

Federal Court



Cour fédérale

Date: 20131022

Docket: IMM-1050-13

Citation: 2013 FC 1060

Montréal, Quebec, October 22, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JACINTH KAREN MILLER

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant seeks judicial review of the decision by the Refugee Protection Division of the Immigration and Refugee Board [IRB], dated January 14, 2013, wherein, it was determined that the Applicant was not a Convention refugee under section 96 nor a person in need of protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Background

[2] The Applicant, Ms. Jacinth Karen Miller, is a citizen of St. Vincent. She was born in 1972 on the island of Bequia. The Applicant was abandoned by her mother at the age of 3 and she grew up with her aunt and grandmother.

[3] At the age of 15, the Applicant moved from Bequia to the mainland to try to find her mother and to escape perpetual physical abuse at the hands of her aunt and sexual abuse by her brothers, her uncle and a man named Edward.

[4] After moving to the mainland, the Applicant began to work at a clothing store and lived with her sister. She resided there for almost 15 years. During this time, the Applicant befriended a man who she explains she really liked, but who eventually raped her. She cut all ties with him shortly after the incident.

[5] At the age of 29, the Applicant met another man at the clothing store by the name of Andrew Newton. Mr. Newton was a Barbadian who was in St. Vincent promoting a show of scantily clad female dancers. Mr. Newton offered to pay for the Applicant to move to Canada with him a few months later.

[6] In September 2005, the Applicant left St. Vincent to come to Canada. She moved in with Mr. Newton and his cousin upon her arrival and worked in housekeeping for him. After a few

months, she was thrown out for refusing to continue giving him sexual favours in exchange for a place to live.

[7] Since leaving Mr. Newton's residence, the Applicant has continually moved in with friends.

[8] The Applicant claimed refugee protection on August 11, 2010.

[9] Standing uncontradicted, the Applicant is illiterate; and, thus, has had difficulty in expressing herself; she presently suffers from depression, anxiety and has suicidal ideation. She has a global functioning score of 65, subsequent to having waited 5 years to have her narrative told to the IRB, that was only possible with the help of a designated representative to act as her voice.

III. Decision under Review

[10] The hearing of the Applicant's claim for refugee protection was heard on December 10, 2012. A designated representative for the Applicant, the Applicant herself, and her counsel were present. At the hearing, the IRB accepted that the Applicant was a vulnerable person, and applied *Guideline 8 on Procedures with Respect to Vulnerable Persons Appearing Before the IRB*, to ensure special accommodation for her hearing.

[11] The IRB accepted the Applicant's identity and recognized that her previous experiences of having been sexually abused had left an indelible mark on her; however, in the IRB's opinion, there was insufficient evidence that the perpetrators of those sexual abuses would pose a risk to the Applicant if she were to return to St. Vincent. The IRB, thus, determined that the Applicant did not

face a well-founded fear of persecution. In making this determination, the IRB stated it carefully considered the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*.

[12] In analyzing the evidence, the IRB noted that the Applicant had not had any contact with her brothers, her uncle or Edward, since she left Bequia when she was 15 years old. The IRB also found that she had not had any communication with her male friend from the mainland since he raped her. The IRB found it unlikely that these individuals would still want to harm the Applicant.

[13] Likewise, the IRB found it unlikely that Andrew Newton could harm the Applicant if she returned to St. Vincent as he was not a citizen of that country. Moreover, the IRB noted that he had not communicated with her since he kicked her out of his home in Montreal around 2005. The IRB thus determined that the Applicant's fear of harm was unfounded.

[14] The IRB found that the documentary evidence did reveal that sexual violence against women was one of the challenges that St. Vincent's government faces; however, the IRB concluded that the Applicant did not face a serious possibility of being harmed by her past perpetrators, or of being victimized by others.

[15] Lastly, the IRB rejected the Applicant's argument of "compelling reasons" under subsection 108(4) of the *IRPA*. The IRB stated that the Applicant did not consider herself to be a refugee when she left her country; she accepted to leave St. Vincent because she sought to begin life anew; therefore, subsection 108(4) of the *IRPA* does not apply.

IV. Issues

[16] (1) Did the IRB err in not conducting a “compelling reasons” analysis under subsection 108(4) of the *IRPA*?

(2) Did the IRB err in assessing the documentary evidence?

V. Relevant Legislative Provisions

[17] The following legislative provisions of the *IRPA* are relevant:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally:

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par

règlement le besoin de protection.

...

[...]

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

108. (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

(a) the person has voluntarily reavailed themselves of the protection of their country of nationality;

a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;

(b) the person has voluntarily reacquired their nationality;

b) il recouvre volontairement sa nationalité;

(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;

c) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;

(d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or

d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;

(e) the reasons for which the person sought refugee protection have ceased to exist.

e) les raisons qui lui ont fait demander l'asile n'existent plus.

...

[...]

Exception

(4) Paragraph (1)(e) does not apply to a person who

Exception

(4) L'alinéa (1)e ne s'applique pas si le demandeur

establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

VI. Position of Parties

[18] The Applicant submits that once the IRB found that her rape and abuse were credible and that her fear no longer existed, it was required to proceed with an analysis of “compelling reasons” under subsection 108(4) of the *IRPA*. By failing to do so, the Applicant argues that the IRB committed an error of law.

[19] The Applicant also submits that the IRB erred by being selective in its assessment of the documentary evidence regarding the responsiveness of police to cases of sexual abuse and the availability of mental health services in St. Vincent.

[20] The Respondent submits that the IRB did consider the application of subsection 108(4) of the *IRPA*. The Respondent states that the IRB considered the Applicant’s personal circumstances and the state of her mental health, as well as the documentary evidence concerning the resources available in St. Vincent; however, the Applicant’s circumstances were such that there were no reasons compelling the application of subsection 108(4).

[21] Moreover, the Respondent submits that there were no allegations made by the Applicant regarding her perpetrators that would still be a problem. In the absence of such allegations and the lack of evidence that the abuses may reoccur, the Applicant failed to meet her burden to show that there was a prospective risk she would be harmed in St. Vincent upon her return.

VII. Analysis

Standard of Review

[22] The applicable standard for weighing of evidence and the interpretation and assessment of evidence is that of reasonableness (*Jin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 595; *Mukamuganga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 566).

[23] Similarly, the applicable standard when reviewing an interpretation and application of subsection 108(4) of the *IRPA* is that of reasonableness (*Decka v Canada (Minister of Citizenship and Immigration)*, 2005 FC 822; *Echeverri v Canada (Minister of Citizenship and Immigration)*, 2011 FC 390).

[24] To satisfy the reasonableness standard, the decision must fall in the “range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

(1) Did the IRB err in not conducting a “compelling reasons” analysis under subsection 108(4) of the *IRPA*?

[25] The Court does not find that the IRB erred by failing to consider whether there were sufficient “compelling reasons” to grant the Applicant refugee protection. The IRB was not

required, nor permitted, to conduct such an analysis under subsection 108(4) of the *IRPA*, as it did not, under the circumstances, make a finding that the Applicant could be determined a refugee.

[26] As stated by Justice John A. O’Keefe in *John v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1088:

[41] ... the threshold which must be met before conducting a compelling reasons analysis is “a finding that the *claimant has at some point qualified as a refugee, but the reasons for the claim have ceased to exist*” (*Nadjat* above, at paragraph 50). This requires a clear statement conferring the prior existence of refugee status on the claimant, together with an acknowledgement that the person is no longer a refugee because circumstances have changed. [Emphasis added.].

(Reference is also made to *Nadjat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 302, 288 FTR 265 at para 50; *Decka*, above; *Luc v Canada (Minister of Citizenship and Immigration)*, 2010 FC 826, 374 FTR 38 at para 32).

[27] Subsection 108(4) of the *IRPA* is an exceptional provision that only allows the Board to grant refugee protection, if requested upon arrival, where applicants face “appalling persecution that their experience alone is a compelling reason not to return them, even though they may no longer have a fear of further persecution” [Emphasis added] (*Canada (Minister of Employment and Immigration) v Obstoj*, [1992] 2 FC 739 (FCA) at para 19). This exception is limited to a minority of refugee claimants.

[28] In the present matter, the Applicant’s refugee claim was rejected because the IRB found that she did not have a well-founded fear of persecution or a serious risk of danger, torture or cruel and unusual treatment if she were returned to St. Vincent. The Applicant never met the pre-conditions

outlined above; and, therefore, did not trigger the requirement for the IRB to consider whether there were compelling reasons to grant her refugee protection.

[29] For this reason, the Court does not find that the IRB committed a reviewable error by failing to conduct an assessment under subsection 108(4) of the *IRPA*.

(2) Did the IRB err in assessing the documentary evidence?

[30] The Court finds that that the documentation referred to by the Applicant as to whether the police are responsive in cases of rape and whether mental health services are available in St. Vincent are inconsequential in this case. Firstly, the Applicant failed to claim refugee status upon arrival; as her allegations were not voiced initially, the delay or the five-year time factor, although not specified by the IRB, is qualified by the Court not necessarily as determinative but certainly became significant. Thus, the IRB was not required to assess the availability of state protection on a claim that had not been voiced in time and place, upon arrival. Secondly, the IRB was not required to assess the availability of mental health services in St. Vincent as the inability of a country to provide adequate health or medical care cannot form, in and of itself, as the very basis for a refugee claim.

[31] Accordingly, the Applicant did not provide any documentary or testimonial evidence to corroborate future risk of being sexually abused if returned to St. Vincent. Yet, the Applicant's record does put into evidence grave incidents of sexual abuse at the hands of people who were close to her and whom she trusted, both in St. Vincent and in Canada. When asked why she claimed refugee status in Canada, the Applicant indicated that she did so because life became too difficult

for her in St. Vincent (Transcript of Hearing at p 30). She then simply stated that she feared all men, with reference to those who harmed her in St. Vincent (Transcript of Hearing at p 38), all of which remained uncontradicted by her narrative, told in her simplistic and childlike rendition (due to her inherent challenged state, well recognized by the IRB in its decision).

[32] While the IRB was sensitive to the Applicant's situation, fully recognizing that she was vulnerable and had endured sexual abuse most of her life, yet, under the IRB's jurisdiction in respect of its refugee-deciding mandate, it found that she did not have a well-founded fear of persecution or that she faced a serious risk of being abused again by her perpetrators by which to grant her refugee status. The Court agrees with this finding. It cannot be said that there is more than a "mere possibility" that the Applicant will be harmed again by her perpetrators in St. Vincent. She has not communicated with or seen any of them in over 25 years, despite having remained in St. Vincent from 1987 to 2005. She also hasn't spoken to Andrew Newton since 2005. There is no reason to believe any of these individuals would attempt to find or harm the Applicant after such an extended period of time.

[33] The Court does not find that the IRB, for its purposes, erred in its assessment of the evidence or in its conclusion that the Applicant was not a refugee or a person in need of protection. The Applicant did not discharge her burden of demonstrating that there is a reasonable chance of persecution, subjectively or objectively, if she is returned to St. Vincent, or that there is a serious possibility of danger, torture or cruel and unusual treatment as per consideration for the granting of refugee status.

VIII. Conclusion

[34] For all of the above reasons, the Applicant's application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be dismissed with no question of general importance for certification.

Obiter

While the Court cannot justify overturning the IRB's decision to reject her refugee claim, yet, this is a case unto itself (un cas d'espèce), it appears that the Applicant would be a significant candidate for Humanitarian and Compassionate Considerations, as someone who is in an acute vulnerable state.

The Applicant has endured a lifetime of sexual violence and insecurity. Illiterate and IQ-challenged, the Applicant came to Canada hoping for a better life, without requesting refugee status for five years, as she was initially under the subjugation as a virtual hostage of Mr. Newton who abused her. She did not know where she resided and could not discern her circumstances but was subjected to even more sexual violence at the hands of the very man who offered her the promise of a better life. Her time in Canada has given her little chance to heal from her past experiences and move on with her life. As an illegal migrant, she has had little opportunity to work. Her narrative stands uncontradicted; she has been sexual abused, repeatedly forced out in the cold and has had to continually move in with friends. As per the medical evidence, she now suffers from severe depression, anxiety, post trauma and suicidal ideation. It is extraordinarily suggested that the

Applicant be allowed to remain in Canada to give her an opportunity to have an eventual H&C decided.

This is a case where H&C could become a consideration (outside of the Court's jurisdiction) for the executive branch of government to decide; it could, upon consideration, serve as a voice of the previously voiceless where the person no longer had a voice, in time and place upon arrival, to relate her narrative which was clearly related only subsequently by others, such as her designated representative and medical personnel. The Applicant's voice had been silenced for years by psychological paralysis, resignation and post dramatic stress and she still remains a battered woman and suffering therefrom. Her voice had been stifled and hers was a silent cry which could not be released for years. It is for that reason that the Court recommends that the Applicant is indeed a strong candidate for H&C. Should she be made to return to her country of origin, her life, as per the medical evidence, is in jeopardy due to past experiences which have left deep wounds in her fragile psychological state, still left untreated which may only leave her with the option of potential suicide.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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