

Federal Court



Cour fédérale

Date: 20110607

Docket: IMM-3827-10

Citation: 2011 FC 648

Ottawa, Ontario, June 7, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**STANLEY BERNARD GONSALVES
PAULA SUSAN GONSALVES (a.k.a. PAULA
SUSAN GONSALVES)
BRANDON JOSH GONSALVES
TRISTAN MARK GONSALVES
TIFFANY AMANDA GONSALVES and
KRYSTAL MARIE GONSALVES**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board that held that the applicants were neither Convention refugees nor persons in need of protection. For the reasons that follow, this application is allowed.

Background

[2] The applicants are a family of Indo-Guyanese descent. They came to Canada on April 6, 2006 and filed a refugee claim on the grounds that they fear ethnically-motivated violence at the hands of Afro-Guyanese criminal gangs in Guyana, and are unable to obtain state protection.

[3] The applicants owned a mechanic shop in Guyana. In May 2006, five gun-wielding men of Afro-Guyanese descent confronted the husband, Stanley Bernard Gonsalves, as he closed his shop. These men forced their way into the applicants' home and demanded money and jewellery. Dissatisfied with the money and jewellery the husband gave them, the men beat him, undressed, fondled, and attempted to rape his wife, and hit and threatened to kill their children. Before leaving, the men tied up the applicants, threatened to return, and fired several shots into the house.

[4] The neighbours heard the applicants' cries for help and called the police. The police did not come because they had no vehicle. After the gunmen left, the applicants' neighbours brought them to the station where they made a police report and subsequently received medical attention for their injuries. The file shows that the police visited the applicants' home the next day, questioned several people, took the applicants' statements, and arrested and charged one individual. The husband testified at the hearing that he did not know the outcome of that arrest, and that he had never followed up with the police about it.

[5] Prior to the home invasion, someone attempted to break into the applicants' home but was prevented from doing so by wooden bars on the window. Other incidents suffered by the applicants included not being paid for repairs on the cars of Afro-Guyanese clients, being followed when

making deposits at the bank, and being robbed by armed thieves at a grocery stall. The husband stated that during the grocery hold-up one Afro-Guyanese thief also urinated on an Indo-Guyanese woman. The wife testified that Afro-Guyanese men had threatened sexual assault against her and her daughters while at a school fair. The husband stated that the children were threatened and harassed at school by Afro-Guyanese students and teachers. The children were sometimes denied entry to the classroom and were subjected to bullying and physical violence at school.

[6] The children were removed from the school and enrolled in a Catholic school. One teacher at the new school was abusive toward the children and the parents complained to the principal. Following the complaint, this teacher became more aggressive toward the children, threatening to hurt them if they ever complained again.

[7] The applicants' first application for refugee protection was denied. The Board found that the claimants had failed to rebut the presumption of state protection.

[8] The applicants applied for leave and judicial review. Justice Kelen allowed the application, finding that the country condition evidence demonstrated continuing tension between Afro- and Indo-Guyanese and the inability of the state authorities to protect the Indo-Guyanese due to an "acute lack of resources." He found further: "[W]hile the Board cites the documentary evidence as providing an unbiased statement that adequate state protection is available to the applicants in Guyana, a review of that evidence raises serious questions as to the effectiveness of the protection available." Since the evidence cited contradicted the Board's conclusions, failing to address the contradiction was a reviewable error.

[9] The Board's failure to address the concerns raised about the treatment of the children and the threats of sexual assault against the female applicant was also found to be a reviewable error.

[10] At the first judicial review hearing, the applicants requested the Court to direct the Board to find the applicants to be Convention refugees. Justice Kelen declined this request and sent the case back for re-determination without issuing any specific directions. A similar request was made in this application and I too refuse to issue the direction sought.

[11] Upon re-determination, the Board found that the claimants were not Convention refugees because there was no nexus between their fear and one of the Convention grounds. The Board acknowledged that the applicants were basing their claim on the ground of race. It held that opinions were divided over whether Indo-Guyanese were disproportionately affected by crime because of their perceived wealth or because of their race. The Board then found that while some criminal attacks against Indo-Guyanese may be racially motivated, the incidents alleged by the claimants were economically motivated.

[12] Regarding the robberies and bank incident, the Board considered crime statistics in Guyana and concluded that the claimants were the targets of random criminality, and that their fear was based on a generalized risk to all Guyanese persons "regardless of ethnicity, gender, or race." The Board further held that where a subcategory of the population faces an increased degree of a risk, the increase does not convert a general risk to a personalized risk. Regarding the attempted rape of the female applicant during the home invasion, the Board relied on *Bulbarela v Canada (Minister of*

Citizenship and Immigration), 2002 FCT 636, for the proposition that rape in the course of a crime does not establish nexus on the basis of gender.

[13] Regarding the threats against the female applicant and her daughters at the school fair the Board concluded that while gender-based, there was no evidence to suggest they were “anything but random” and that the harm caused was discrimination, not persecution.

[14] Regarding the children, the Board found that the ill treatment of the children at the public and private schools appeared to be racially motivated in at least two instances. The Board noted that the female applicant testified she was unaware whether similarly situated children suffer similar discrimination and concluded that the incidents, while discriminatory, did not rise to the level of persecution.

[15] The Board also found that the applicants were not persons in need of protection under s. 97(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27, noting that s. 97 does not extend to generalized risks, and that therefore the home invasion and bank incidents were excluded from s. 97 consideration. The Board also found that the threats at the school fair and discrimination against the children at school did not raise a serious possibility of risk to their lives.

[16] Counsel submitted at the hearing that if the claimants were found not to be Convention refugees or persons in need of protection, the Board should consider whether there were compelling reasons to let the claimants remain in Canada under s. 108(4) of the *Act*, based on the trauma from the 2006 home invasion. The Board denied this request on the basis that there needed to be a

change in circumstances to trigger s. 108 of the *Act*, and that the Board was without jurisdiction to consider compelling reasons regarding incidents found to be the result of a generalized risk.

Issues

[17] The applicants raised a number of issues in their memorandum but abandoned some issues at the hearing. The remaining issues are the following:

1. Did the Board err by departing from the first judicial review decision quashing the previous determination?
2. Did the Board err in not finding the deprivation of the children's right to education to be persecution?
3. Was the decision adequately reasoned with due regard to the evidence?

Analysis

[18] I do not accept the applicants' submission that by raising the issue of nexus as grounds for dismissing their claim, the Board "is doing an 'end run' around the judicial review order and reasons for the Federal Court remitting it for rehearing."

[19] The rehearing by the Board ordered by this Court is a hearing *de novo* and absent any directions from the Court in remitting the case, the Board is entitled to decide the case on the merits. In finding that the applicants' claim failed on the basis of state protection, the first decision did not go on to consider the other elements of the refugee definition. Accordingly, the Federal Court's reasons in reviewing the decision were also limited to state protection. However, the applicants still need to meet all the elements of the refugee definition in order for their claim to succeed and it was

open to the Board to find, regardless of the availability of state protection, that the applicants' claim failed to meet another aspect of the definition.

[20] The Board did not defy the directions or contradict the reasons of Justice Kelen and therefore there is no violation of the right to judicial review and no abuse of process. There were no directions to defy. The Board did not make findings on state protection, and therefore did not contradict the reasons of the Court.

[21] I also do not accept the submission of the applicants that the Board erred in finding that the incidents of discrimination the children faced at their schools did not rise to the level of persecution. The applicants rely on *Ali v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1392 (TD), for the proposition that where the only way a child can avoid persecution is to cease attending school, asking the child to do so violates his or her right to an education and the child should therefore be found a refugee. The applicant submits that as in *Ali*, the only way the applicant children could avoid persecution was to cease attending school.

[22] In order for leaving school to be determinative, the Board must first find that the ill treatment the child faces at school is persecution. Justice McKeown states in *Ali*, at para. 4: "I do not agree with [the Board's] reasoning since it means if Hossay Ali is returned to Afghanistan, the only way she can avoid being persecuted is to refuse to go to school. [emphasis added]" In this case, the Board found that the ill treatment the children faced in school was discrimination, but not persecution. That finding was not unreasonable given the evidence before the Board.

[23] Lastly, the applicants submit that since the Board found them credible, found there to be ongoing racial tension in Guyana, and found that some criminal attacks were racially motivated, and since the applicants testified that the attacks against them were accompanied by racial slurs, the Board's finding that the attacks were not racially motivated is unreasonable.

[24] The applicants argue further that in failing to address the racial slurs alleged by the applicants, and in ignoring the documentary evidence confirming the prevalence of racially motivated attacks in Guyana, the Board's reasons are inadequate and a violation of procedural fairness.

[25] The applicants therefore submit that the findings made by the Board regarding nexus were perverse and capricious, and made without evidence or in disregard of the evidence.

[26] The respondent submits that the Board's finding that attacks could be racially motivated does not mean the Board must find a nexus or Convention status. The respondent relies on *Vickram v Canada (Minister of Citizenship and Immigration)*, 2007 FC 457, for the proposition that where attacks might be racially motivated, but the claimant's evidence indicates that wealth was the real motivation in their case, the Board's finding that the claimant is not targeted on racial grounds is reasonable and "cannot be said to be perverse or made without regard to the evidence before it."

[27] The respondent does not address the racial slurs alleged by the applicants, but simply states that the Board did not fail to provide adequate reasons and did not fail to consider evidence in arriving at its conclusions. The respondent alleges that the applicants are asking the Court to

reweigh the evidence, and says that the Board's findings were reasonably open to it on consideration of all the evidence.

[28] The Board's nexus analysis is inadequate. In finding that the home invasion and bank incidents were economically and not racially motivated, the Board quotes from the United States Department of State (DOS) Report for the proposition that while ethnic tensions persist in Guyana, the under-representation of Indo-Guyanese in the civil service and security forces was likely due to the Indo-Guyanese preferring business careers over the military. The Board also cites two Federal Court decisions as authority for the finding that opinions are divided over whether Indo-Guyanese are disproportionately targeted by criminals because of their economic or racial status and then prefers the explanation of economic affluence.

[29] The Board's conclusion is unreasonable because it approaches the issue of motive for the attacks as a yes or no question. The criminals targeting the applicants may have been motivated by a combination of the applicants' racial and economic status. That the motive is at least not purely economic is supported by the applicants' reference to racial slurs made against them during the incidents they allege. It is further supported by other evidence, namely the testimony given by the applicants. In *Katwaru v. Canada*, [2007] FCJ No 822 (FC), this Court left open the possibility that where at least one of the motives is based on a convention ground, nexus might be established. The Court there decided there was not enough evidence to establish race as a motive, and therefore declined to find mixed motives. However, the Court left open the possibility that nexus may be found where there is evidence to support both alleged motives. In this case there was some evidence before the Board as to the possibility of mixed motives and therefore the Board erred in

failing to consider whether there were mixed motives and if so, whether the motives could constitute the convention nexus required.

[30] *Vickram* is unlike the present case. In *Vickram*, the applicant repeatedly indicated that he believed he was targeted because of his wealth. He only once hinted that he might also be targeted because of his race, and he did not expand on or provide evidence to support that argument. Based on these facts, Justice de Montigny found that “The Board was therefore entitled to find, based on the documentary evidence and on Mr. Vickram’s own testimony, that he was the victim of criminal acts with no link to the Convention.” However, as previously noted, in this case the applicants repeatedly asserted that they were being targeted for their race and provided documentary and verbal evidence of racial violence in Guyana.

[31] For these reasons this application must be allowed. No question for certification was proposed and there is none on these facts.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is allowed and the applicants’ claim for refugee protection is to be re-determined by a different Member of the Board who has had no previous involvement in their claims, and no question is certified.

“Russel W. Zinn”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-3827-10

STYLE OF CAUSE: STANLEY BERNARD GONSALVES ET AL v.
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 25, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: June 7, 2011

APPEARANCES:

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