

Federal Court



Cour fédérale

**Date: 20110901**

**Docket: IMM-975-11**

**Citation: 2011 FC 1042**

**Ottawa, Ontario, September 1, 2011**

**PRESENT: The Honourable Mr. Justice Crampton**

**BETWEEN:**

**PETER DOERKSEN BUECKERT  
DUSTIN CALEB BUECKERT**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The minor Applicant, Dustin Bueckert, is a seven-year-old citizen of Belize who was physically and emotionally abused by his mother from the time he was approximately one year old until his paternal aunt assumed custody of him at the age of four. There is also evidence that his mother sexually abused him.

[2] The other Applicant, Peter Bueckert, is Dustin's father. He is a citizen of both Belize and Mexico.

[3] The Applicants submit that the Refugee Protection Division of the Immigration and Refugee Board of Canada erred in rejecting their claims for refugee protection, by failing to sufficiently address their particular vulnerabilities and evidence before concluding that they will likely be able to avail themselves of adequate state protection should they return to Belize.

[4] For the reasons set forth below, Dustin's application for judicial review of the Board's decision is granted and Peter's is rejected.

## **I. Background**

[5] Peter and his wife Aganetha moved to Canada in May 2007. They moved in part because Peter obtained a Canadian work visa. They also hoped to find professional help to assist Aganetha with her anger and to distance themselves from Aganetha's very controlling mother.

[6] When Aganetha's abuse of Dustin continued, Dustin was placed in the care of his paternal aunt, Helena Bueckert, and her husband Johan in November 2007.

[7] Helena and Johan became Dustin's legal guardians in November 2008. Shortly thereafter, when it became apparent that Peter and Aganetha likely would have to return to Belize, Peter decided to leave Dustin in Helena and Johan's care.

[8] Aganetha was furious with the decision to leave Dustin behind in Canada. When she informed her parents that Peter was insisting upon returning without Dustin, they also became enraged and directed her not to return to Belize without Dustin. Her brother Bernhard then told

Peter that if he returned without Dustin “something else would happen.” Aganetha also threatened Peter that, if Dustin did not return with them, “her brothers and other men would tie [him] down and whip [him].”

[9] In February 2009, after Peter’s Canadian work visa expired and his renewal application was denied, he and Aganetha returned to Belize.

[10] Two days later, Peter returned to Canada and claimed refugee protection after learning that one or more members of Aganetha’s family was planning to kill or seriously harm him.

## **II. The Decision under Review**

[11] After reviewing the background facts, the Board stated its view that Peter and Helena had both given “reliable and trustworthy evidence” and were credible. It proceeded to “accept the allegations in this case as factual; that [Peter’s] brothers-in-law have threatened to kill [him] and that Dustin suffered abuse at the hands of his mother.”

[12] However, after noting, among other things, that Peter had never tested the effectiveness of state protection in Belize, either by reporting the threats allegedly made by his brothers-in-law or by reporting his wife’s abuse of Dustin, the Board ultimately concluded that there is adequate state protection in Belize.

[13] The Board therefore rejected the claims of both Peter and Dustin under sections 96 and 97 of the *Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA)*.

### III. Standard of Review

[14] The issues that the Applicants have raised with respect to the Board's assessment of the adequacy of state protection are questions of mixed fact and law that are reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 51-55).

### IV. Analysis

A. *Did the Board err by failing to assess Dustin's particular vulnerabilities and evidence?*

[15] The Applicants submitted that the Board erred by failing to consider and assess Dustin's particular vulnerabilities as an abused child as well as certain evidence that supported his claim that he: (i) is likely to suffer future abuse at the hands of his mother if he returns to Belize; and (ii) is unlikely to be able to avail himself of adequate state protection, if that occurs.

[16] I agree.

[17] Early on in its decision, the Board recognized that, in considering a child's claim for refugee protection under the IRPA, the child's "special vulnerabilities must be taken into account" (*Kim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 149, at paras 58-61). However, the Board proceeded to virtually ignore Dustin's particular vulnerabilities and other important evidence that supported his claimed likelihood of harm at the hands of his mother should he return to Belize.

[18] In concluding that Dustin likely would be afforded adequate state protection in Belize, the Board appeared to place significant weight on the fact that he and his father had never tested state protection in Belize. However, this finding completely ignored the fact that Dustin was never in any position, while he lived in Belize, to test the adequacy of state protection. He was only three years

old when his parents left Belize to come to Canada. It is not immediately apparent how anyone that age could ever personally test the adequacy of state protection.

[19] The Board also relied on the following findings in reaching its conclusion with respect to the adequacy of state protection:

- i. Belize is a functioning democracy with democratic institutions;
- ii. Although there are reports of inadequate police resources, excessive force and corruption in Belize, the evidence before the Board did not “warrant a finding of a wholesale failure of law enforcement,” such as to place in question “the adequacy of the entire nation state protection mechanisms” or the ability and willingness of authorities to assist the Applicants;
- iii. There are no reported cases of police impunity. Police have been charged and prosecuted with crimes, including sexual assault, corruption, violence and other abuse;
- iv. Family violence is prohibited by a law which includes penalties such as imprisonment. The law also enables the family court to issue protection orders against accused offenders, and authorities are empowered to remove children from abusive home environments. In addition, certain government programs have been established specifically to address children’s issues and to coordinate programs for children who are victims of domestic violence;

- v. Although one source has reported that approximately 50% of neglect cases are withdrawn or not prosecuted, another source has reported that victims or their families are often reluctant to press charges;
- vi. Concerns about lax investigation are insufficient to undermine the presumption of state protection and do not represent clear and convincing proof of the state's inability to protect Dustin and Peter; and
- vii. Local failures to provide effective policing do not amount to a lack of state protection.

[20] Based on the foregoing *pro forma* analysis, the Board concluded that “there is state protection in Belize and there is no serious possibility of persecution or, on balance, a risk of other type of personalized harm if [Dustin] returned to Belize.”

[21] In reaching this conclusion, the Board only gave very limited consideration to Dustin's particular circumstances. Specifically, after stating that it was not persuaded that the police would fail to respond should he require their protection, the Board observed that “production of the transfer of guardianship documents showing [the legal guardianship of his aunt and uncle] could resolve any question of kidnapping [of Dustin by Peter] and do [*sic*] not illustrate that the police would fail to protect [him from] ... child abuse.”

[22] The only other consideration given to Dustin's particular circumstances was when the Board recognized that: (i) he falls short in development areas by Canadian standards; (ii) he may not have access to certain “supports that he requires as assessed by his psychologists or social workers in

Canada;” and (iii) he “will enjoy a better quality of life in Canada, receive better social support and will be better loved and cared for here.”

[23] I am satisfied that the foregoing analysis fell significantly short of the type of contextualized analysis that was required in the particular circumstances of this case.

[24] In reaching its conclusion on the determinative issue of state protection, the Board failed to address the following important evidence:

- i. Documentary evidence which suggests that “[w]hile the laws [of Belize] ascribed financial responsibility for the care of the child to the father, they require the mother to maintain and care for the child.” The Board ought to have assessed this or other documentation with a view to determining Peter’s realistic chances for prevailing in a custody dispute with Aganetha’s family, particularly given the evidence that they have significantly greater financial resources than him.
- ii. Testimonial evidence that:
  - a) Blue Creek, the village where Aganetha and her family live in Belize, is a small, isolated Mennonite community numbering approximately 700 or 800 people;
  - b) Blue Creek is part of a broader Mennonite community in Belize which numbers approximately 5,000, out of a total national population of approximately 300,000, and is secluded from the rest of the country;

- c) The Mennonite community in Blue Creek has its own schools, its own stores, its own community rules and so on;
- d) People in Blue Creek try to live independently from the government as much as they can – they try to solve their own problems, and their culture is to resist seeking outside help to deal with their problems;
- e) People in Blue Creek do not trust the police;
- f) It is very common for children in Blue Creek to be hit with “a stick or a rope or a belt”;
- g) It is also very common that “if a child was screaming at your neighbour’s house for quite some time, you wouldn’t do anything”;
- h) Peter is only aware of one occasion in which the Belizean authorities intervened in a case of child abuse, and that particular occasion involved an especially severe case of such abuse;
- i) Aganetha threatened to kill Dustin on a number of occasions – for example, when Peter returned home from work one day, she yelled “[i]f I had been doing like I felt, I would have killed Dustin today”;
- j) When Dustin lived with Aganetha, she would spank him daily for sustained periods of time, often until he would fall asleep, exhausted from crying;



- k) Aganetha's family is strongly motivated to regain custody of Dustin because they are humiliated and their standing in their community has suffered as a result of the fact that Aganetha no longer has custody over Dustin; and
- l) Aganetha's abuse of Dustin while he lived in Canada was such that, during her visits with him, she was supervised at every moment.

iii. A psychological report which confirmed that Aganetha:

- a) "is lacking in anger control";
- b) "readily expresses her anger with little provocation";
- c) has "symptoms of adjustment disorder, generalized anxiety, specific phobia, and social anxiety"; and
- d) has suicidal tendencies.

iv. Other evidence which reported that Aganetha is facing a charge of sexual abuse should she attempt to re-enter Canada.

[25] Considered collectively, the foregoing evidence strongly corroborates the fears expressed by Peter and his sister Helena, Dustin's guardian, that there is a very real risk that: (i) if Dustin returns to Belize, his mother will regain complete or partial custody over him; (ii) if that occurs, she will, at a minimum, likely resume abusing him physically and emotionally; and (iii) no one in the Mennonite Community is likely to seek state protection for Dustin. This no doubt explains why both

Peter and Dustin's legal counsel (who is also counsel to Peter) begged the Board not to deny Dustin's claim even if they denied Peter's claim.

[26] Given the foregoing, the Board should have addressed the above-mentioned evidence in its decision and explained why it nevertheless concluded that Dustin would not face a serious possibility of persecution, or, on a balance of probabilities, a risk of a type of personalized harm contemplated by section 97 of the IRPA if he returns to Belize (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35; *Canada (Minister of Citizenship and Immigration) v Ryjkov*, 2005 FC 1540; *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1076, at paras 13 to 15; *Surajnarain v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1165, at paras 6 and 7; *Uluk v Canada (Minister of Citizenship and Immigration)*, 2009 FC 122, at paras 16 and 32).

[27] The Board's failure to address the evidence summarized in paragraph 24 above constitutes a reviewable error. Accordingly, its decision in respect of Dustin's claim will be set aside.

B. *Did the Board err by failing to assess Peter's particular situation?*

[28] The Applicants' written submissions focused almost entirely on Dustin's claims. They did not specifically address any particular aspects of Peter's claims. Indeed, in his closing submissions at the oral hearing before the Board, their legal counsel conceded that the basis for Peter's claim for protection is "not as obvious" as the basis for Dustin's claim, in part because there have not yet been many threats to his physical safety and there is no evidence that the people who allegedly have made them have ever behaved in a violent manner before. In addition, he holds Mexican citizenship

and does not appear to have offered significant evidence to demonstrate that he will face a risk contemplated by sections 96 or 97 of the IRPA if he returns to that country.

[29] In contrast to its failure to address the most important evidence adduced to support Dustin's claim for refugee protection, the Board did specifically address the most important evidence adduced to support Peter's claim. Although the Board's treatment of that evidence was far from a model for others to follow, I am satisfied that its analysis and the conclusions it reached in respect of Peter's claims under sections 96 and 97 of the IRPA were not unreasonable.

[30] At the outset of its analysis, the Board stated that it accepted his allegation that his brothers-in-law have threatened to kill him. The Board then proceeded to conclude that he had provided little evidence to "illustrate that it would be objectively unreasonable" for him to have sought out police protection in Belize before seeking refugee protection in Canada.

[31] As noted at paragraph 21 above, the Board also specifically addressed Peter's claim that Aganetha's brothers might attempt to persuade the police in Belize to arrest him for kidnapping Dustin.

[32] Peter's failure to make any effort whatsoever to obtain state protection, including prior to returning to Canada to make his claims under the IRPA, was inconsistent with his obligation to avail himself of domestic state protection before seeking international protection (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1, at 724; *Santiago v Canada (Minister of Citizenship and Immigration)*, 2008 FC 247, at para 23; *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 66, at paras 11 to 13; *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 134, at paras 9-10).

[33] In my view, on the particular facts of this case, it was not unreasonable for the Board to conclude that Peter's "belief, which is not founded in any personal experience, that the police would not respond and [his] concern that [his] in-laws have approached the police about kidnapping charges against [him] [is] not persuasive." I am satisfied that this conclusion fell within "the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

[34] Accordingly, Peter's application for judicial review of the Board's decision will be rejected.

## **V. Conclusion**

[35] This application for judicial review is granted in part. The Board's decision, dated January 19, 2011, in respect of Dustin's claims under sections 96 and 97 of the IRPA will be set aside and remitted to a differently constituted panel of the Board for redetermination in accordance with these reasons. The Board's decision in respect of Peter's claims for refugee protection will stand.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUGES THAT:**

1. The Board's decision, dated January 19, 2011, in respect of Dustin's claims under sections 96 and 97 of the IRPA is set aside and remitted to a differently constituted panel of the Board for redetermination in accordance with these reasons.
2. The Board's decision in respect of Peter's claims for refugee protection will stand.
3. No question of general importance is certified.

"Paul S. Crampton"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-975-11

**STYLE OF CAUSE:** PETER DOERKSEN BUECKERT et al v  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Calgary, Alberta

**DATE OF HEARING:** August 18, 2011

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

**DATED:** September 1, 2011

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