Federal Court  Cour fédérale

Date: 20111221

Docket: IMM-7214-10

Citation: 2011 FC 1511

Ottawa, Ontario, December 21, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ONICA EFURU NASHA RAGGUETTE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Onica Efuru Nasha Ragguette applies for judicial review of the November 10, 2010 decision of the Immigration and Refugee Board's Refugee Protection Division (RPD) which found that the Applicant was not a Convention refugee and was not a person in need of protection.

[2] Ms. Ragguette is a citizen of St. Vincent and the Grenadines who came to Canada as a teenager and who made a *sur place* refugee claim because of threats by her ex-boyfriend who

was deported to St. Vincent and the Grenadines. The RPD refused the Applicant's claim on the basis that adequate state protection would be available.

[3] I have concluded the application for judicial review should be granted for the reasons that follow.

Background

[4] Ms. Onica Efuru Nasha Ragguette is a citizen of St. Vincent and the Grenadines (St. Vincent).

[5] The Applicant came to Canada in 1999 at the age of 16. In August 2003, the Applicant began dating Mr. Dabreo, another national of St. Vincent. In March 2004, the Applicant learned she was pregnant with Mr. Dabreo's child. Mr. Dabreo told the Applicant to abort the pregnancy, and when she refused to do so, Mr. Dabreo became violent, physically abused her and threatened to kill her.

[6] In order to avoid Mr. Dabreo, the Applicant stayed at a friend's home. When the Applicant returned to her own apartment, Mr. Dabreo was waiting for her. He forced her inside the apartment and raped her while holding a knife to her throat and then kicked her in the stomach. Mr. Dabreo threatened to kill the Applicant if she told anyone what had happened, and the Applicant never reported the incident to the police.

[7] The Applicant returned to her friend's apartment and later moved into a shelter. Mr. Dabreo continued to call her on her cell phone.

[8] The Applicant's son was born on December 11, 2004.

[9] In June 2005, the Applicant and her son encountered Mr. Dabreo on the street; he picked up their son and grabbed the Applicant, threatening to push her into traffic. The Applicant took back her son and fled. She still did not contact the police because she was afraid that Mr. Dabreo or his friends would retaliate against her if she did.

[10] The Applicant moved into a new apartment in September 2005. In December 2005, Mr. Dabreo showed up at the Applicant's apartment and again physically assaulted her. Her neighbours intervened when they heard the noise, and Mr. Dabreo left. Mr. Dabreo continued to phone the Applicant and leave her threatening messages.

[11] In August 2006, the Applicant encountered Mr. Dabreo by chance, and he threatened her in public. Strangers intervened to help her and she was able to leave.

[12] In December 2006, Mr. Dabreo called the Applicant from an Immigration Holding Centre. He accused her of reporting him to Canadian officials and told her that he was being deported. He threatened to kill her if she ever returned to St. Vincent.

[13] In May 2007, Mr. Dabreo called the Applicant from St. Vincent and said that he would behead her if she returned, describing a recent murder in St. Vincent in which a woman had been beheaded by her former partner. He called again in December 2007, complaining that there was no work in St. Vincent and blaming her for his deportation from Canada. He again threatened to kill her if she returned to St. Vincent.

[14] The Applicant claimed refugee protection because she feared for her life if she was returned to St. Vincent. She also alleged that two of Mr. Dabreo's childhood friends are police officers in St. Vincent, and that he would therefore be able to find her and kill her, and the police would not protect her.

Decision Under Review

[15] The RPD did not question the Applicant's credibility. Instead, the RPD found that the determinative issue was state protection and that the Applicant had failed to rebut the presumption that adequate state protection would be forthcoming.

[16] The RPD summarized the jurisprudence about state protection, noting that clear and convincing evidence is required in order to rebut the presumption of state protection and that protection need only be adequate, not perfect.

[17] The RPD found that St. Vincent is a democracy, and that its government has taken action in recent years to address domestic violence. The RPD acknowledged evidence that domestic

violence remains a serious issue in St. Vincent, but found that the government was making progress in addressing this issue and that police assistance and legal recourse would be available.

[18] The RPD then found that it must consider what the Applicant did to avail herself of the protection of St. Vincent. It noted that a state cannot be considered to have failed to provide state protection when a claimant has failed to approach the state, and that in the absence of a compelling explanation, a failure to pursue state protection opportunities within the home state will usually be fatal to a refugee claim.

[19] The RPD rejected the Applicant's argument that Mr. Dabreo's friends in the police force would make it impossible for her to seek protection, noting that the Applicant had not provided any information about their ranks or in which office they worked. The RPD also noted that there are approximately 850 police officers in St. Vincent, and found it implausible that a friendship with two officers would let Mr. Dabreo attack her with impunity or that these officers would risk their careers for him.

[20] The RPD acknowledged the Applicant's evidence that the police had refused to intervene in her mother's abusive relationship when the Applicant was a child. However, the RPD found that the documentary evidence outweighed this past failure, and reiterated the fact that protection does not need to be perfect.

[21] Finally, the RPD accepted the ongoing negative effects on the Applicant from Mr. Dabreo's abuse, but found that treatment would be available to her in St. Vincent if she needed it.

Relevant Legislation

[22] The *Federal Courts Act*, RSC 1985, c F-7 provides:

18.1 (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	18.1 (4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas:
…	…
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

[23] The *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) provides:

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	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

opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself 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

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

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

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

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

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

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

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires

in or from that country…	de ce pays ou qui s'y trouvent ne le sont généralement pas,

Issues

[24] The issue arising in this case is whether the RPD's state protection determination is reasonable.

Standard of Review

[25] The RPD's findings of fact and conclusions on questions of mixed fact and law are to be assessed on the standard of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. As questions about the adequacy of state protection are questions of mixed fact and law, they are to be reviewed according to a standard of reasonableness: *Hinzman v Canada (Minister of Citizenship & Immigration)*, 2007 FCA 171, 282 DLR (4th) 413 at para 38.

Analysis

[26] The Applicant submits that the RPD's failure to reference three letters she provided from the President of the Saint Vincent and the Grenadines Human Rights Association (SVGHRA) renders the state protection determination unreasonable. The Applicant submits that these letters directly contradict the RPD's conclusions and that the RPD is obligated to address these letters and explain why it rejected them. The Applicant relies on this Court's judgment in *Cepeda-*

Gutierrez v Canada (Minister of Citizenship & Immigration), [1998] FCJ no 1425, 157 FTR 35 [*Cepeda-Gutierrez*].

[27] The Applicant further submits the RPD erred in considering her failure to approach the police in St. Vincent because the events that gave rise to her claim transpired in Canada. The Applicant notes that her claim is *sur place*, and that she could not have approached the authorities in St. Vincent because the events only began after she left the country.

[28] The Respondent submits *Cepeda-Gutierrez* does not apply where the contradictory evidence which is not discussed is general documentary evidence. The Respondent submits that the letters from the President of the SVGHRA were repeatedly referenced in counsel's submissions, and that the RPD stated that it had considered these submissions.

[29] The Respondent also submits that a refugee claim is concerned with prospective risk, even in *sur place* claims. The Respondent submits it was reasonable for the RPD to weigh the Applicant's assertions regarding her inability to approach the police in St. Vincent, and notes that a determination of inadequate state protection must be based on more than just a claimant's subjective belief. The Respondent submits the RPD clearly appreciated the *sur place* nature of the Applicant's claim and was actually addressing the Applicant's allegations that she would not be able to approach the police in St. Vincent and not her failure to have done so prior to seeking refugee protection. The Respondent emphasizes the RPD's use of the word "would" rather than the past tense.

[30] An applicant's sworn testimony is presumed to be credible unless there are reasons to doubt their truthfulness: *Maldonado v Canada (Minister of Employment & Immigration)*, [1980] 2 FC 302, 31 NR 34 (FCA) at para 5. In this case, the RPD takes no issue with the credibility of the Applicant's testimony. The allegations made by the Applicant, and the threats upon returning to St. Vincent, were presumed to be true. This requires the RPD to assess the adequacy and availability of state protection in the Applicant's particular circumstances. A general state protection analysis which does not take into account the Applicant's situation is insufficient: *Flores Alcazar v Canada (Minister of Citizenship & Immigration)*, 2011 FC 173, 97 Imm LR (3d) 21 at paras 21-22.

[31] In the oft-cited *Cepeda-Gutierrez*, Justice Evans (now of the Federal Court of Appeal) stated:

> [15] The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusions, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.
>
> [16] On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A

> statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.
>
> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its fining of fact.
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> [Emphasis added]

[32] There is no reference by the RPD to the letters from the SVGHRA President submitted by the Applicant. In the 2010 letter, the SVGHRA President expressly stated that there is no state protection for victims of domestic violence and there are no safe homes or shelters. This is clearly contrary to the conclusions arrived at by RPD. The RPD was not required to mention all the evidence before it. However, the RPD was required to address evidence which was contrary to its final conclusion. This requirement was discussed in *Peter v Canada (Minister of Citizenship & Immigration)*, 2011 FC 778, [2011] FCJ no 977 where J. O'Keefe stated:

> [45] There is a presumption that Board members have considered all of the evidence before them (see *Cepeda-Gutierrez v. Canada (Minister of Citizenship & Immigration)* (1998), 157

> F.T.R. 35 (Fed. T.D.)). The Board need not summarize all of the evidence in its decision so long as it takes into account evidence which may contradict its conclusion and its decision is within the range of reasonable outcomes (see *Florea v. Canada (Minister of Employment & Immigration)*, [1993] F.C.J. No. 598 (Fed. C.A.); *Rachewiski v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 244 (F.C.) at paragraph 17.)
>
> [Emphasis added]

[33] In this case, the RPD's blanket statement in the final paragraph of its decision stating that it had considered all of the evidence and counsel's submissions, without any discussion of the evidence submitted that points to the opposite conclusion is insufficient.

[34] The Respondent submits *Cepeda-Gutierrez* does not apply where the contradictory evidence which is not discussed is general documentary evidence; the Respondent relies on *Shen v Canada (Minister of Citizenship & Immigration)*, 2007 FC 1001, [2007] FCJ no 1301 [*Shen*], and *Quinatzin v Canada (Minister of Citizenship & Immigration)*, 2008 FC 937, [2008] FCJ no 1168 [*Quinatzin*].

[35] In *Shen*, Justice Pinard of this Court found *Cepeda-Gutierrez* distinguishable from the application before him. Justice Pinard found that the evidence in *Cepeda-Gutierrez* was particular to the applicant, whereas the evidence which the applicant in *Shen* claims was ignored was general documentary evidence: *Shen* at paras 4-6. In *Quinatzin*, Justice O'Keefe followed the reasoning in *Shen*. At paragraph 29, Justice O'Keefe stated:

> The applicant submitted that the Board erred in failing to expressly mention documentary evidence that directly contradicted its

> finding on the adequacy of state protection. In making this argument, the applicant relied on *Cepeda-Gutierrez*, above. In *Shen v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. 1301, Justice Pinard found that the Board's duty to expressly refer to evidence that contradicted its key findings as per *Cepeda-Gutierrez*, above did not apply where the evidence in question was general documentary evidence. I am satisfied that *Cepeda-Gutierrez*, above, can also be distinguished from the present case. While in that case the evidence in question was specific and personal to the applicant, in the present case, the evidence in question is general documentary evidence.

[36] After reviewing the evidence, I find this case is distinguishable from both *Shen and Quinatzin*. The evidence that the Applicant claims was ignored by the RPD in this case is not general documentary evidence. The letters were prepared specifically for this particular Applicant. While they do include evidence of the general country conditions, the letters also indicate that they are direct responses to questions and concerns regarding the Applicant's particular circumstances. For example, in the 2010 letter, the SVGHRA President organized her letter using several headings that indicate an awareness of the Applicant's particular circumstances. Some of the headings included are: "Domestic Violence and Rape in Saint Vincent and the Grenadines", Social Support Services within Saint Vincent and the Grenadines for single mothers with no family to live with", and "Assessment as to how client will fare if forced to return to Saint Vincent and the Grenadines". These headings demonstrate that the information contained in the letter is directed towards the particular circumstances of the Applicant, not generally.

[37] As the letters are not general documentary evidence, I choose to follow *Cepeda-Gutierrez* and *Peter*. The RPD erred by not addressing the evidence submitted by the Applicant that was contrary to the conclusions ultimately made by the RPD. The decision is therefore unreasonable.

[38] My finding that the RPD's decision is unreasonable is bolstered when the RPD's comments regarding the Applicant's failure to seek protection in St. Vincent are taken into consideration. The Applicant notes that her claim is *sur place*, and that she could not have approached the authorities in St. Vincent because the events which led to her claim happened after she left St. Vincent.

[39] According to the United Nations Handbook on Procedures and Criteria for Determining Refugee Status, a *sur place* refugee includes anyone "who was not a refugee when he left his country, but who becomes a refugee at a later date".

[40] In this case, the events that led to the Applicant's claim, set out above, all occurred after she came to Canada. Therefore, any discussion requiring the Applicant to avail herself to the state protection of St. Vincent would be in error. After reviewing the RPD's decision, it is unclear to me whether the RPD adequately considered the *sur place* nature of the Applicant's claim.

[41] In its decision, the RPD stated that it was required to consider what the Applicant did to avail herself to the protection of St. Vincent and to also consider the response of the police. The RPD further stated:

> A state cannot be considered to have failed to provide state protection when a claimant has failed to approach the state for protection. The adequacy of state protection cannot rest on the subjective fear of the claimant and a claimant cannot rebut the presumption of state protection in a functioning democracy by asserting only a subjective reluctance to engage the state. The onus is on the claimant to produce clear and convincing evidence that the police would not provide protection. In the absence of a compelling explanation, a failure to pursue state protection opportunities within the home state will usually be fatal to a refugee claim, at least where the state is a functioning democracy with the willingness and the apparatus necessary to provide a measure of protection to its citizens. The claimant stated in her PIF and at the hearing that Mr. Dabreo has two friends in the Saint Vincent Police Force and that this connection would make it impossible for her to get protection from the police. She did not provide any information regarding these two policemen, such as their ranks, names or where they worked. Considering that Saint Vincent has approximately 850 police officers, I do not find it plausible that friendship with two of these officers would enable an individual to break the law with impunity or that these two officers would risk their careers because of a friend's vengeful plans.
>
> [Emphasis added]

[42] The RPD's decision is troubling as it suggests either a lack of consideration of the Applicant's specific circumstances or confusion about the Applicant's claim. It is unclear whether the RPD appreciated and took into consideration the *sur place* nature of the Applicant's claim. While the RPD was correct to question the police response to a potential request for state protection, the RPD would be in error if it required this particular Applicant to have already pursued state protection.

Conclusion

[43] In making its decision, the RPD erred by failing to address evidence before it that was contrary to the conclusions made. It is also unclear whether the RPD appreciated and took into consideration the *sur place* nature of the Applicant's claim. I therefore find the RPD's decision to be unreasonable.

[44] The application for judicial review is granted and the matter is remitted back for reconsideration by a differently constituted panel.

[45] The parties have not proposed and I do not certify any question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is remitted back for reconsideration by a differently constituted panel.

2. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Katherine Ramsey	FOR THE APPLICANT
Bradley Bechard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Katherine Ramsey Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT