Federal Court  Cour fédérale

Date: 20100510

Docket: IMM-5280-09

Citation: 2010 FC 505

Ottawa, Ontario, May 10, 2010

PRESENT: The Honourable Frederick E. Gibson

BETWEEN:

VIOLET MAUD WALCOTT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

Introduction

[1] These reasons follow the hearing at Toronto on the 28TH of April, 2010, of an application for judicial review of a decision of the Refugee Protection Division (the "RPD") of the Immigration and Refugee Board, dated the 29th of September, 2009, wherein the RPD determined the Applicant, Violet Maud Walcott, not to be a Convention refugee and not to be a person in need of Convention refugee-like protection.

Background

[2] The Applicant is a female citizen of Jamaica, single and the mother of a now thirteen year old daughter who is a citizen of Canada. The Applicant is well educated. Before fleeing to Canada on a visitor's visa and with her daughter, she had been employed for some years as a teacher and later as manager of the Small Fry Nursery and Learning Center in Kingston, Jamaica. She also held other employments and appointments.

[3] In November, 2005 and February, 2006, the Applicant was, on the first occasion, assaulted following an automobile accident and on the second occasion, physically assaulted and had her handbag and car keys stolen. Both incidents were reported to the police who reacted without sympathy and provided the Applicant with no satisfaction.

[4] On the 28th of April, 2006, while the Applicant was in her office at her principal place of employment, she received a sealed envelope addressed to her and a wreath in the shape of a cross. The envelope and wreath had apparently been delivered to her place of employment in a white van and, coincidentally, a white van had been involved in the two earlier incidents. The sealed envelope contained the following brief message written in red ink:

> Violet, this is a special gift for you, Special wishes comes your way today with special gift. Your next gift will be six feet, 6 ft. 6 inches in Hanover very very soon !!!
>
> [underlining in the original]

The Applicant understood that such a note accompanied by such a wreath was a normal indicator in Jamaica when one is marked to be murdered.

[5] The police were called immediately. They attended at the Applicant's place of employment. They took the note and wreath to police premises and accompanied the Applicant and her daughter,

in the Applicant's car driven by a police officer, to the same police premises. The police took a statement from the Applicant. A female police officer advised the Applicant to dispose of the wreath and note in a garbage bin.

[6] Private security was arranged for the Applicant. A private security officer described the wreath and note as "crucial evidence" and instructed that they should not be destroyed. The Applicant and her daughter continued to rely on private security 24 hours a day. The Applicant ceased to drive her own car. Only a security guard drove for her and for her daughter.

[7] The Applicant diligently pursued her situation with the police. She received no satisfaction whatsoever.

[8] Unknown persons enquired after the Applicant at her principal place of work. When one of them was questioned, he gave false information to the questioner.

[9] The Applicant and her daughter lived in a home in a gated community. On the 11th of June, 2006, in the course of the night, the Applicant and her daughter heard strange noises from the roof of their home. They saw a man jump down from the roof. They shouted for help. The security guard who was in their home with them frightened the man away.

[10] Following the incident on the 11th of June, the Applicant determined to move away from her home. She concluded that nowhere would be safe for her in Jamaica since the note that she had received focused on the parish of Hanover where she had grown up and which is relatively remote

from Kingston. She concluded the person or persons threatening her knew all about her personal history and daily routine.

[11] On the 18th of June, 2006, the Applicant, who already had a Canadian visitor's visa and a passport, together with her daughter, fled to Canada. The Applicant claimed Convention refugee status some six months later, after applying for an extension of her visitor's visa but without waiting for a decision on that application.

The Decision Under Review

[12] The RPD accepted the Applicant's identity. It wrote:

> The claimant's [here the Applicant's] testimony was forthright and there was no attempt to embellish her claim. There were no contradictions or inconsistencies and the Board found her to be very credible.

It found the Applicant's explanations regarding the delay between the time of her arrival in Canada and the filing of her claim to be reasonable. It found her to be a victim of crime with no link between her fear and a Convention ground, those being race, religion, nationality, membership ina particular social group and political opinion, and thus summarily rejected her claim to Convention refugee status.

[13] The RPD then turned to an examination of the Applicant's claim to be a person in need of protection as described in section 97 of the *Immigration and Refugee Protection Act*[1].

---

1 S.C. 2001, c. 27.

[14] The RPD wrote:

> The claimant cannot identify her perpetrator. In fact, she does not know if there is more than one perpetrator. She thinks he may live on a certain street, however, is unsure of the motive. Her best guess is that it is an individual who is a part of a gang, who demanded a percentage of her income in February, 2006, several months before the incident which has lead [*sic*] to her fears. The claimant indicated to the Board that, in situations where business people are successful, gangs will extort money from these individuals. The claimant had refused to accede to the demands.
>
> Upon further questioning, the claimant indicated that she was in a job which could invoke envy or jealousy. She is passionate in her endeavours in the field of childhood education. According to the claimant, she has worked hard to reach her goals. When asked how the claimant's perpetrator/s would know of her success, she testified that this would be known through her school and other activities which she was involved in, sometimes appearing on television.
>
> The onus is on the claimant to provide evidence to the Board that she is being targeted and that in the particular circumstances of her case, the target is individualized.

In fact, the time-lag between the extortion demand in February of 2006 and the delivery of the death threat against the Applicant was only about two months.

[15] The RPD then went on to refer briefly to documentary evidence before it regarding the extensive operations of criminal gangs in Jamaica and the extraordinary level of violence in that country. It then briefly concluded:

> ... the risk that the claimant faces would be exempted pursuant to section 97(1)(b)(ii) of the IRPA as her fear of crime as a successful business person is a risk faced generally by others in Jamaica.

The relevant portions of subsection 97(1) of the *Immigration and Refugee Protection Act* read as follows:

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	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 :
...	…
(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 :
...	…
(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,
...	…

The Issues

[16] In the Memorandum of Fact and Law filed on behalf of the Applicant, the issues on this application for judicial review are identified in the following terms:

> First, did the Board Member err in failing to consider the Applicant's gender based risk? Secondly, did the Board Member err by ignoring facts and evidence before her and thereby failing to conduct an individualized risk assessment in accordance with section 97 of the *Immigration and Refugee Protection Act*; and finally, did the Board Member err by failing to adequately consider the grounds of persecution that may have given rise to a protection pursuant to section 96 of the *Immigration and Refugee Protection Act*?

[17] As with all applications for judicial review before this Court, the issue of standard of review arises here. I will deal with that issue first.

Analysis

Standard of Review

[18] Since the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*[2], it is trite to say that the standard of review on an application such as this where a pure error of law or a breach of natural justice or procedural fairness is alleged, is "correctness", but that where an error in the evaluation of the evidence properly before a tribunal such as the Refugee Protection Division, whether alone or in relation to a provision of law within the ambit of the Tribunal's expertise, it is "reasonableness" and that, where the reasonableness standard applies, the analysis will be concerned with:

> ... the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law ...
>
> (*Dunsmuir v. New Brunswick*, at para. 47)

Gender Based Risk

[19] In what follows, I will examine the RPD's summary dismissal of the Applicant's Convention refugee claim on the basis that it found no nexus between a Convention ground and the Applicant's claim and its reasoning in its brief section 97 analysis leading to its conclusion that the Applicant faced only a generalized risk in Jamaica and not an individualized risk.

---

2 [2008] 1 S.C.R. 190.

[20] Gender can, of course, be a very significant factor in identification of a "particular social group", it being long settled that women who are victims of gender violence can constitute a particular social group.

[21] While counsel for the Applicant acknowledged before the Court that the Applicant's claim was not pursued as a gender based claim, the evidence before the RPD was clear that the Applicant is a woman and the mother of a young daughter and that her fear was not only for herself but for her daughter.

[22] Counsel for the Applicant referred the Court to *Frejuste v. Canada (Minister of Citizenship and Immigration)*[3] where Justice O'Keefe wrote at paragraph 34 of his reasons:

> Given the applicant's framing of the issue in terms of her status as a returnee who happens to be female, rather than as a returnee and also as a woman in Haiti, it is perhaps not surprising that the Board did not undertake a separate analysis on gender-based grounds. Nonetheless, a separate analysis was warranted. As the documentary evidence reveals, the risk of sexual violence is one widely faced by women in Haiti, irrespective of whether or not they are returnees. ... [emphasis added]

Justice O'Keefe concludes at paragraph 37 of his reasons:

> I am of the opinion that the Board erred in failing to include in her reasons a gender-based analysis taking into account the evidence of violence directed at women in Haiti. ...

[23] The Tribunal Record here before the Court clearly reflects that a high level of violence is directed at women in Jamaica as well and further, that women are less likely to receive the protection of the law in Jamaica than are men. That being said, as noted by Justice O'Keefe in

---

[3] 2009 FC 586, June 4, 2009.

the first paragraph quoted from his reasons in *Frejuste* above, it is here also not surprising that the RPD did not undertake a separate analysis on gender-based grounds given the way the issues were here framed. Further, the Applicant here did not fear gender-based violence but rather death by reason of what she assumed might be her failure to submit to extortion which arose not out of her gender, but by reason of her successful career.

[24] Counsel for the Respondent referred the Court to an exchange between counsel for the Applicant and the presiding member of the RPD during closing argument at the hearing of the Applicant's refugee claim. Counsel acknowledged that the Applicant's claim was as a victim of crime which she urged was personalized rather than generalized but certainly not gender related.[4]

[25] In all of the circumstances of this matter I am satisfied that Justice O'Keefe's conclusion in *Frejuste* is entirely distinguishable and that the RPD, against a standard of review of reasonableness, made no reviewable error in its determination that there was no link between the Applicant's claim for protection and a Convention ground or in its failure to place special emphasis on the Applicant's gender in its section 97 analysis.

Ignoring Facts and Evidence and Thereby Failing to Conduct an Individualized Risk Assessment in Accordance with Section 97

[26] Counsel for the Applicant took me to *Pineda v. Canada (Minister of Citizenship and Immigration)*[5], where Justice de Montigny wrote at paragraph 15 of his reasons:

> ... It cannot be accepted, by implication at least, that the applicant had been threatened by a well-organized gang that was terrorizing the entire country, according to the documentary evidence, and in the same breath surmise that this same applicant would not be

---

4 See: Tribunal Record, pages 325, following line 40, 326, preceding line 10 and 327, following line 40.

5 2007 FC 365, April 4, 2007.

> exposed to a personalized risk if he were to return to El Salvador. It could very well be that the Maras Salvatruchas recruit from the general population; the fact remains that Mr. Pineda, if his testimony is to be believed, had been specifically targeted and was subjected to repeated threats and attacks. On that basis, he was subjected to a greater risk than the risk faced by the population in general.

[27] Justice de Montigny continued at paragraph 17 of his reasons:

> ... The applicant alleged that he had been personally targeted on more than one occasion, and over quite a long period of time. Unless we question the truthfulness of his story, which the RPD did not do, we have no doubt that he will be personally in danger if he were to return to El Salvador. In the particular circumstances of this matter, to find the opposite amounts to a patently unreasonable error.

[28] I am satisfied that Justice de Montigny's analysis can be distinguished. First, the Applicant here had no idea by whom, or by how many, she was threatened. She certainly made no claim that she was targeted by a "well-organized gang that was terrorizing the entire country". While she was personally targeted, and the evidence leaves no doubt about that, the evidence does not come close to establishing that she was personally targeted but rather, based on the Applicant's own assumptions, she was targeted as a member of remarkably ill-defined group, that being business people who had achieved a degree of success and notoriety that potentially exposed them to extortion, that were extorted and refused to succumb to the extortion. And even this was only surmised. It was unsupported by any documentary evidence.

[29] In the foregoing circumstances, I am satisfied that it was open to the RPD, against the standard of review of reasonableness, to conclude as it did that the Applicant's "... fear of crime as a successful business person is a risk faced generally by others in Jamaica." That group of

persons, “successful persons in Jamaica” does not meet the test for a “particular social group” under section 96 of the *Immigration and Refugee Protection Act*, nor does it meet the onus on the Applicant to provide evidence that her situation is individualized for the purposes of section 97 of the *Immigration and Refugee Protection Act.*

Conclusion

[30] For the foregoing reasons, and with regret, this application for judicial review must be dismissed.

Certification of a Question

[31] These Reasons will issue without an Order giving effect to the reasons, at this time. Counsel for the Applicant will have seven (7) days from the date these Reasons are issued to file and serve on the Respondent any submissions that she considers justified on certification of a question. Thereafter, counsel for the Respondent will have seven (7) days to file and serve on counsel for the Applicant submissions in response. Once again thereafter, counsel for the Applicant will have four (4) days to file and serve any reply submissions. Only thereafter will an Order issue giving effect to these Reasons and taking into account any submissions.

“Frederick E. Gibson”

Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5280-09
STYLE OF CAUSE:	VIOLET MAUD WALCOTT v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 28, 2010
REASONS FOR ORDER AND ORDER:	Gibson D. J.
DATED:	May 10, 2010

APPEARANCES:

Asiya Hirji	FOR THE APPLICANT
Suran Bhattacharyya	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MAMANN, SANDALUK Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
MYLES KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT