

Federal Court



Cour fédérale

**Date: 20121010**

**Docket: IMM-5427-11**

**Citation: 2012 FC 1181**

**Ottawa, Ontario, October 10, 2012**

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

**BETWEEN:**

**ASRIEL ASHER BELLE  
DORIEL NELSON  
BRENDA LAVERNE NELSON-BELLE**

**Applicants**

**and**

**MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The Applicants apply for judicial review of the July 26, 2011 decision of the Immigration and Refugee Board, Refugee Protection Division (RPD) in which the RPD determined that the Applicants are not Convention Refugees and not persons in need of protection.

[2] The Applicants are Brenda Laverne Nelson-Belle (Principal Applicant), Asriel Asher Belle (the male Applicant) and Doriel Nelson (the minor female Applicant). All three are citizens of Saint Vincent and the Grenadines. The male Applicant is also a citizen of Grenada.

[3] In April, 2007, the Principal Applicant's non-accompanying son Jariel was shot by a Bee Hive Crew gang member following an argument when Jariel refused to join the gang. When Jariel could not be located by the gang members, the Applicant family members were targeted. The male Applicant and his cousin were assaulted by gang members. The cousin's brother was subsequently murdered. After the assault, the Principal Applicant took the male Applicant to Barbados to hide. While they were in Barbados, the minor female Applicant was sexually assaulted by one of the gang members; she was thirteen at the time. After the sexual assault was reported to the police, the minor Applicant was threatened with rape and murder if the charge was pursued.

[4] After several incidents marked by gang members efforts to locate the male Applicant, the Applicants came to Canada, arriving separately during the period December 2009 to March 2010. Their refugee claims were joined and heard on June 7, 2011. The RPD refused the Applicants' refugee claims on July 26, 2011.

[5] The RPD focused its analysis on whether the harm the Applicants feared was related to a Convention ground and whether the Applicants had rebutted the presumption of state protection.

[6] The standard of review for decisions of the RPD is reasonableness. *Dunsmuir v New Brunswick* 2008 SCC 9, *Morales Gonzalez v Canada (Minister of Citizenship & Immigration)*, 2010 FC 991 at para 8 Determinations of state protection are matters of fact and mixed fact and law which are also reviewed on a reasonableness standard. *Hinzman v Canada (Minister of Citizenship & Immigration)*, 2007 FCA 171, 282 DLR (4th) 413 at para 38.

[7] The determinative issues are whether the RPD reasonably concluded the section 96 harm feared by the minor female Applicant was not founded on a Convention ground and whether the section 97(1) risk faced by the Applicants was addressed in an individualized inquiry.

[8] The RPD held that the Principal Applicant and the male Applicant's fears of the Bee Hive Crew were clearly not related to a Convention refugee ground. The RPD also found that the sexual assault upon the minor Applicant had no domestic or relationship aspect to it; it was not domestic violence. The RPD considered the sexual assault as a crime perpetrated pursuant to criminal gang retaliation, and as a form of harm, it was distinctly separate from and unrelated to gender violence occurring within the context of domestic relationships. The RPD held the minor Applicant's fear, under a Convention refugee analysis, was the same as that of the other two Applicants and it therefore had no nexus to the Convention refugee definitions.

[9] In the alternative, the RPD considered whether adequate state protection would be available in Saint Vincent and Grenada.

[10] The RPD again considered the prospective harm faced by the minor female Applicant separate from and unrelated to gender violence occurring within domestic relationships. The RPD held that state protection for her must be analyzed in exactly the same way as for the other two Applicants, that is, based on the police response to gang crime and not based on the police response to domestic violence evidence.

[11] The RPD did refer to the Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender Related persecution. However, I am of the view the RPD did not properly consider the Guidelines. The Supreme Court of Canada has stated that "sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women" *R v Osolin* [1993] 4 SCR 595 at 669.

[12] In *Spencer v Canada (Minister of Citizenship & Immigration)*, 2011 FC 397 Justice Campbell approved of the applicants' submission that:

In *Canada (Attorney General) v. Ward*, the Supreme Court of Canada explicitly recognized that gender can provide the basis for a "social group." Since the principal applicant claimed that she feared that as a woman she would be targeted for rape in Jamaica, the Board is expected to have considered the evidence with respect to her membership in a particular social group, namely women in Jamaica or more specifically, Jamaican women targeted for rape by gang members. The failure to evaluate the evidence in this way constitutes a reviewable error (*Canada (AG) v. Ward*, [1993] 2 S.C.R. 689 at para 70; *Bastien supra* at para 12; *Dezameau v. Canada (MCI)*, 2010 FC 559 at para 19).

The same may be said of the RPD's assessment of the minor female Applicant's claim.

[13] The minor Applicant is a female who was targeted for retaliation by the Bee Hive gang members. Females in Saint Vincent and the Grenadines are more vulnerable to sexual violence. In the Response to Information Request VCT102939.E (RIR) the writers noted the prevalence of sexual violence in Saint Vincent and the Grenadines indicate a recorded rate of 112 incidents of rape per 100,000 people as compared to the average rate of 15 recorded incidents of rape per 100,000 among all 102 countries surveyed.

[14] The RPD failed to consider this evidence in deciding the minor female's claim could not succeed on a Convention ground on the basis of being a member of a female group vulnerable to sexual assault by criminal gang members.

[15] I consider the RPD to have erred in concluding the sexual assault inflicted on the 13 year old female Applicant was not gender violence simply because it was retaliation by a gang member not inflicted within the context of a domestic relationship.

[16] The RPD also decided the Applicants had failed to rebut the presumption of state protection.

[17] Absent a situation of complete breakdown of state apparatus, it is assumed the state is capable of protecting its citizens. To rebut the presumption, an applicant must produce clear and convincing evidence of a state's ability to protect. *Hinzman* at paras 43-44.

[18] The Respondent submits the principal Applicant, the mother, withdrew the complaint of sexual assault on the 13 year old minor Applicant, a factor that weighs against the Applicants' claim of inadequate state protection. While the RPD makes no reference to this withdrawal, the RPD did accept the minor female Applicant suffered psychological trauma. The psychological report supports that finding. It records the minor female Applicant saying she was threatened with further rape and death if she followed through with the charge and she begged her mother not to pursue the charge.

[19] I am of the view that, having regard to the circumstances, the RPD properly chose not to weigh the withdrawal of the sexual assault charge as a factor weighing against the principal Applicant and the minor female Applicant in its state protection analysis.

[20] However, I do consider the RPD to have erred in not conducting an individualized inquiry into the particular risk to the minor female Applicant in its section 97(1) analysis. The above RIR information indicated higher risk of sexual assault to females in Saint Vincent and the Grenadines than in other countries. The minor female Applicant was singled out for retaliation by members of a criminal gang. In considering the question of state protection, the RPD should conduct an individualized inquiry as to whether state protection is available given the minor female Applicant's dire situation. *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31 at para 7. A factor to include in that individualized inquiry is the minor Applicant's report of a death threat if the investigation into the sexual assault proceeded. The RPD failed to conduct the necessary individualized inquiry.

[21] Finally, the RPD conflated the claim of the minor female Applicant with the claims of other two Applicants. The RPD wrote:

State protection for her must therefore be analyzed in exactly the same way as it is for the other two claimants – i.e. based on the police response to gang violence, and not based on the police response to domestic violence evidence.

[emphasis added]

[22] The RPD decided the police in Saint Vincent and the Grenadines and in Grenada are making serious efforts to fight drugs, gangs, and crime. The RPD went on to conclude the Applicants, having some assistance from the police, are capable of seeking further protection from the authorities if they were to return. The RPD found the Applicants did not rebut the presumption of state protection with clear and convincing evidence.

[23] There are two questions to be addressed. First, did the Applicants rebut the presumption of state protection? Second, is the state protection available to the Applicants' adequate?

[24] The RPD does not review the Applicants' efforts to evade harm and their approaches to the police beyond the observation that the male Applicant was provided with witness protection in Trinidad (on another matter) and did not seek police protection in Grenada. The Applicants' evidence is that the principal Applicant approached the Prime Minister of St. Vincent and the Grenadines and the male Applicant went to see the Police Commissioner. It is for the RPD to assess whether these and other efforts are sufficient to rebut the presumption of state protection and, if so, to assess whether operational protection is adequate. The RPD did not.

[25] The RPD statement that the Applicants did not rebut the presumption of state protection is a conclusion without analysis of the Applicant's evidence of the efforts they did make to secure state protection. As such it is a reviewable error.

[26] Moreover, in *Jaroslav et al v Canada (Minister of Citizenship and Immigration)*, 2011 FC 634 at para 75, Justice Kelen wrote:

Serious efforts by the state to provide protection are relevant to, but not determinative of, the question of whether protection is adequate. No standard of perfection is required. In *Beharry v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 111 Madam Justice Mactavish held at paragraph 9 with respect to state protection that the proper focus is not on the efforts made by the government to combat crime, but the efforts which have "actually translated into adequate state protection". Similarly, Mr. Justice O'Keefe held in *Toriz Gilvaja v. Canada (Minister of Citizenship and Immigration)* 2009 FC 598 at paragraph 39 that the Board ought not to look at whether serious efforts have been made to protect the citizens, but whether at the operational level the protection has been applied.

[27] The RPD failed to consider whether the police protection actually translated into state protection in an individualized section 97(1) inquiry with respect to the present or prospective risk for the male Applicant. The RPD failure to conduct an individualized assessment of the section 97(1) claim is a reviewable error.

[28] The application for judicial review succeeds.

[29] Neither party has submitted a serious question of general importance for certification.



**ORDER**

**THIS COURT ORDERS that:**

1. The application for judicial review is granted.
2. The matter is referred to a differently constituted panel for redetermination.
3. No question is certified.

“Leonard S. Mandamin”

---

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-5427-11

**STYLE OF CAUSE:** BRENDA LAVERNE NELSON-BELLE, DORIEL  
NELSON AND ASRIEL ASHER BELLE v MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 6, 2012

**REASONS FOR ORDER:** MANDAMIN J.

**DATED:** OCTOBER 10, 2012

**APPEARANCES:**

Mr. Richard Wazana FOR THE APPLICANTS

Mr. Tamrat Gebeyehu FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Richard Wazana FOR THE APPLICANTS  
Toronto, Ontario

Myles J. Kirvan FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Toronto, Ontario