Federal Court  Cour fédérale

Date: 20120430

Docket: IMM-5171-11

Citation: 2012 FC 494

Ottawa, Ontario, April 30, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

ANNETTA PROFITT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application by Annetta Profitt (Ms. Profitt), made pursuant to subsection 72(1) of the *Immigration and refugee Protection Act*, SC 2001 [*IRPA*], for judicial review of the decision of the Immigration and Refugee Board (the Board) dated July 6, 2011, whereby the Board concluded

that the Applicant was neither a Convention refugee under section 96 nor a person in need of protection under sections 97 and 98 of the *IRPA*.

[2] For the following reasons, this application for judicial review is allowed.

II. Facts

[3] Ms. Profitt is a 49-year-old citizen of Guyana. At an early age, Ms Profitt was adopted by Ms. Sheila Conway.

[4] Ms. Profitt is the mother of three children, Cleveland Gray, Tamica Blair and David Blair.

Several years of abuse

[5] In 1979, Ms. Profitt met Alex Beckles at a party; eventually, they commenced a relationship. Mr. Beckles is a policeman. In 1980, Ms. Profitt moved in with him and, after a year in their relationship, realized that Mr. Beckels was a very aggressive man. She suffered verbal, physical and sexual abuse at the hands of Mr. Beckles for several years. He often forced her to have sexual intercourse with his colleagues or mistresses. If Ms. Profitt protested or sought protection at a friend's house, he would find her and mistreat her.

[6] Mr. Beckles forcibly confined Ms. Profitt for several months in 2001 and physically and sexually abused her while forcing Ms. Profitt's younger son, David, to watch. Mr. Beckles also

sexually abused David on occasions. Ms. Profitt unsuccessfully attempted to file several complaints with the police.

Permanent resident status in the US and criminal convictions

[7] In 1988, Ms. Profitt married Horriss Harding and acquired permanent resident status in the United States. However, she lost her status after having been convicted of three criminal charges. She was convicted of Grand larceny in the 3rd degree in 1992 and sentenced to a period of probation of 3 years. In 1995, she was convicted for attempted grand larceny and was sentenced to 1 to 3 years of imprisonment but served 6 months in a boot-camp instead. In 2006, Ms. Profitt was charged with possession of forged instruments but was convicted of falsifying business records. She was imprisoned for almost 2 years and deported subsequently to Guyana.

Arrival in Canada

[8] Ms. Profitt was mistreated by Mr. Beckels for approximately 6 months in 2008. She eventually disclosed her mistreatment at the hands of Mr. Beckels to her parents. Ms. Profitt's father obtained a false passport for her and bought a plane ticket to Canada for her. She arrived in Toronto on January 28, 2009, and immediately made her refugee claim.

Impugned decision

[9] The Board concluded that Ms. Profitt was neither a Convention refugee nor a person in need of protection and rejected her application. It found that state protection in Guyana would reasonably be forthcoming and that law enforcement authorities would make serious efforts to protect Ms. Profitt from her ex common-law partner if she returned to Guyana. It also concluded there were serious reasons to consider that Ms. Profitt had committed a serious non-political crime within the meaning of Article 1F(*b*) of the *Convention Relating to the Status of Refugees* [*Convention*] during her stay in the US.

III. Legislation

[10] The applicable legislation is appended to this judgment.

IV. Issues and standard of review

A. Issues

[11] The issues raised by this application are as follows:

1. ***Did the Board provide sufficient reasons for its exclusion of Ms. Profitt under section 98 of the IRPA?***

2. Did the Board err in excluding Ms. Profitt from refugee protection by concluding that she had committed a serious non-political crimes under Article 1F(b) of the Convention?

3. Did the Board err in its assessment of the adequacy of state protection in Guyana?

B. Standard of review

[12] The determination of a serious non-political crime is a question of law and the appropriate standard of review is that of correctness (see *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 50 and 60 [*Dunsmuir*]; *Canada* (*Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 44) while the application of Article 1F(*b*) of the Convention attracts a standard of reasonableness (*Dunsmuir* and *Ivanov v Canada* (*Minister of Citizenship and Immigration)*, 2004 FC 1210 at para 6).

[13] The adequacy of state protection is a mixed question of fact and law and is reviewable on a standard of reasonableness (see *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 [*Carillo*]; *Ventura v Canada (Minister of Citizenship and Immigration)*, 2012 FC 10 at para 29).

V. Parties' submissions

A. Ms. Profitt's submissions

[14] Ms. Profitt argues that the Board failed to provide appropriate reasons as to why it preferred the Respondent's submissions regarding the exclusion under section 98 of the *IRPA* and Article 1F*(b)* of the *Convention*. The Board wrote in paragraphs 19 and 20 of its decision:

> [19] Based on the evidence and the text of the parties' written submissions, I find that I prefer the Minister's case. Minister's counsel has persuaded me, on balance of probabilities, that there are serious reasons to consider that the claimant has committed a "serious non-political crime".
>
> [20]Reliable evidence provided by the Minister establishes serious reasons to consider that the claimant committed grand larceny in the U.S. in 1991, attempted grand larceny in the U.S. in 1995, and falsifying business records in the U.S. in 2006. Moreover, Minister's counsel has persuaded me that the claimant's 2006 falsify business records crime in the U.S. falls within the definition of "serious criminality" in the *IRPA*, and is therefore sufficient in itself to trigger a rebuttable presumption that the claimant has committed a crime that falls within the meaning of "serious non-political crime" under Article 1F (*b*) of the Convention.

[15] Ms. Profitt submits that the brief analysis of her mental health fails to appreciate the significance of this evidence and its relation to the contextual analysis required by *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*]. In sum, she argues that the Board did not provide adequate reasons nor did it properly apply the criteria propounded by the Federal Court of Appeal in *Jayasekara*.

[16] Furthermore, Ms. Profitt submits that she was found guilty of minor class felonies. The Board did not correctly determine the gravity of Ms. Profitt's convictions and failed to properly identify the equivalent Canadian offences and conduct a detailed examination thereof, as required by *Jayasekara*. Article 1F(*b*) of the *Convention* should only be applied in cases involving serious crimes. Given the purpose of the *IRPA* and the nature of her crimes, Ms. Profitt argues that she should be entitled to claim refugee protection in Canada.

[17] Ms. Profitt submits that the Board made three errors with respect to its assessment of the adequacy of state protection in Guyana.

[18] First, it is submitted that the Board applied the wrong test as to the issue of state protection. In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 49 [*Ward*], the Supreme Court of Canada stated that "only in situations in which state protection "might reasonably [be] forthcoming", will the claimant's failure to approach the state for protection defeat his claim". Mere willingness to provide protection on the part of the state does not satisfy that requirement.

[19] Ms. Profitt reminds us that "in order for state protection to be adequate, it must be effective at an operational level" (see *Level v Canada (Minister of Citizenship and Immigration)*, 2010 FC 251 at para 32; *Mendoza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 119 at para 33; *Wisdom Hall v Canada (Minister of Citizenship and Immigration)*, 2008 FC 685 at paras 8-9; *Gilvaja v Canada (Minister of Citizenship and Immigration)*, 2009 FC 598 at paras 39-40; *Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359 at para 27).

[20] In the present case, the Board simply made a recitation of the legislation and existing resources in Guyana without a qualitative assessment of state protection.

[21] Secondly Ms. Profitt submits that the Board erroneously assessed the documentary evidence regarding domestic violence in Guyana. Clear and convincing evidence can rebut a presumption of state protection (see *Ward* cited above). The documentary evidence before the Board showed the inadequacy of state protection afforded to victims of domestic violence in Guyana.

[22] In *Persaud v Canada (Minister of Citizenship and Immigration)*, 2010 FC 850 and *E.B. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 111, the Court determined that state protection in Guyana was simply not available or inadequate.

[23] Ms. Profitt also submits that the Board failed to consider her personal circumstances. It ignored her previous attempts to seek state protection and her exhaustive medical history. It also ignored the fact that Ms. Profitt's abuser was, and still is, a police officer. This failure to consider an applicant's situation is "even more serious given that the Board did not make any negative credibility assessments" (see *Farias v Canada (Minister of Citizenship and Immigration)*, 2008 FC 578 at para 29) as alleged.

B. Respondent's submissions

[24] According to the Respondent, in reaching its conclusion, the Board considered both the Respondent's and Ms. Profitt's submissions. The Board reasonably assigned more weight to the

Respondent's argument (see *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 11).

[25] The Respondent further argues that despite Ms. Profitt's submission that she was convicted of minor class felonies, she was actually charged with five class D felonies. Since she entered a guilty plea on all three occasions, she was convicted of lesser serious crimes. However, as Ms. Profitt was charged with possession of forged instruments, the Board had serious reasons to believe that she had committed a crime equivalent to the uttering of forged documents.

[26] The Respondent also submits that there were serious reasons to believe that Ms. Profitt had committed a serious non-political crime. The Board considered all the mitigating and aggravating factors, as required under *Jayasekara*. The Board reasonably decided that Ms. Profitt was excluded from refugee protection under Article 1F(*b*) of the *Convention*.

[27] The Respondent further submits that the Board considered all the evidence adduced by Ms. Profitt and determined that she had failed to rebut the presumption of state protection in Guyana with clear and convincing evidence (see *Ward*, cited above; *Canada (Minister of Employment and Immigration) v Villafranca* (FCA), 99 DLR (4^{th}) 334; *Carillo*, cited above). This test is not met merely because an applicant is able to demonstrate that state cannot provide perfect protection to its citizens. Rather, the proper test is whether the protection is adequate.

[28] The Board, according to the Respondent, is also presumed to have weighed all the evidence and is not required to mention or refer to particular passages from adverse documentary evidence

(see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at paras 16-17). The Respondent submits that, in this case, the Board weighed all the evidence and reasonably determined that state protection is adequate in Guyana.

VI. Analysis

1. Did the Board provide sufficient reasons for its exclusion of Ms. Profitt under section 98 of the IRPA?

[29] Ms. Profitt argues that the Board failed to provide sufficient reasons explaining why she was excluded from seeking refugee protection in Canada under section 98 of *IRPA*.

[30] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 22, the Supreme Court of Canada held that "[i]t is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there are reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis". In *Dunsmuir*, cited above, at para 47, the Supreme Court wrote these often quoted comments : "in judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". Sufficient reasons must be given to enable the reviewing Court to determine whether or not a decision-maker erred (see *Via rail Canada Inc v Lemonde*,

[2000] FCJ No 1685, [2001] 2 FC 25, at para 19). It is the Court's duty to review the decision and determine whether or not it falls within the range of possible and acceptable outcomes.

[31] The Board did not provide adequate reasons explaining why Ms. Profitt was excluded from refugee protection. The Board only stated that "Minister's counsel has persuaded me, on a balance of probabilities, that there are serious reasons to consider that the claimant has committed a "serious non-political crime"" (see para 19 of the Board's decision). It also mentioned that "Minister's counsel has persuaded me that the claimant's 2006 falsifying business records crime in the U.S. falls within the definition of "serious criminality" in the *IRPA*, and is therefore sufficient in itself to trigger a rebuttable presumption that the claimant has committed a crime that falls within the meaning of "serious non-political crime" under Article 1F(b) of the Convention" (see para 20 of the Board's decision).

[32] While some reasons were provided by the Board, the Court concludes that they are insufficient in that the Board failed to conduct the proper analysis and apply the appropriate test, as required by the Federal Court of Appeal in *Jayasekara*, cited above, at para 44, or properly weigh the mitigating evidence adduced by Ms. Profitt.

2. Did the Board err in excluding Ms. Profitt from refugee protection by concluding that she had committed serious non-political crimes under Article 1F(b) of the Convention?

[33] The adequacy of reasons is fundamental in determining whether a decision-maker has properly applied the jurisprudence or the law to the facts of the case. In this instance, the Board did not apply the required criteria in order to determine if Ms. Profitt's crimes were serious enough to attract Article 1F(*b*) of the *Convention*.

[34] In paragraph 44 of *Jayasekara*, cited above, the Federal Court of Appeal wrote: "I believe there is a consensus among the courts that the interpretation of the exclusion clause in Article 1F(*b*) of the *Convention*, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction". Even though the Board considered Ms. Profitt's past abuse as a mitigating factor, it still concluded that is was not sufficient to rebut the serious non-political crime presumption. However, no evaluation of the elements of the crime, the mode of prosecution and the penalty prescribed were made by the Board. It is just not enough to make plain remarks on the criminal history of an Applicant.

[35] Furthermore, the Board failed to assess the circumstances surrounding the crime. Ms. Profitt had suffered years of physical, sexual and mental abuse. Several medical reports were adduced before the Board to demonstrate Ms. Profitt's medical condition and its relation to years of exploitation and mistreatment. Dr. Celeste Thirlwell evaluated Ms. Profitt and found that she "developed many symptoms which are consistent with Battered Woman Syndrome (BWS), Post Traumatic Stress Disorder (PTSD) and Dissociative Identity Disorder (DID)" (see page 73 of the Applicant's Record, Volume I). Another report by Dr. Linda Weber reveals that "Ms. Profitt suffers from Post Traumatic Stress Disorder and Major Depressive Episodes. From August 2009-May 2010

she was seen 9 times by Dr. Meador with concerns of worsening suicidal ideation, nightmares, flashbacks, hypervigilance and anxiety. Dr. Meador was very concerned about her health and well-being and arranged an urgent psychiatric consultation with Dr. Gotlib" (see page 78 of the Applicant's record, Volume I). Dr. Les Richmond performed a complete physical assessment of Ms. Profitt and concluded that she had sustained several injuries consistent with her history of physical abuse.

[36] According to Dr. Thirlwell's evaluation, "the crimes she committed in the United States were not premeditated or meant to cause harm. They were examples of her maladaptive way of seeking help" (see page 77 of the Applicant's Record, Volume I). Even though Ms. Profitt committed crimes in the US, the above factors were not properly assessed or were simply ignored by the Board. Failure to follow the *Jayasekara* doctrine gives rise to a reviewable error.

[37] The Court having concluded in favour of Ms. Profitt on the first two issues there is no need to proceed to an analysis with respect to the issue of adequacy of state protection in Guyana.

VII. Conclusion

[38] The Board has failed to provide give adequate reasons as to why it concluded that Ms. Profitt was excluded under Article 1F(*b*) of the *Convention*, and to follow the *Jayasekara* doctrine. Therefore, this application for judicial review is allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is allowed; and

2. There is no question of general importance to certify.

"André F.J. Scott"

Judge

Annex

Sections 96, 97 and 98 of the *Immigration and refugee Protection Act,* SC 2001 [*IRPA*] read as follows:

Convention refugee

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 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.

Person in need of protection

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 in or from that country,

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

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

Person in need of protection

(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.

Exclusion — Refugee Convention

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

Article 1F(*b*) of the *Convention relating to the Status of Refugees* reads as follows:

1F(*b*) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5171-11
STYLE OF CAUSE:	ANNETTA PROFITT v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 20, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	SCOTT J.
DATED:	April 30, 2012

APPEARANCES:

Laura Brittain and Alyssa Manning	FOR THE APPLICANT
Veronica Cham	FOR THE RESPONDENT

SOLICITORS OF RECORD:

LAURA BRITTAIN, BARRISTER & SOLICITOR Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT