Federal Court  Cour fédérale

Date: 20131018

Docket: IMM-10060-12

Citation: 2013 FC 1052

Ottawa, Ontario, October 18, 2013

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

KAVIJENENE KAMBURONA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant seeks judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (Board), dated September 7, 2012, in which it concluded that she was not a Convention refugee nor a person in need of protection under sections 96 or 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). This application is brought pursuant to section 72 of the IRPA.

Background

[2] The Applicant is a citizen of Namibia. She claims that her father, without her consent, arranged her marriage to Mr. Kamarukua Weya. Mr. Weya lives in her community, is a Namibian police officer, and is seen to be well off.

[3] On September 10, 2010, the Applicant's father sent her to Mr. Weya's house on an errand. Mr. Weya sexually assaulted her, beat her and held her against her will for three weeks until she escaped.

[4] When the Applicant's father protested, Mr. Weya demanded the return of money given to the Applicant's father. Her father then attempted to find and return the Applicant to Mr. Weya. She fled to Canada on October 19, 2010 and claims that she is afraid to return to Namibia as she fears Mr. Weya who has the ability to use police resources to find her and because of corruption within the Namibian police force.

[5] On September 7, 2012, the Board denied the Applicant's claim for refugee protection (Decision). This is the judicial review of that Decision.

Decision Under Review

[6] The Board found that the Applicant was not a Convention refugee, nor was she a person in need of protection.

[7] The determinative issue was the availability of an Internal Flight Alternative (IFA). The Board found that the Applicant had an IFA in Walvis Bay.

[8] The Board found that the Applicant did not rebut the presumption of state protection in Walvis Bay with clear and convincing evidence. It stated that the reasons for this were that the Applicant had never approached Namibian police or a women's shelter in Walvis Bay for protection. Further, that the documentary evidence indicated that Namibia now has sophisticated state protection mechanisms available for women fearing domestic abuse, both in legislation and in practice. The Board then quoted extensively from that evidence. It found that while the documents provided by the Applicant further illustrated the extent of domestic violence and forced marriage issues in Namibia, they did not alter the overall state protection picture. The Board found that among the protection mechanisms available, Namibia has shelters with trained police officers. One of the shelters is located in Walvis Bay which houses a "Women and Child Protection Unit" of the Namibian police. The Board stated that the Applicant had never requested protection at a police station or at a shelter in Walvis Bay.

[9] The Board stated that in its view:

> […] it would be too problematic for the surrogate notion of refugee protection if putative IFA state protection presumptions were found rebutted in the face of recent documentary state protection evidence this positive, in circumstances where a claimant has not yet taken full advantage of the prospective protection mechanisms available to her as in this case, and where the last chance the state was given to protect the claimant occurred outside the putative IFA.

[10] The Board found that the IFA state protection issue was whether Namibian authorities in Walvis Bay could be reasonably expected to provide the Applicant with serious efforts at protection if she were to return to Namibia, and whether they could provide her with de facto effective or de facto guaranteed protection from her husband. The Board found that one cannot rebut the presumption of state protection simply by asserting a subjective reluctance to engage it. It noted that the Applicant is an able-bodied adult female and that it was objectively reasonable to assume that she could seek protection from authorities in Walvis Bay.

[11] The Board considered that the Applicant came from a traditional situation and marriage. However, the documentary evidence indicated that Namibian law and state do not approve of forced marriages regardless of the tradition. Therefore, her traditional marriage itself was insufficient to establish a prospective lack of state protection in Walvis Bay.

[12] The Board also considered the failure of the Windhoek police to provide the Applicant with protection in response to her father's one complaint in the past. However, the Board noted that this failure occurred some time ago and a local failure to provide protection does not amount to a lack of putative IFA state protection unless it is part of a broader, current and applicable state pattern, which the Board found was not established. Nor would the Applicant's circumstances constitute "undue hardship" within the meaning of IFA law.

[13] Given that the Applicant did not rebut the presumption of state protection in Walvis Bay, the Applicant was found not to face a risk to life, a probable danger of torture, or a probable risk of cruel or unusual treatment or punishment in Walvis Bay.

Issues

[14] The Applicant submits that the issues in this application are as follows:

1. Whether the Board misapprehended the facts and/or failed to take relevant evidence into consideration;

2. Whether the Board proceeded on improper principles and based its decision on erroneous findings of fact made in a perverse or capricious manner without regard for the material before it;

3. Whether the Decision is unreasonable, including the finding that the Applicant has a viable IFA in Namibia.

[15] In my view, the issue to be decided in this application is whether the Board erred in finding that Walvis Bay was a viable IFA. However, a preliminary issue not directly raised by the parties in their submissions but which the Court requested that they address at the hearing is whether the Board applied the correct legal test for an IFA.

Standard of Review

[16] An exhaustive analysis is not required in every case to determine the proper standard of review. Courts must first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a decision-maker with regard to a particular category of question (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 53 [*Khosa*]; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at paras 57 and 62).

[17] Setting out the basic test for determining IFA is a question of law for which the Board is not entitled to deference (*Estrada Lugo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 170 at para 31 [*Estrada Lugo*]). Whether the Board identified the correct test is to be determined on the correctness standard (*Golesorkhi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 511 at para 8).

[18] The standard of review applicable to factual issues relating to an IFA is reasonableness (*Diaz v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ No 1543 (QL) (TD) at para 24; *Mendoza Velez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 132 at para 24; *Estrada Lugo*, above, at para 31). Thus, the issue of whether the Applicant rebutted state protection in Walvis Bay and the Board's application of the IFA test is reviewable on a standard of reasonableness.

IFA Legal Test

[19] As the issue of the identification and application of the correct legal test is dispositive, I will address it at the outset.

[20] In its written submissions, the Applicant did not directly raise the question of the correct IFA test, but pointed to the UNHCR Guidelines on International Protection, "Internal Flight or Relocation Alternative", which includes the statement that international law does not require threatened individuals to exhaust all options within their own country before seeking asylum. For its part, the Respondent asserted only that the test is well settled, citing *Immigration Law and Practice*, Vol 1, loose-leaf, 2nd ed (Markham, Ont: LexisNexis, 2005) (updated June 2012) and

Rasaratnam v Canada (Minister of Employment and Immigration), [1991] FCJ No 1256 at para 10 (CA), in support of that statement.

[21] At the hearing before me the Applicant referred to *Tjipuravandu v Canada (Minister of Citizenship and Immigration)*, 2013 FC 927 [*Tjipuravandu*] which set out the IFA test, and in which Justice Annis also noted that it was possible that the Board had misstated the test for an IFA. Justice Annis stated that there is no requirement that an applicant have already sought state protection in the designated IFA. Rather, that the IFA is determined by the Board and, thereafter, it is incumbent upon the applicant to establish, on the balance of probabilities, that there is a serious possibility that he or she will be persecuted in the location proposed as an IFA (*Alvapillai v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1160 (QL)). However, based on the remainder of the Board's reasons in that case, Justice Annis was satisfied that the Board had not misdirected itself on the issue.

[22] The Applicant points out that in the present case, in the course of its reasons, the Board made three statements suggesting that the Applicant should have sought protection in Walvis Bay before making a refugee claim. Thus, the Board misunderstood and misdirected itself in the application of the IFA test which, unlike *Tjipuravandu*, above, affected the outcome of its Decision.

[23] The Respondent submits that in order for this Court to interfere with the Board's Decision it must find that, from start to finish, the Decision is flawed by the Board's misinterpretation of the IFA test. Taking the Decision as a whole, however, it is apparent that the Board directed itself to the documentary evidence and made its Decision on the basis of that evidence. This is a situation

like *Tjipuravandu*, above, and, therefore, the Decision may stand despite an apparent error as to the IFA legal test.

[24] In my view, the Respondent's position cannot succeed.

[25] It is correct that the following two-part disjunctive test for determining whether there is not an IFA is well-settled and continues to be applied:

(1) The Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the proposed IFA; or,

(2) Conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of all the circumstances, including consideration of a claimant's personal circumstances, for the claimant to seek refuge there.

(*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1172 (QL) (CA); *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 1256 (QL) (CA); *Tjipuravandu*, above, at para 14; *Huerta Morales v Canada (Minister of Citizenship and Immigration)*, 2009 FC 216 at paras 5 and 6).

[26] Although the Board found the determinative issue to be whether a viable IFA existed for the Applicant, nowhere in its Decision does it specifically state the legal test to be met in that regard.

[27] At paragraph 9 of the Decision, the Board found that the Applicant had not rebutted the presumption of state protection in Walvis Bay. The first reason it provided for this determination was that:

> [10] The claimant has never approached Namibian police or a woman's shelter in Walvis Bay for protection.
>
> [Emphasis added]

[28] The Board then conducted a survey of and made findings concerning the documentary evidence on country conditions, at the conclusion of which it stated:

> [14] Among the protection mechanisms available, it is important to note for this case that Namibia does have shelters with trained police officers. Furthermore, one of these shelters is located in Walvis Bay and, indeed, it does house a unit of the Namibian police. Again, to date, the claimant has never requested protection at a police station in Walvis Bay or at a shelter in Walvis Bay.
>
> [15] In my view, it would be too problematic for the surrogate notion of refugee protection if putative IFA state protection presumptions were found rebutted in the face of recent documentary state protection evidence this positive, in circumstances where a claimant has not yet taken full advantage of the prospective protection mechanisms available to her as in this case, and where the last chance the state was given to protect the claimant occurred outside the putative IFA.
>
> [Emphasis added]

[29] In my view, it is clear that the Board both misstated and misapplied the test for IFA. As noted above, there is no requirement that the Applicant have already sought protection in the designated IFA. The IFA is determined by the Board and, thereafter, it is incumbent upon the Applicant to establish, on a balance of probabilities, that there is a serious possibility that she will be persecuted in the location proposed as an IFA.

[30] In that regard, Justice O' Keefe's comments in *Estrada Lugo*, above, are directly on point in the present case:

> [35] The test for the existence of an IFA set out in *Thirunavukkarasu* above, is a two pronged test, but it is a test in which the refugee claimant need only defeat one of the prongs. Both prongs can be successfully defeated without a refugee having lived in or even traveled to the proposed IFA. A refugee claimant may defeat prong one by establishing that there is a serious possibility of being persecuted or subjected, on a balance of probabilities, to persecution or to a danger of torture or to a risk to life or of cruel and unusual treatment or punishment in the proposed IFA. Alternatively, a claimant can defeat prong two by establishing that conditions in the IFA are such that it would be unreasonable in all the circumstances for the claimant to seek refuge there.
>
> [36] The Board must not only state the correct test but it must also apply the correct test. Adding an additional requirement in the application of the test will cause the Board to run afoul of the reasonableness standard. Adding the requirement that the applicants must have tried living in another, safer region of the country demonstrates a misunderstanding of the legal test for an IFA. As noted above, this was an error.
>
> [37] The respondent submitted that it would not be proper to send the matter back for redetermination as the Board also applied the proper two prong test for an IFA and the new decision would necessarily be the same. I do not agree.
>
> [38] When the Board's decision is reviewed, it becomes obvious that the Board considered the failure to try to live in the IFA a very important factor in denying the applicants' claim for refugee protection. I cannot determine whether the Board's decision would have been the same had the Board applied only the proper factors for assessing an IFA. This is a decision to be made by the Board not by the Court.

[31] This same view was expressed by Justice Snider in *Ramirez Martinez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 600:

> [6] The following statements in the decision reflect a misapplication of the IFA test:

> I am of the view that the claimants had an obligation to at least try to find a safe haven in their own country before abandoning it altogether and unless it were patently unreasonable for them to do so, their failure to try will be fatal to their claims.
>
> I find that the claimants clearly had an obligation to relocate, in this case to Mexico City, and if in the chance they were to have problems with Mr. Ybarra or anyone else, to approach the state before seeking Canada's protection.
>
> I find that the claimants had the onus to move to an IFA, in this case specifically in Mexico City, before leaving the country. The claimants have not discharged their responsibility of showing that the risk of harm they fear would be faced in every part of Mexico pursuant to section 97(1)(b) of the IRPA. [Emphasis added.]

[7] According to *Thirunavukkarasu*, under the first part of the IFA test, the Applicants need to show, on a balance of probabilities, that there is a serious possibility of persecution throughout the country, including the alleged IFA (above, at para. 5). This burden is only triggered when the Board has warned the claimant that an IFA is going to be raised. As such, the Court of Appeal in *Thirunavukkarasu* recognized that, "in some cases the claimant may not have any personal knowledge of other areas of the country" (above, at para. 9). This means that the potential IFA might not have crossed the Applicants' mind until it was raised. Thus, the test is for the Applicants to show that, even in the proposed IFA of Mexico City, they will likely face persecution. The test is not, as the Board stated, for the Applicants to have attempted, or tried living in Mexico City, and show that they did face persecution. It is incorrect to say that there is an onus on the Applicants to move to Mexico City, prove that it is dangerous to live there, and – only thereafter – seek surrogate protection in Canada. Such a requirement is not contained in any of the jurisprudence dealing with IFA.

[8] The Board's approach to the test was rejected by Justice Rothstein in *Alvapillai v. Canada (Minister of Citizenship and Immigration)* (1998), 152 F.T.R. 108, 45 Imm. L.R. (2d) 150, at paragraph 3, where he stated:

> The viability of an IFA is to be objectively determined and it is not open to an applicant, simply for his own reasons, to reject the possibility of resettlement in his own country, if he can do so without fear of persecution; see Thirunavukkarasu v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 589 (F.C.A.) at 597-599. However, the way in which the panel has characterized the IFA test here is not correct. The panel seems to be saying that it is up to an individual, before he seeks the surrogate protection of Canada, to test the viability of an IFA in his own country. The logical conclusion of this proposition is that an applicant is obliged to test the IFA and suffer persecution before making a refugee claim in Canada. This cannot be correct. There is no onus on an applicant to personally test the viability of an IFA before seeking surrogate protection in Canada. [Emphasis added.]

[Emphasis in original decision of Justice Snider]

[32] The Respondent submits that the wording of paragraphs 14 and 15 of the Decision indicates only that the Board was trying to suggest that there may be cases, unlike this one, where a claimant had sought protection in an IFA location before seeking refugee protection. I cannot agree.

[33] In my view, reading the Decision as a whole *(Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 14), the Board misunderstood and misapplied the IFA test and, like *Estrada Lugo*, above, considered the Applicant's failure to try to live in Walvis Bay to be a significant factor in denying her claim for refugee protection. It is, therefore, distinguished from *Tjipuravandu*, above. Because the standard of correctness permits no deference to the decision-maker for errors of law, the matter must be returned to the Board. And, in any event, the application of the IFA test by the Board was unreasonable for the reasons set out above.

[34] Given my conclusion that the Board erred in stating and applying the legal test for an IFA, this analysis need not proceed further. However, I would also note that the law is clear that the Board has an obligation to assess IFA through the personal circumstances of the claimant (*Vega v Canada (Minister of Citizenship and Immigration)*, 2013 FC 487 at para 20). However, in this case the Board failed to directly assess whether the Applicant could reasonably obtain state protection when the agent of persecution, Mr. Weya, is also a Namibian police officer. The Decision was also unreasonable in that basis.

[35] The application for judicial review must be allowed and the matter is referred to a different panel of the Board for redetermination.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, the Decision is quashed and the matter is to be remitted to a different panel of the Immigration and Refugee Board for reconsideration; and

2. No question of general importance is certified.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Adetayo G. Akinyemi	FOR THE APPLICANT
Charles Jubenville	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Adetayo G. Akinyemi North York, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT