

Federal Court



Cour fédérale

Date: 20120227

Docket: IMM-5626-11

Citation: 2012 FC 267

Ottawa, Ontario, February 27, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

**RAGHUJA RANJANI MALLAMPALLY
SAM MANOHAR EMBETI**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated August 5, 2011. The Board found that the Applicants were not Convention refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] For the reasons set out below, the application is dismissed.

I. Facts

[3] The Principal Applicant, Raghuja Ranjani Mallampally, and her adult son, Sam Manohar Embeti (or the Associate Applicant) are citizens of St. Vincent and the Grenadines (St. Vincent). Having Indian nationality and race, they form part of a small minority on the island. The Principal Applicant was also the only single female doctor living in St. Vincent and was often referred to by a racially derogatory name.

[4] She nonetheless became an expert witness and testified against the accused in several rape and murder trials. As a result, she started receiving verbal threats from convicted criminals, sometimes in person but mostly by telephone. She also experienced break-ins at her home.

[5] The Principal Applicant and Associate Applicant arrived in Canada on December 6, 2009 and October 4, 2009 respectively. The Principal Applicant claimed her decision to leave was precipitated by an incident involving the killing of her dog and leaving of a knife outside the home.

[6] Fearful of having to return to St. Vincent because of the previous threats and incidents, they brought claims for refugee protection on April 21, 2010 (by the Principal Applicant) and June 9, 2010 (by the Associate Applicant).

II. Decision Under Review

[7] At the outset, the Board faulted the Applicants for not providing a satisfactory explanation as to why they delayed in making refugee claims, particularly since as a medical doctor the Principal Applicant has a relatively high degree of sophistication compared to other refugee claimants.

[8] While the Board accepted that the Applicants were subject to some degree of discrimination and harassment in St. Vincent over the years, it was not satisfied that, on a balance of probabilities, the Applicants left St. Vincent, or chose to stay and claim refugee status in Canada, because of a well-founded fear of persecution or a risk to their lives, a risk of cruel and unusual treatment or punishment, or a danger of torture in St. Vincent.

[9] The Applicants had not provided credible evidence that the critical incident, involving the killing of their dog and a knife being left behind as a warning, actually occurred. It was not articulated consistently and there was no police corroboration of the presence of the knife.

[10] The Board acknowledged that the Applicants might be experiencing some or all of the symptoms set out by the psychologist but found it had not been established that the material elements of the claims caused or contributed to those symptoms or that any historic mistreatment they sustained in St. Vincent, had a substantially prejudicial effect, morally or physically, that would make it unreasonable for them to return to St. Vincent.

III. Issues

[11] This application raises the following issues:

- (a) Did the Board err in its credibility findings?
- (b) Did the Board err in finding that the harm suffered by the Applicants did not meet the criteria of serious and persistent harm or rise to the level of persecution?
- (c) Did the Board err by not conducting an analysis under section 96?
- (d) Did the Board err by determining that the Principal Applicant's delay in claiming refugee protection affected her credibility?
- (e) Did the Board err in failing to consider the issue of state protection?

IV. Standard of Review

[12] Questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 51). In particular, credibility findings are reviewed according to this standard (see *Aguirre v Canada (Minister of Citizenship and Immigration)*, 2008 FC 571, [2008] FCJ no 732 at para 14).

[13] Reasonableness refers to “the existence of justification, transparency and intelligibility” as well as “whether the decision falls with the range of possible, acceptable outcomes defensible in respect of the facts and law” (*Dunsmuir*, above at para 47).

V. Analysis

A. *Did the Board Err in its Credibility Findings?*

[14] The Applicants contest the Board’s adverse credibility findings for a failure to properly consider the evidence before it and provide reasons that explain why it preferred certain pieces of evidence over others.

[15] More specifically, they insist the Board ignored the preponderance of evidence regarding the profile of the Principal Applicant as a single, foreign-born doctor who testified in criminal court and that led to her family being targeted. Instead, the Board conducted a microscopic analysis and focused on the statement of the Associate Applicant at the Port of Entry (POE) suggesting that the knife was left in the backyard when he was not physically present in St. Vincent at the time. The sworn testimony of the Principal Applicant regarding the knife was rejected in favour of the police report, despite her efforts to ensure that accurate evidence could be provided to the Board.

[16] By contrast, the Respondent maintains that the Applicants are asking the Court to reweigh the evidence. Two clear credibility findings were made regarding the police report and Associate

Applicant's erroneous recitation of the location of the knife. The reasons identify the basis on which the decision was reached as the Board accepted the allegations of discrimination and harassment but found that in conjunction with the delay and credibility issues, the persecution claim was not established.

[17] Where the Board makes a negative credibility finding, it must provide reasons in "clear and unmistakable terms" (see *Hilo v Canada (Minister of Employment and Immigration)* (1991), 15 Imm LR (2d) 199, [1991] FCJ no 228 (FCA)). The Board met this requirement in its assessment of the Applicants' claims by citing an inconsistency regarding the location of the knife and failure to provide corroboration through the police report. Since the Principal Applicant considered this a critical incident in precipitating her decision to come to Canada, it was not unreasonable for the Board to place the emphasis it did on this issue.

[18] Contrary to the Applicants' submissions, the Board provided a specific evidentiary basis for its finding, considered credibility in light of the totality of evidence before it (see *Ahangaran v Canada (Minister of Citizenship and Immigration)* (1999), 168 FTR 315, [1999] FCJ no 772 at para 5), and addressed contradictory evidence (see *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, [2008] FCJ no 625 at para 28).

[19] While the Board highlighted inconsistencies regarding the incident involving the knife and dog, it also acknowledged that the Applicants experienced some degree of discrimination and harassment over the years in St. Vincent and they might experience some or all of the symptoms as

set out by the psychologist. Albeit rather brief in its assessment, the Board recognizes the Applicants' personal and professional circumstances.

[20] The reasons provided for the adverse credibility findings are sufficient to allow this Court "to understand why the tribunal made its decision" and determine that the conclusion is within the range of acceptable outcomes (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] SCJ 62 at para 16).

B. *Did the Board Err in Finding that the Harm Suffered by the Applicants did not Meet the Criteria of Serious and Persistent Harm or Rise to the Level of Persecution?*

[21] The Applicants submit that the Board was dismissive of their evidence of racial and other forms of persecution. Without proper analysis, the Board disposed of the issue simply by stating that it did not amount to serious harm.

[22] The Respondent maintains that the Board was not dismissive of the treatment suffered by the Applicant but found that it did not cumulatively rise to the level of persecution. This demonstrates that it was aware of the relevant legal tests.

[23] The Applicants have highlighted the recent decision of *Warner v Canada (Minister of Citizenship and Immigration)*, 2011 FC 363, [2011] FCJ no 468 at para 7 where Justice Russel Zinn canvassed determinations on the meaning of persecution. He makes reference to a definition first considered in *Rajudeen v Canada (Minister of Employment and Immigration)* (1984), 55 NR 129, [1984] FCJ no 601 that "persecution" is "[t]o harass or afflict with repeated acts of cruelty or

annoyance; to afflict persistently.” Justice Zinn also notes that *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, [1993] 2 SCJ 74 and *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593, [1995] SCJ no 78 generally define persecution as a serious interference with a basic human right.

[24] In *Sagharichi v Canada (Minister of Employment and Immigration)* (1993), 182 NR 398, [1993] FCJ no 796, the Federal Court of Appeal determined that incidents of discrimination in that case were “not serious or systematic enough to be characterized as persecution.” At paragraph 3, the Court stressed:

[3] It is true that the dividing line between persecution and discrimination or harassment is difficult to establish, the more so since, in the refugee law context, it has been found that discrimination may very well be seen as amounting to persecution. It is true also that the identification of persecution behind incidents of discrimination or harassment is not purely a question of fact but a mixed question of law and fact, legal concepts being involved. It remains, however, that, in all cases, it is for the Board to draw the conclusion in a particular factual context by proceeding with a careful analysis of the evidence adduced and a proper balancing of the various elements contained therein, and the intervention of this Court is not warranted unless the conclusion reached appears to be capricious or unreasonable.

[25] Based on this passage in *Sagharichi*, above, the Applicants emphasize that discrimination and harassment can amount to persecution and therefore their evidence should not have been dismissed quite so easily.

[26] While I acknowledge that the Board could have more explicitly stated the legal test being employed, the conclusion reached is reasonable and in accordance with *Sagharichi*, above.

[27] The Board recognized that the Applicants had been “subject to some degree of discrimination and harassment”, but still found that it had not been “established on the balance of probabilities that these forms of mistreatment and abuse, even when viewed cumulatively, would meet the criteria of serious and persistent harm or persecution.” The discrimination and harassment experienced was simply not serious or persistent enough to amount to persecution, either singularly or cumulatively. The Board considered the factual context and conducted a balancing of various elements of the evidence that was neither capricious nor unreasonable.

[28] The Board’s conclusion is brief but as required by *Newfoundland and Labrador Nurses’ Union*, above, makes clear why the decision was made. This Court must bear in mind the quoted passage referred to in that decision that states “[r]easons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties’ submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive” (para 18).

[29] I therefore find that the Board reasonably concluded the treatment the Applicants experienced did not amount to persecution.

C. *Did the Board Err by not Conducting an Analysis Under Section 96?*

[30] For similar reasons, the Applicants insist that the Board is silent on any principled analysis of the Applicants’ claims under section 96. As individuals of Indian descent, they are part of a small minority in St. Vincent and have been subjected to racial discrimination. The Principal

Applicant's status as the only single female doctor on the island further exacerbates their feelings of vulnerability and fear.

[31] However, I agree with the Respondent that there is nothing to suggest that the Board did not consider the basis of the Applicants' claim under section 96. At paragraph 2 of its reasons, the Board acknowledges the Principal Applicant's professional, gender and personal profile as a "wealthy Indian woman living alone and having provided expert evidence for the prosecution in other criminal cases as a medical doctor."

[32] As noted above, the Board simply found that the discrimination experienced in St. Vincent did not reach the level required to advance a claim of persecution under section 96. It was reasonable for the Board to weigh the evidence before it in this manner.

D. *Did the Board Err by Determining that the Principal Applicant's Delay in Claiming Refugee Protection Affected her Credibility?*

[33] The Principal Applicant takes issue with the Board's finding that the delay in making a claim negatively affected her credibility. She explains that having entered the country as a visitor, she initiated a refugee claim before the six months expired. During her time in Canada, she continued to worry about returning to St. Vincent and attempted to inform herself of the various options available to foreign nationals who wished to immigrate. Moreover, the Board erroneously suggested that as a medical doctor she was more sophisticated and should have known about the refugee process, when she had a different image in her mind of who would be considered a refugee.

[34] However, I am satisfied by the submissions of the Respondent that the Board's assessment of the Principal Applicant's delay in making a claim was reasonable.

[35] In *Huerta v Canada (Minister of Employment and Immigration)* (1993), 157 NR 225, [1993] FCJ no 271, the Federal Court of Appeal determined that while a "delay in making a claim to refugee status is not a decisive factor in itself", it represents "a relevant element which the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant."

[36] The Board considered the Principal Applicant's explanation for her delay but found this was "not satisfactory." Although in the country legally as a visitor at the time, it is reasonable to expect that the Principal Applicant would make a claim at the first possible opportunity and to determine that a failure to do so further undermines her subjective fear and credibility (see *Jeune v Canada (Minister of Citizenship and Immigration)*, 2009 FC 835, [2009] FCJ no 965 at para 15). As the Respondent points out, the fact that she did not attempt to inform herself about the options available until her visitor's visa was about to expire supports the Board's conclusion.

[37] In addition, the Board's reference to the Principal Applicant's sophistication as a medical doctor in not pursuing a refugee claim does not amount to an error. The Principal Applicant may have preferred that the Board give greater weight to her argument that she had a different image of refugees when initially learning about her options, it does not necessarily follow that the Board's approach is unreasonable. As the Respondent makes clear, it is within the range of possible,

acceptable outcomes to expect that an educated and sophisticated individual who feared for her life to have some idea what her plans would be on arrival in Canada.

[38] As a consequence, the Board did not commit any reviewable error in considering the delay in making a refugee claim and its impact on the Principal Applicant's credibility.

E. *Did the Board Err in Failing to Consider the Issue of State Protection?*

[39] As their final argument, the Applicants dispute the Board's lack of analysis on state protection, given extensive evidence provided in relation to state protection, including admissions by the police to the Principal Applicant. According to the Respondent, however, this argument does not account for the Board's finding that the Applicant lacked a subjective fear of persecution.

[40] Having found issues associated with the Applicants' credibility based on a critical incident and that any discrimination or harassment experienced did not amount to persecution; I agree that it was unnecessary for the Board to analyze the issue of state protection and an error was not committed by failing to do so.

VI. Conclusion

[41] However briefly articulated, the Board's credibility findings, determination that the discrimination and harassment experienced did not rise to the level of persecution and analysis

under section 96 were reasonable. Given these conclusions, the Board was also not required to conduct an analysis of state protection.

[42] As a result, I dismiss this application for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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