

Federal Court



Cour fédérale

Date: 20110331

Docket: IMM-5202-10

Citation: 2011 FC 397

Toronto, Ontario, March 31, 2011

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**KIMBERLY RACQUEL SPENCER
SEAN-TAE KIMONE GRANT**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns the August 16, 2010 decision by the Immigration and Refugee Board's Refugee Protection Division (RPD) which found the Applicant, Ms. Spencer, and her daughter, to be neither Convention refugees nor persons in need of protection. In my opinion, Ms. Spencer's claim was erroneously found by the RPD to be lacking nexus to social group

Convention grounds found in s.96 of the *Immigration and Refugee Protection Act (IRPA)*. For the reasons that follow, I find that the decision under review is made in reviewable error.

[2] The RPD found Ms. Spencer to be a credible witness with respect to the basic elements of her claim as follows:

The claimant, a 28-year-old female, fears the Green Tank gang located in Rose Heights who normally target homes occupied by single women. The claimant was in a common-law partnership until 2007 when she went to live with her mother. On June 6, 2008, her home was burglarized one night by men who entered through the bathroom window. The claimant's mother screamed and the burglars took off. A few days later a gang broke into the home of her neighbour and unfortunately her neighbour was raped during the break-in.

The claimant testified that she also fears this gang because her brother, who is politically active, had been a victim of gang violence in August 2007 from Montego Bay. She testified that if this gang cannot find her brother than they normally take revenge on another family member, to make a point. As well, the claimant feared this gang because she worked the night shift as a supervisor of a call centre, most of the time. Sometimes her mother would call her and tell her not to come home because of gunshots in the area or people were hanging around the house.

The claimant stated that living in fear became a way of life for herself, her daughter and mother. She was very afraid of her home being broken into and being raped. She feared walking on the streets because at any time she could be shot. The claimant concluded that it was no longer safe to live in Jamaica so she departed Jamaica on July 9, 2009 and made a claim for protection on July 13, 2009. Her daughter followed on July 16, 2009 and the mother attended an inland office on July 22, 2009 making a claim for protection on behalf of her daughter.

(Decision, paras. 2 – 4)

[3] The RPD's determination of the protection element of Ms. Spencer's claim is as follows:

The claimant's evidence is that she is targeted because she is a single woman living alone and is therefore vulnerable to gangs who rob women. She fears that she will be raped as was one her neighbours. With respect to the latter, I am truly sympathetic however, with little evidence regarding the

“robbery” incident, I am unable to conclude that the rape, as repugnant as this crime is, was anything but a consequence of generalized crime. The claimant herself testified that she had a good job that paid well, she lived in a gated home in an upper income neighborhood [sic] and was therefore considered well-to-do.

I find the claimant’s fears relates to her and her daughter becoming a victim of a house robbery in which she/they may be raped, or perhaps face risk of being shot or mugged on the way home. These do not provide the claimants with a link to a Convention ground. As a result these claims must fail under section 96 of the IRPA. [...]

[Emphasis added]

(Decision, paras. 9 – 11)

[4] Counsel for Ms. Spencer’s argument that the RPD’s decision on nexus exposes reviewable error is well framed as follows:

The Board Member stated that the determinative issue in her section 96 analysis was the absence of nexus between the applicants’ claim and any of the Convention grounds (Reasons, Applicant’s Record at p. 9).

Despite grounding her decision on the issue of nexus, the Board Member at no point discussed whether the applicants belonged to a particular social group, namely that of women and/or girls from Jamaica who are targeted for rape. Instead, the Board Member found that the applicants and their neighbour who was raped were merely victims of generalized crime. She concluded that the applicants’ fear of persecution was therefore unrelated to any Convention ground (Reasons, Applicant’s Record at p.9).

This Court has held that it is incumbent upon the Board to properly identify and address the relevant social group in a claim for refugee protection. This obligation extends even to grounds which the claimant may have failed to identify (*Vilmond v. Canada (MCI)*, 2008 FC 926 at paras 17-18 and 20; *Bastien v. Canada (MCI)*, 2008 FC 982 at para 12; *Viafara v. Canada (MCI)*, 2006 FC 1526 at para 6).

In this case, the principal applicant testified that she feared that she or her daughter would be raped by gang members. She also testified that she had been a victim of sexual violence on several occasions, both by her father and by a stranger. This testimony, when taken together with documentary evidence of widespread sexual violence against women and girls in Jamaica, particularly by gang members, clearly raised the issue of gender-

based persecution (Reasons, Applicant's Record at p. 10; National Documentation Package, Applicant's Record at p. 70, 72; 79; p.100, 110, 145-148, 154; 174-177, 186, 188; 227).

In *Canada (Attorney General) v. Ward*, the Supreme Court of Canada explicitly recognized that gender can provide the basis for a "social group." Since the principal applicant claimed that she feared that as a woman she would be targeted for rape in Jamaica, the Board is expected to have considered the evidence with respect to her membership in a particular social group, namely women in Jamaica or more specifically, Jamaican women targeted for rape by gang members. The failure to evaluate the evidence in this way constitutes a reviewable error (*Canada (AG) v. Ward*, [1993] 2 S.C.R. 689 at para 70; *Bastien* supra at para 12; *Dezameau v. Canada (MCI)*, 2010 FC 559 at para 19).

As the Federal Court stated in *Vilmond*, supra:

The failure to identify the relevant ground precludes any analysis the Board might have performed regarding the merits of that claim. The determination made by the Board that there is no nexus between the claim and a Convention ground is therefore unsubstantiated.

If this Court determines that the Board did consider that the applicants belonged to a particular social group, which is denied, it is submitted that the Board erred in finding that there was no nexus between the applicants' social group and the risk of rape.

The Board Member characterized the applicants and their neighbour who was raped as victims of crime. She appears to have dismissed the rape of the applicants' neighbour as nothing but "a consequence of generalized crime," because it occurred in the context of a burglary of her home. It is this characterization of rape as an act that is motivated by common criminal intent or desire, without regard to the status of women in society, which led the Board Member to conclude that there was no link between the applicants' fear of rape and a Convention ground (Reasons, Applicant's Record at p.10).

It is submitted that the Board's finding that rape is rooted in a general problem of criminality in Jamaican society such that there is no nexus between the applicant's risk and her social group is an error in law.

It is well-established in Canadian law that rape, and other forms of sexual assault, are gender-specific crimes, grounded in the status of women in society. In *R. v. Osolin*, the Supreme Court of Canada held that:

It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women [Emphasis added]; (*R. v. Osolin*, [1993] 4 S.C.R. 595 at page 669).

In *Dezameau, supra*, the Federal Court similarly recognized that,

The notion that rape can be merely motivated by common criminal intent or desire, without regard to gender or the status of females in society is wrong according to Canadian law (see also *R. v. Lavallee*, [1990] 1 S.C.R. 852). In addition, rape is referred to as a “gender-specific” crime in the Gender Guidelines (*Dezameau, supra* at para 35; *R. v. Lavallee*, [1990] 1 S.C.R. 852).

Moreover, in *Dezameau, supra*, Pinard J. held that, “a finding of generality does not prohibit a finding of persecution on the basis of one of the Convention grounds.” He explained that this is explicitly set out in the Immigration and Refugee Board’s Guideline 4, *Women Refugee Claimants Fearing Gender-Related Persecution*, which states:

The fact that violence, including sexual violence and domestic violence, against women is universal is irrelevant when determining whether rape, and other gender-specific crimes constitute forms of persecution. The real issues are whether the violence - experienced or feared - is a serious violation of a fundamental human rights for a Convention ground and in what circumstances can the risk of that violence be said to result from a failure of state protection. [Emphasis added]; (*Dezameau, supra* at paras 23-24; Chairperson’s Guideline 4, *Women Refugee Claimants Fearing Gender-Related Persecution*, Immigration and Refugee Board of Canada).

Pinard J. went on to conclude that,

A Gender-related crime cannot be rejected because women face general oppression and the applicant’s fear of persecution is not supported by an individualized set of facts (see the Federal Court of Appeal’s decision in *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 (*Salibian*). Where the applicant has not, herself,

experienced the type of persecution she fears, the applicant can use evidence of similarly-situated persons to demonstrate the risk and the unwillingness or inability of the state to protect [Emphasis added]; (*Dezameau, supra* at para 26).

The Federal Court of Appeal in *Salibian v. Canada (MEI)* found that:

The best evidence that an individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin. In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status [Emphasis added]; *Salibian v. Canada (MEI)* (CA.), [1990] 3 F.C. 250 at para 18.

It is submitted that the Board Member's conclusion that rape in Jamaica is merely a consequence of generalized crime is inconsistent with all of the above jurisprudence and the Gender Guidelines. The failure to recognize the abundance of authority which establishes that rape is a form of gender-based persecution is an error of law. This failure precluded the Board Member from considering the real issue in this case, which was whether sexual violence against women in Jamaica is sufficiently serious to substantiate a claim to refugee status.

[5] In my opinion, Counsel for the Respondent's argument fails to meaningfully respond to Counsel for Ms. Spencer's s. 96 arguments.

[6] I completely agree with Counsel for Ms. Spencer. The RPD not only missed the gravity of Ms. Spencer's circumstances, but erred by not placing Ms. Spencer's claim in its proper context as a gender-based claim. Canadian jurisprudence has clearly shown that rape is gender-based violence.

[7] During the course of the hearing before the RPD, the RPD member said that the Gender Guidelines would be reviewed in reaching a decision (Tribunal Record, p. 266). However, nothing

in the RPD's decision indicates that Ms. Spencer's claim was considered in congruence with the Gender Guidelines. In my opinion, given that the RPD did not make a negative credibility finding with respect to Ms. Spencer's evidence, it was incumbent upon the RPD to consider Ms. Spencer's claim in accordance with the Gender Guidelines. The failure to do so renders the decision in further reviewable error. As a result, I find that the decision rendered cannot be said to be within the range of possible, acceptable outcomes defensible in respect of the facts and law and is, therefore, unreasonable.

ORDER

Accordingly, the decision under review is set aside and the matter is referred back for redetermination before a differently constituted panel.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4830-10

STYLE OF CAUSE: KIMBERLY RACQUEL SPENCER, SEAN-TAE KIMONE
GRANT
v. THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

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**REASONS FOR ORDER
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