

Federal Court



Cour fédérale

Date: 20120222

Docket: IMM-4543-11

Citation: 2012 FC 242

Ottawa, Ontario, February 22, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

DWANE ELON PHILLIP

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Dwane Elon Phillip, seeks judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated June 9, 2011. The Board found that he was neither a Convention refugee nor person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

I. Facts

[2] The Applicant is a citizen of Grenada. He fears an abusive stepfather who has been living with his mother since he was 14 years old.

[3] The Applicant claimed he had to depend on neighbours for food or stay hungry. He described an incident where he tried to step in when his stepfather was hitting his mother. His stepfather threw a vase at him. The neighbours called the police and the Applicant's mother begged him not to tell them what happened. For a period following the incident, the Applicant slept under the house.

[4] There was also an incident where the stepfather chased the Applicant with a cutlass. He filed a police report but his mother took his stepfather's side. As a result, he went to live with an aunt nearby. The Applicant insists that the stepfather continued to threaten him and spread rumours that he was homosexual among his classmates.

[5] His mother's childhood friend living in Toronto, Patrice Grant, sent the Applicant money to finish secondary school in Grenada. She also helped him purchase a plane ticket for Canada.

[6] On July 30, 2008, the Applicant arrived in Canada on a temporary resident visa at 17 years old. When that visa expired on January 29, 2009; however, the Applicant remained in the country working occasionally in construction and keeping a low profile. He claims that Ms. Grant told him that the only way for him to get permanent status was to get married and be sponsored.

[7] The Canada Border Services Agency (CBSA) arrested the Applicant in March 2010. It was at this time that the Applicant first made a refugee claim based on the abuse experienced at the hands of his stepfather in Grenada.

II. Decision Under Review

[8] The decision begins with an assessment of the Applicant's credibility. The Board did not believe, on a balance of probabilities, his story that he was abused by an "unnamed, abusive, alcoholic stepfather." He had failed to claim protection on arrival in Canada and did not do so until he was arrested by the CBSA in March 2010, almost 15 months after his temporary resident visa expired.

[9] The Board also took issue with the Applicant's initial failure to identify his biological father, Dylon Phillip. It was only after being pressed that the Applicant admitted to meeting him when he was 14 or 15 years old. He is a businessman who travels a lot outside Grenada. The Board noted that this would put his father in the picture at the beginning of the abuse but the Applicant does not mention why he would not seek his help, rather than living on the street and depending on neighbours for food. He also denied coming to Canada with his father in 2008.

[10] The Applicant admitted obtaining a temporary resident visa to come to Canada at 15 years old that would have required the help of his mother and father. According to the Board, if the reference to "father" had referred to his stepfather it seemed strange that an abusive man, who did

not want him around, would assist him in coming to Canada. In his oral testimony, the Applicant admitted that his biological father applied for him when he was 15. The Applicant insisted they had a falling out, although this was not in his Personal Information Form (PIF) and they were clearly in communication on at least two occasions.

[11] The Board also raised questions regarding the name of his abuser, who was only referred to as “Forde” in the PIF without the clarification later provided in oral testimony that he indicated his stepfather’s name was Knoxforde Smith.

[12] At the hearing, the Applicant testified that his stepfather “does drugs, sells drugs, alcoholic, gangster and member of the Crips.” The danger posed by the stepfather was not mentioned in his PIF and country documents did not suggest the Crips operate in Grenada. Moreover, the police letter provided did not refer to the stepfather as a gangster or member of the Crips. As a consequence, the Board found that the Applicant had not provided any credible or trustworthy evidence to advance his claim.

[13] The Board also determined that adequate state protection would be available to the Applicant on returning to Grenada in the face of threats of violence or abuse at the hands of his stepfather. Grenada is a parliamentary democracy that criminalizes rape. Police and judicial authorities usually act promptly in cases of domestic violence.

[14] In the Applicant’s case, he reported the abuse and police clearly responded. Although the Board was prepared to accept a letter for what it stated as signed by the Officer in Charge of the

Western Division, Gouyave Police Station in St. John, Grenada; it was not prepared to accept the handwritten letter of the constable as it had not been written on official letterhead and did not contain the stamp of the official police unit, except that it corroborated the police attended when called.

[15] On the issue of state protection, the Board summarized its conclusion as follows:

Although I acknowledge that there is conflicting information with respect to the level of responsiveness of the authorities in Grenada to complaints of child abuse, the degree of effectiveness of child violence legislation, and societal attitudes and attitudes among the police towards minor victims of domestic violence, I find, based on the preponderance of the most current and up to date information, that adequate state protection would reasonably be forthcoming to the claimant if he were to return to Grenada today and continue to face problems, threats, violence, or abuse at the hands of his stepfather. Moreover, now that the claimant is no longer a minor, there is no reason for him to live with his mother and his stepfather and therefore, there is no longer any reasonable possibility of persecution or other serious harm.

[16] Following this finding, the Board proceeded to consider the subjective basis of the Applicant's claim. It did not accept explanations as to why the Applicant delayed in leaving his home country for seven months after he had secured a temporary resident visa and failed to claim in Canada on arrival or for months afterwards. He even allowed himself to become illegal. The Board did not believe that the Applicant would not know that he should make a refugee claim and none of his friends and relatives would suggest he do so, unless the Applicant was merely an economic migrant seeking to better his life in Canada.

[17] Finally, the Board rejected the Applicant's argument that the compelling reasons exception of the IRPA would apply since there was no subjective fear and he had not suffered from "atrocious" or "appalling" acts of persecution.

III. Issues

[18] This application raises the following issues:

- (a) Did the Board breach natural justice in stating that credibility was not an issue and then proceeding to make negative credibility findings?
- (b) Did the Board err in determining the Applicant's credibility based partly on his delay in making a refugee claim?
- (c) Did the Board ignore evidence in its assessment of state protection?

IV. Standard of Review

[19] As stated in *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 43, questions of natural justice or procedural fairness as raised by the first issue require the correctness standard.

[20] However, the remaining issues should be reviewed based on reasonableness. This was confirmed by the Court for issues of credibility in *Aguirre v Canada (Minister of Citizenship and Immigration)*, 2008 FC 571, [2008] FCJ no 732 at para 14 and for the assessment of state protection in *Mendez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 584, [2008] FCJ No 771 at paras 11-13.

[21] Applying the reasonableness standard, intervention is only warranted where the decision fails to accord with the principles of justification, transparency and intelligibility or falls outside the range of possible, acceptable outcomes (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

V. Analysis

A. *Did the Board Breach Natural Justice in Stating that Credibility was not an Issue and then Proceeding to Make Negative Credibility Findings?*

[22] The Applicant submits that the Board breached natural justice by suggesting that credibility was not an issue in response to a question from counsel as to whether he should focus on certain factors in making final submissions. As instructed, counsel made submissions on the Applicant's future fear and state protection. However, the Board's decision proceeded to make significant negative credibility findings. According to the Applicant, he was entitled to know this case against him.

[23] The Respondent acknowledges that the Board member's negative credibility findings contrary to his comments at the hearing are regrettable, but maintains that the situation is not as clear-cut as the Applicant suggests. The Applicant was questioned about several issues regarding his story, including the issuance of a visa, the delay in claiming, his biological father, and his stepfather's occupation. The Board member gave the Applicant opportunities to clarify and explain these issues.

[24] Reviewing the transcript of the hearing, the Board member signalled that future subjective fear and state protection were his main concerns. He also made comments regarding the credibility of the witness such as "I found him in many ways a credible witness in the sense that he has been straightforward, he has been consistent I am just left with those imponderable...or those ponderables." This phrase, among others, would seem to confirm that credibility was not a primary issue. However, the reference to the "imponderable" would not necessarily foreclose those concerns. There were also some questions raised regarding the Applicant's story which in part explains the counsel's attempt to seek reassurances from the Board member that credibility did not remain an issue. Indeed, counsel continues to ask about the issue and the Board member expresses reluctance to provide his decision at the time.

[25] The Respondent is correct to point out that the issue is not as clear as the Applicant suggests, particularly in light of questions asked of the Applicant regarding his story. Nevertheless, the authoritative statements made in favour of the Applicant's credibility, when contrasted with those in the final decision, remain undeniable.

[26] This Court has recognized that giving counsel the impression an issue is resolved and proceeding to make an adverse finding on that same issue would amount to denial of natural justice or procedural fairness since it deprived the applicant of an opportunity to make further submissions (see for example *Sivamoorthy v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 408, [2003] FCJ no 591 at para 47; *Bokhari v Canada (Minister of Citizenship and Immigration)*, 2005 FC 574, [2005] FCJ no 717 at paras 5-6; *Bondarenko v Canada (Minister of Citizenship and Immigration)*, 2004 FC 306, [2004] FCJ no 354 at para 72). More specifically, in *Brown v Canada (Minister of Citizenship and Immigration)*, 2011 FC 585, [2011] FCJ no 787 at para 29 it was noted that “where the Board indicates on what issues submissions should be made, it is a denial of natural justice to render a decision on issues other than those which it mentioned.”

[27] There is some uncertainty in the case law, however, as to when a breach of this nature would constitute a reviewable error. In *Sivamoorthy*, above at para 46, where the issue of identity arose it was suggested that even when there was a basis to support refusing the claim, “the denial of natural justice in this case requires a new hearing irrespective of whether the ultimate decision would have remained the same.”

[28] In other circumstances, the Court has stressed that the critical issue is whether the breach is material to the claim. For example, Justice Anne Mactavish in *Lahocsinszky v Canada (Minister of Citizenship and Immigration)*, 2004 FC 275, [2005] FCJ no 313 at paras 12-14 noted that “[h]aving advised the applicants that the only issue under consideration at the hearing was credibility, particularly as it related to their explanation for the late filing of their amended PIFs, it was a breach of natural justice for the Board to then base its decision, in part, on its finding that state protection

was available to the applicants.” Nevertheless, she was not convinced that this breach had any effect on the result of the case and dismissed the application for judicial review.

[29] In reaching this conclusion, Justice Mactavish relied on previous jurisprudence that only breaches of natural justice that affect the result will warrant a decision being set aside (see for example *Mughal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1557, [2006] FCJ no 1952 at paras 39-41; *Fontenelle v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1432, [2006] FCJ no 1796 at para 15; *Yassine v Canada (Minister of Employment and Immigration)*, (1994), 27 Imm LR (2d) 135, [1994] FCJ no 949 at para 11 (FCA); *Mobile Oil Canada Ltd et al v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202; [1994] SCJ no 14 at para 53).

[30] Given these principles, the Board member’s comments necessarily give rise to a breach of natural justice. The question is whether that breach alone warrants the Court’s intervention as a material aspect of the Applicant’s claim.

[31] The Respondent argues that this was not the case. State protection was an alternate and determinative finding against the Applicant, notwithstanding the inconsistency on the issue of credibility.

[32] Although it would appear that state protection and subjective fear are the dominant findings, in this particular instance it appears that the concerns regarding credibility permeated throughout the

entire decision and impacted on an assessment of the material aspects of his claim. Addressing the issue is not as simple as the Respondent's submissions imply.

[33] In the section on state protection, the Board faulted the claimant for not providing sufficient "relevant, probative and reliable evidence" to show that adequate state protection would be forthcoming. Similarly, in the section addressing subjective fear, the Board's analysis is focused on the Applicant's credibility. Not only are there inconsistencies regarding the decision and the comments of the Board member during the hearing, but there are identifiable contradictions or a lack of clarity in portions of the decision itself.

[34] For these reasons, I am prepared to find that the breach of natural justice in suggesting that credibility was not an issue where it proved to be central to the Board member's assessment of the Applicant's claim constitutes a reviewable error. The Board member made significant negative credibility findings that the Applicant's story could not be believed and he had not provided any credible or trustworthy evidence to advance his claim in direct opposition to his comments at the hearing that the Applicant was a credible and straightforward witness.

[35] Having reached this conclusion on Issue A, it is unnecessary for me to address the issues of delay and state protection. I do note, however, that the Board is entitled to weigh these factors in assessing any applicant's claim.

VI. Conclusion

[36] Since negative credibility findings served as the basis for the decision despite indications at the hearing to the contrary, there was a breach of natural justice that warrants the intervention of this Court. The application for judicial review is allowed and the matter is referred back to a differently constituted panel of the Board.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is referred back to a differently constituted panel of the Board.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4543-11

STYLE OF CAUSE: DWANE ELON PHILLIP v. MCI

PLACE OF HEARING: TORONTO

DATE OF HEARING: JANUARY 23, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** NEAR J.

DATED: FEBRUARY 22, 2012

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