were not subjectively well-founded. He based his decision on three factors. First, he considered implausible the fact that the applicant returned to Guyana without asking for protection in the United States, after having been raped and unable to obtain assistance. He also drew a negative inference from the one-year delay in making a refugee claim in Canada. In his view, those actions were not compatible with those of a person fearing her return to Guyana.

[13] Finally, the Board member pointed out that the applicants had no documents to corroborate their claim. He could not understand why Mrs. Sukhu had not provided medical reports corroborating her rapes and he rejected her explanation that she was ashamed. He also stated that they should have tried to report the rape by the police officer to the Ministry of the Interior or to the Attorney General.

THE ISSUES

[14] The applicants have raised four issues in their written and oral submissions. They submit that the Board member made incorrect findings when he stated that Mrs. Sukhu's boss was Afro-Guyanese, that their daughter came to Canada on August 2005, and that the applicants waited a year

before making refugee claims. They argue that these errors can be explained by the fact that the Board member was asleep during at least part of the hearing, thereby depriving them of procedural fairness. Thirdly, they contend that the Board could not question their subjective fears without identifying credibility issues. Finally, they assert that the Guidelines entitled *Women Refugee Claimants Fearing Gender-Related Persecution* (the Gender Guidelines) were not mentioned nor considered by the Board member in coming to his conclusions.

ANALYSIS

[15] As a result of the Supreme Court's decision in *Dunsmuir v. New-Brunswick*, 2008 SCC 9, I believe the reasonableness standard is applicable to review questions of fact and credibility. On the other hand, there is no need to apply a standard of review analysis to the argument that the applicants did not receive a fair hearing: if there has been a breach of procedural fairness, this Court must intervene (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404).

[16] Turning first to the argument of procedural fairness, it is the applicants' contention that the Board member fell asleep or dozed off during portions of the hearing. They rest their assertion on their own affidavits and that of a friend who was not present at the hearing. This is a difficult argument to make, and I do not think it has been made out in the circumstances of this case.

[17] The transcript clearly shows that the Board member did participate in the hearing, asking a number of questions on different aspects of the claim. One can not infer from the silence of the Board member at some points of the hearing that he was not paying attention to what was going on. Moreover, there is no evidence that the applicants, who were represented by counsel, raised an objection at the hearing or immediately after to what they perceived to be a denial of natural justice or procedural fairness. The applicants have therefore waived their right to subsequently raise any such objection before this Court: *Lopez v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 979 (QL).

[18] As for the Gender Guidelines, I agree with the respondent that the Board's failure to specifically mention them in its reasons is not fatal, as long as they have been taken into consideration. I also accept that they are not meant to serve as a cure for all deficiencies in an applicant's claim or evidence. Having said that, a careful reading of the Board member's reasons leads me to believe he did not pay sufficient attention to these Guidelines.

[19] The following considerations found in the Guidelines are of particular relevance in the present case:

> Decision-makers should consider evidence indicating a failure of state protection if the state or its agents in the claimant's country of origin are unwilling or unable to provide adequate protection from gender-related persecution...
>
> When considering whether it is objectively unreasonable for the claimant not to have sought the

> protection of the state, the decision-maker should consider, among other relevant factors, the social, cultural, religious, and economic context in which the claimant finds herself…
>
> In determining whether the state is willing or able to provide protection to a woman fearing gender-related persecution, decision-makers should consider the fact that the forms of evidence which the claimant might normally provide as "clear and convincing proof" of state inability to protect, will not always be either available or useful in cases of gender-related persecution

[20] The Board member drew negative inferences from the fact that the applicant did not have supporting documentation to prove "the two rapes because the female claimant was too ashamed to seek medical attention". It appears that in the Board member's mind, a female refugee claimant should not be too ashamed to obtain a medical report after a sexual assault. Such an inference does not sit well with the Gender Guidelines, which recognize that shame is a perfectly plausible explanation. One would have expected, at the very least, an explanation demonstrating that the Board member had considered the Gender Guidelines before coming to his conclusion.

[21] The same can be said of the Board member's view that the applicant should have denounced the police officer who raped her to the Ministry of Interior or the Attorney General. Her explanation that she had no more confidence in the police at that point was perfectly reasonable, considering what she had gone through before. After all, she had already tried to report a previous sexual assault to three police stations, to no avail. There was also documentary evidence showing that only 3% of the rape complaints make it to trial, and that the conviction rate is below 1% (Tribunal

Record, p. 174). Yet, the Board member does not discuss any of this, thus showing insensitivity to the applicant's plight and certainly not demonstrating that he was familiar with the Gender Guidelines.

[22] Before leaving this part of the applicant's argument, I must confess that I do not know what to do with the Board member's view that Mrs. Sukhu should have reported the rape by the police officer to the Ministry of the Interior or the Attorney General. What the Board member seems to be saying is that all political party supporters should be aware of their respective Minister of the Interior or their respective Attorney General, and that they should turn to these office holders personally when assaulted by a police officer. This clearly shows a lack of understanding of how these matters are dealt with, even in a small and impoverished country like Guyana.

[23] As to the factual errors made by the Board member, I agree with the respondent that they were not strictly speaking material to the decision. This is true, in particular, of the confusion surrounding the ethnicity of the female applicant's boss and the location of the applicants' daughter (who is apparently still residing in Guyana, contrary to what the Board member found). With respect to the explanation for the applicants' delay in claiming protection in Canada, I also agree with the respondent that it is not open to the applicants to supplement or clarify their evidence with affidavits filed in support of their leave application. After having read the transcript, however, I believe the Board member did mischaracterize the applicants' testimony. Mrs. Sukhu did explain

that she did not ask for refugee protection immediately when she ran out of status because she wanted to wait for her husband, to settle in and look for legal counsel to advise them. She did not know that the delay would be an issue and she was not in a rush to ask for refugee status as she was feeling safe for the first time in a long period. Her counsel also noted that they were experiencing financial problems having arrived in Canada and had difficulty finding counsel. The Board member did not even mention these explanations.

[24] Once again, these factual errors may not have been significant in reaching the conclusion. It is nevertheless troubling to find that many mistakes in such a short decision. It tends to show, if nothing else, that the Board member may not have been sufficiently familiar with the case.

[25] Finally, and more importantly, I take issue with the Board member's essential finding that the applicants' fears are not subjectively well founded. Since the decision of the Supreme Court in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, it is well established that a claimant must establish both that he or she subjectively fears persecution and that this fear is objectively well-founded. A lack of evidence going to the subjective element of the claim will, in and of itself, be sufficient for the claim to fail.

[26] Nowhere did the Board member question the credibility of the applicants. Accordingly, the applicants' testimony is presumed to be true. The explanations provided during the hearing with

regard to the three grounds of concern identified by the Board member should in turn be presumed to be true unless there are clear and specific reasons for disbelieving them. This is particularly true where the Board member has not articulated any reason for rejecting the applicants' explanations with regard to re-availment, delay in claiming and failure to provide corroborative documents on certain points (*M.B.K. v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 374 (QL); *Camargo v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1434.

[27] If the Board member wanted to impugn the credibility of the applicants, he had to say so explicitly and to provide an explanation. In the absence of such a finding, it is difficult to understand why the Board member came to the conclusion that the applicants' fears were not subjectively well founded. If he accepts that the female applicant has been twice sexually assaulted, how could she not have a subjective fear to return to the location of her aggressors, in a country where the authorities are unwilling and/or incapable to protect her? This is as clear an illustration as one can find of the principle enunciated by the Federal Court of Appeal that "it is almost always foolhardy for a Board in a refugee case, where there is no general issue as to credibility, to make the assertion that the claimants had no subjective element in their fear" (*Shanmugarajah v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 583 (QL)).

[28] While brevity is not always a flaw in legal reasoning, this case is a testimony to the perils of not fully addressing the explanations provided by the parties. Deference is still warranted when the

Board makes findings of fact, but it is not for this Court on judicial review to supplement cryptic reasons so that they become intelligible and acceptable.

[29] For all the reasons set out above, this application for judicial review is allowed, and the matter is referred back to a differently constituted Board for reconsideration. No question of general importance was proposed, and none will be certified.

ORDER

THIS COURT ORDERS that the application for judicial review is granted, and the matter remitted to a differently constituted panel of the Refugee Protection Division, Immigration and Refugee Board, for redetermination. No question is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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