Federal Court  Cour fédérale

Date: 20110302

Docket: IMM-4040-10

Citation: 2011 FC 250

Ottawa, Ontario, March 2, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

VIRGINIA VIOLA ST. CLAIR
SIANNA ELDWINA ST. CLAIR (Minor)
ISHMEL NEIL ST. CLAIR (Minor)

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 a member of the Immigration and Refugee Board (Board), pursuant to s 72(1) of the *Immigration and Refugee Protection Act,* SC 2001 c 27 (Act) by Virginia Viola St. Clair (Principal Applicant) and her dependent children, Sianna Eldwina St. Clair and Ishmel Neil St. Clair. The Board determined that the applicants were neither Convention refugees nor persons in need of protection under sections 96 and 97 of the Act.

[2] The applicants are citizens of Saint Lucia. The Principal Applicant was born on April 8, 1982. Her daughter was born on May 6, 1999, and her son was born on January 7, 2002. The Principal Applicant ran a successful hair and nail salon in Saint Lucia prior to her departure. The Principal Applicant was in a relationship with Mr. Simon Citolyn for approximately six (6) years, and in a common-law marriage with him for the last four (4) of those years. The minor applicants lived with them for two (2) years, but the Principal Applicant alleges that she moved them out to live with their grandmother for the two (2) years prior to her departure, out of fear for their safety around Mr. Citolyn.

[3] The Principal Applicant alleges that on July 7, 2008, she came home to discover Mr. Citolyn and another woman in the house with bags of cocaine. She fought with Mr. Citolyn, who then assaulted her, tried to choke her, and gave her a black eye. A neighbor called the police and upon their arrival, the Principal Applicant showed them the cocaine. Mr. Citolyn and the woman were arrested. The police helped the Principal Applicant to make a formal complaint, took her to the hospital for medical treatment, and then took her to a women's shelter.

[4] The next morning, at approximately 3:00 a.m., the Principal Applicant alleges that two (2) of Mr. Citolyn's acquaintances came to the house looking for her. Her cousin and her sister were present. As the Principal Applicant and her children were at the shelter, no harm came to them.

[5] Following a referral from the Family Court to the Women's Support Centre, on July 8, 2008, the Principal Applicant and her children spent five (5) days in the shelter, where they received counseling and practical support. On July 9, 2008, the Family Court issued a Protection Order

prohibiting Mr. Citolyn from contacting the Principal Applicant, and ordering both of them to attend therapy. A judicial hearing was held with Mr. Citolyn present.

[6] At the Principal Applicant's hearing before the RPD Board, she alleged that the Family Court Judge held a private meeting in her chambers, in which she told the Principal Applicant that she should leave Saint Lucia for her own safety, as the country could not protect her.

[7] The Principal Applicant immediately left for Canada, leaving her children with their grandmother. She arrived on July 13, 2008 and claimed refugee status on July 14, 2008.

[8] The Principal Applicant further alleges that on February 2, 2009, the children were on their way to school when Mr. Citolyn and two (2) acquaintances pulled up alongside them in a car. He asked the children to come with him, but they ran away to a store and hid. The Principal Applicant and her mother decided not to call the police, but flew the children to Canada to join the Principal Applicant. They arrived on June 6, 2009 and claimed refugee status on July 9, 2009. Their claims were joined to the Principal Applicant's.

[9] The hearing was held on May 20, 2010. The Board's negative decision was issued on June 8, 2010, and received by the applicants on June 28, 2010.

The decision under review

[10] The Board issued a lengthy decision, in which the two (2) determinative issues were the credibility of the Principal Applicant regarding the ongoing nature of the abuse she suffered at the

hands of Mr. Citolyn, as well as the existence of adequate and efficient state protection for victims of domestic violence. The Board took into account the Chairperson's *Gender Guidelines*, as well as the *Guidelines on Child Refugee Claimants*. The Board stated that it was cognizant of the difficulties a domestic violence victim may face in testifying, but noted that the Principal Applicant said that she did not feel nervous.

[11] Regarding the issue of credibility, the Board found that on the balance of probabilities, the Principal Applicant did experience domestic assault on July 7, 2008, but found no persuasive evidence that she was a victim of ongoing domestic abuse. The Board found significant inconsistencies, contradictions and omissions in the Principal Applicant's testimony. The Board noted that there was no mention of previous physical or sexual assault in the Principal Applicant's PIF or in her Citizenship and Immigration Canada interview notes, which describe only the one (1) incident referred to above, and the one (1) approach to police.

[12] At the hearing, however, the Principal Applicant mentioned that Mr. Citolyn had hit her, slapped her, and banged her head against the wall approximately two (2) or three (3) times a month for four (4) years. When asked to explain this omission, she said that he had never been "that violent" before the incident in question, and yet later she stated that he had sexually assaulted her several times. The Board drew a negative inference from the failure to mention this in the PIF, which clearly asks for "all significant events and reasons" for the Principal Applicant's fear of persecution. The Board noted that the explanation that Mr. Citolyn was never "that violent" before was contradicted by the testimony regarding ongoing physical and sexual assaults, and drew a negative inference.

[13] The Principal Applicant also testified to at least one (1) other incident in which she had complained to the police but received no assistance, and the Board noted that this did not appear in the PIF narrative either, though the PIF instructs applicants to "provide details of any steps you took to obtain protection from any authorities in your country and the result".

[14] Regarding state protection, the Board noted that when called, the police immediately came to the Principal Applicant's home, arrested Mr. Citolyn and the woman, made a report, took the Principal Applicant to the hospital and then placed her in a shelter. The Principal Applicant also had the assistance of a court-appointed social worker, a referral to the Women's Support Centre, counseling, and other practical assistance. She received a Protection Order against Mr. Citolyn and had a hearing within days of the assault. The Board found that all of this pointed to the existence of effective state protection in the Principal Applicant's case.

[15] The Board noted the Principal Applicant's alleged fear that Mr. Citolyn is a drug dealer who has police contacts, and that in future the police may not adequately be able to protect her, but found that a subjective fear not supported by evidence does not overcome the presumption of state protection in a functioning democracy, especially where the state has demonstrated a quick and efficient response in the past. The Board noted that the Principal Applicant made no effort to approach the state for protection at all in the alleged incident involving the children.

(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.	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays; b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
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	Personne à protéger 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 : a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture; b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (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, (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés

	par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	Personne à protéger
(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.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Issues and standard of review

[19] There are two issues in this application:

a) Did the Board misunderstood or mischaracterized the evidence supporting the central element of the applicants' claim?

b) Did the Board commit a reviewable error by ignoring vital evidence in its state protection analysis?

[20] The standard of review applicable to a Board member's findings on credibility is reasonableness, as it is a question of fact, to which deference is owed by the Court, as per *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, paras 47, 53, 55 and 62; also *Khosa v Canada (Minister of Citizenship and Immigration)*, [2009] 1 SCR 339, paras 52-62; *Malveda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 447, paras 17-21.

[21] In *Paguada v Canada (Minister of Citizenship and Immigration)*, 2009 FC 351, para 19, it is stated that the standard of review applicable to a finding of adequate state protection, which is a

mixed question of fact and law, is reasonableness. The Board's conclusion must fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, above, para 47).

Analysis

A. *Mischaracterization of the central element of the claim*

[22] The applicants submit that the Board misunderstood the nature of their claim, and allege that the social group to which the Principal Applicant belongs is not women who are victims of domestic violence, but women who are subjected to violence and threats as a result of witnessing a crime. She claims that the instances of abuse were not the main reason that she left Saint Lucia, and claims that this is clear from her PIF and her oral testimony. She notes that the Judge of the Family Court told her to leave Saint Lucia because she could not be protected there, and alleges that this was in the context of being a witness to a crime, not a victim of domestic abuse.

[23] The Principal Applicant cites over a dozen cases in support of the argument that the Board misunderstood her evidence thereby committing a reviewable error. The Principal Applicant submits that as the Board's error went to the root of the decision, it must therefore be set aside.

[24] The Respondent argues that regardless of the applicants' new characterization of their claim, it is clear that the Board understood the substance of the claim, namely violence at the hands of Mr. Citolyn. The Respondent alleges that at no point in the PIF or the Principal Applicant's oral testimony did she indicate that her fear arose specifically because she had witnessed a crime. The facts as alleged were about violence and domestic abuse. The Respondent acknowledges that the

fear came to a head because of a specific incident, but argues that the Principal Applicant had a generalized fear of violence, which was not solely as a result of the discovery of a criminal incident. The Respondent notes that the Principal Applicant's counsel at the hearing characterized the cocaine incident as the "last straw" in a history of domestic violence, and pointed the Board specifically to documentary evidence about domestic violence. The Respondent argues that no evidence was given to show that the Principal Applicant would be required to be a witness against Mr. Citolyn, and that the documentary evidence alluded to by counsel at the hearing mentioned crime victims only in passing.

[25] The Respondent argues that the Principal Applicant's fear is based on her knowledge that her ex-boyfriend is a violent man, and that the fact that he was also the perpetrator of the crime she witnessed is not, as she alleges, coincidental. The Respondent argues that at most, the issue is a mixed one of fear of the alleged incident and the alleged ongoing abuse (the latter of which was disbelieved by the Board). The Respondent cites *Suvorova v Canada (Minister of Citizenship and Immigration)*, 2009 FC 373, paras 56-60, for the proposition that where the ground of persecution or risk alleged is mixed, the decision can be upheld provided the Board properly addressed the evidence before it and considered all possible grounds for protection. The Respondent submits that the Board addressed the totality of the evidence in the present case. The Respondent also cites *Arunasalam v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1070, in support of their position that where the Principal Applicant specifically links their fear to particular facts, the Board is not faulted for having dealt with evidence under that ground only.

[26] The Respondent submits that the Board never specifically characterized the Principal Applicant's claim, nor excluded the risk of being a witness, which the Respondent argues is not a distinct risk. The Respondent argues that this risk is only a risk of generalized criminality, without any nexus to a s 96 group. The Respondent contends that while this may give rise to a s 97 claim, where there is no evidence beyond that considered in the s 96 analysis that could establish that the claimant is in need of protection, the s 97 is not required, according to *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, and *Chikukwa v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1191, para 55. Before the Court, the Respondent argued that there is no evidence that the Principal Applicant is at an additional risk beyond the evidence regarding the cocaine incident and Mr. Citolyn's violent history, so the Board was not required to deal with this ground separately.

[27] Regarding the Principal Applicant's credibility, the Respondent notes the Principal Applicant's claim that since her fear was based only on the cocaine incident, the past violence was not relevant. The Respondent argues that the Principal Applicant did not say at any point that she had not included the history of violence because it was not relevant, but said at the hearing that Mr. Citolyn had not been "that violent" before. Her argument is therefore contradicted by her testimony. The Respondent submits that the supposed violent history, which was disbelieved by the Board, is directly relevant to whether Mr. Citolyn would be violent towards the Principal Applicant in the future, and that it was not unreasonable of the Board to draw this inference. The Respondent argues that the Board's conclusion on credibility was reasonable, as the Principal Applicant's testimony shifted from stating that Mr. Citolyn was not "that violent", then that he beat her two (2) or three (3) times a month, and then that he sexually assaulted her on several occasions. The Respondent argues

that as the well-foundedness of her fear was central to the claim, the Board's credibility findings are determinative.

[28] Firstly, this Court finds that the cases cited by the Principal Applicant in her memorandum are, on the whole, not very relevant to the facts in the present case. Each case cited deals with a situation in which the Board misapprehended a specific fact related to the case, rather than misunderstood in a more general sense the substance of the claim, as is alleged in the present case.

[29] Counsel for the Principal Applicant pointed out to the Court that the Principal Applicant's PIF describes only the incident of finding Mr. Citolyn with the cocaine, and details the threats that he made at that point, saying that he would kill the Principal Applicant if he went to jail because of her. It also confirms that the police took her to the shelter for her protection because "they have been looking for evidence against [Mr. Citolyn] on trafficking drugs and for other cases". In her testimony at the hearing, the Principal Applicant did not specifically lay out the claim as one of witness protection, nor did she state that it was simply a case of domestic violence. It is our opinion that *Suvorova* and *Arunasalam,* cited by the Respondent, are not directly on point, as the Board in the present case did not deal with the risk as arising from "mixed" factors, nor did the Principal Applicant fail to mention that she had witnessed a crime.

[30] This Court does not conclude that the Board was unreasonable in finding that there were separate credibility concerns in the Principal Applicant's story. She did state (transcript, CTR p 339), when asked, that Mr. Citolyn had not been physically abusive to her prior to the cocaine incident, only made threatening statements, and then she specifically contradicted this statement

several times throughout the testimony. However, on the whole, the Board's analysis was not focused on the risk faced by the Principal Applicant as a witness to a crime, and so the reliance on issues regarding Mr. Citolyn's violent past should not have been as relevant to the determination of the case as the Respondent argues. The Board accepted that the cocaine incident had occurred (Decision, para 15). This Court does not agree with the Respondent that the Board's conclusions apply no matter the nature of the risk faced by the Principal Applicant, or that the Board was in fact dealing with a "mixed" case. The Board's focus on state protection for domestic violence victims shows that this was the only risk faced by the Principal Applicant in the Board's view. It did not address the possibility of persecution based on witnessing a crime, though this was clearly a relevant issue. In the similar case of *Vilmond v Canada (Minister of Citizenship and Immigration)*, 2008 FC 926, Justice Michel Beaudry held at para 17 that "[f]or the Board's conclusion to be reasonable, it must first characterize the claim in such a way that is responsive to the allegations put forward by the aim".

[31] Therefore I find, as did Justice Beaudry, that the Board's conclusions on credibility are flawed in that the Board has misapprehended the nature of the claim, and consequently has not correctly analyzed the Principal Applicant's case and the credibility of the risk that she faced. The Board's decision cannot be held to be reasonable in such circumstances.

B. *State protection*

[32] The Principal Applicant submits that the Board ignored most of the relevant facts and made selective use of the documentary evidence, all the while failing to address the most crucial issue, namely the lack of a witness protection program in Saint Lucia. The Principal Applicant cites an

RPD *Response to Information Request* from 2006 stating that there is "no legislation or program for protecting crime victims and witnesses in Saint Lucia. Also, witness protection is provided only rarely, on a case-by-case basis, and only when requested by the witness." The Principal Applicant also cites a report by CEDAW, published in 2006, stating that there is a lack of support for victims of domestic violence in Saint Lucia, that the legislation is not effectively implemented, and that women are given restraining orders that cannot be enforced because police are understaffed and do not always respond to calls.

[33] The Principal Applicant notes that the Board did not reject her testimony regarding the incident of finding Mr. Citolyn with cocaine, and notes that he was arrested for drug possession and later sent gang members to the house to look for her (at which time she was in the women's shelter). She notes that the Family Court Judge told her to leave the country as she could not be protected. She also cites the existence of a letter from the Family Court's social worker (CTR, p 225) and another from the Women's Support Centre (CTR, p 273) in support of her claim that she witnessed a crime and that no infrastructure exists that could protect her, and that she should seek refuge outside of the country.

[34] The Respondent submits that the Board's findings are equally applicable to victims of domestic violence and witnesses of crimes. The Board is presumed to have considered all evidence before it (*Hassan v Canada (Minister of Employment and Immigration)* (1992), 147 NR 317 (FCA)), and the conclusions are consistent with and supported by that evidence.

[35] The Respondent notes that the police came to the Principal Applicant's house, she was able to make a report, she was taken to hospital and to a shelter, and was given the services of a social worker and of the Family Court. The Respondent notes that when Mr. Citolyn's men came to the house to look for her, the Principal Applicant was safe in a shelter due to the police's actions. The Respondent argues that the Principal Applicant did not challenge the Board's conclusions regarding state protection for domestic violence victims, and notes that the conclusions regarding her failure to rebut the presumption of state protection still apply.

[36] The Respondent argues that the evidence indicates that despite the lack of a formal witness protection program, Saint Lucia is able to protect women who are victims of violence, domestic or otherwise, and notes that the document cited by the Principal Applicant states that witness protection is sometimes available on a case-by-case basis.

[37] Regarding the statement made by the Saint Lucia judge, the Respondent argues that this cannot be substituted for the Board's own determination regarding the state's ability to protect the Principal Applicant. The Respondent argues that the preponderance of evidence indicates serious efforts on the state's part to redress violence against women, and notes that the Principal Applicant was able to access these programs. It was within the Board's jurisdiction to assign little probative weight to the Judge's statement.

[38] The CEDAW report is from 2006, while much of the documentation relied upon by the Board is more recent as it is dated from 2009. Furthermore, the Court finds nothing to indicate that the Board's weighing of the evidence regarding protection for victims of violence was

unreasonable. If domestic violence was indeed the central element of the Principal Applicant's case, the Court would agree with the Respondent that there is nothing that indicates that the Board's conclusion was unreasonable, especially given the steps taken by the Saint Lucia state in the Principal Applicant's case before she left the country.

[39] The Board extensively canvassed the protection offered to victims of domestic violence, and there is nothing to indicate that there was any failure on the Board's part to examine any evidence in that regard. The Court notes, however, that the Board did not discuss the Judge's statement to the Principal Applicant, nor the letters from the court-appointed social worker and the Women's Support Centre advising the Principal Applicant that nothing could be done in her situation, and that she should leave the country and seek refuge elsewhere. It is the Court's view that these items of proof were crucial enough that the Board should have explained why they were being given relatively little weight. In light of these documents, which were before the Board, this Court does not find that the Board's conclusion on state protection was consistent with and supported by the evidence (see *Cepeda-Gutierrez v Canada (Minister of Citizenship & Immigration)*, [1998] FCJ No 1425 (Fed TD)) in these circumstances.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed and the matter is returned for reconsideration. There is no question for certification.

"André F.J. Scott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4040-10
STYLE OF CAUSE:	VIRGINIA VIOLA ST. CLAIR SIANNA ELDWINA ST. CLAIR (MINOR) ISHMEL NEIL ST. CLAIR (MINOR) v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
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