

Federal Court



Cour fédérale

**Date: 20160419**

**Docket: IMM-4459-15**

**Citation: 2016 FC 430**

**Fredericton, New Brunswick, April 19, 2016**

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

**BETWEEN:**

**ANNASACHA DELINE KANDHA  
ANNEILA KANDHA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP &  
IMMIGRATION CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Annasacha Deline Kandha and Anneila Kandha [the applicants] seek judicial review of a decision of the Refugee Appeal Division [RAD] in which the RAD dismissed an appeal of the Refugee Protection Division's [RPD] determination that the applicants are neither Convention

refugees nor persons in need of protection under ss 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons set out below, I would allow the application for judicial review.

## II. Background

[3] The applicants are citizens of Trinidad and Tobago. The eldest, Annasacha, was born on April 1, 1990, and the youngest, Anneila, was born on February 6, 1996. They both arrived in Canada with their mother, Rena Seeragie Kandha [Ms. Kandha] in December 2014. The applicants' and Ms. Kandha's refugee claims were heard together before the RPD on March 9, 2015. In a decision dated April 8, 2015, the RPD accepted Ms. Kandha's refugee claim based on gender-related persecution, but rejected the applicants' claims.

[4] In March 2011, Ms. Kandha's common law partner, Mr. Manny Rooplal, moved in with Ms. Kandha and the applicants and took responsibility for the household expenses. Mr. Rooplal worked as a senior customs officer. Over time, Mr. Rooplal became verbally, physically and sexually abusive toward Ms. Kandha. In her application to the RPD, Ms. Kandha testified that Mr. Rooplal had repeatedly beaten her, attacked her with a hot frying pan, raped her at gunpoint, and continuously harassed, assaulted and threatened her. In October 2012, Mr. Rooplal forced Ms. Kandha outside, removed all of her clothing, threw it in the yard and set it on fire along with other items. The applicants were forced to watch and neighbors also witnessed the event. Later that evening, Mr. Rooplal beat and raped Ms. Kandha, put a gun to her head and pulled the

trigger. Unbeknownst to Ms. Kandha, the gun was not loaded. However, Mr. Rooplal threatened to load it and kill her family in front of her if she told anyone about the incident.

[5] In the community, rumours were spreading about Mr. Rooplal's alleged corruption and involvement in unlawful activities such as drug and weapons trafficking, as well as his sexually abusive behavior toward Ms. Kandha. Ms. Kandha and the applicants tried to leave in December 2012 at which time they went to Ms. Kandha's mother's house. Following threats by Mr. Rooplal to set fire to the house, Ms. Kandha and the applicants returned to him.

[6] During the Christmas season in 2012, some of Mr. Rooplal's friends visited the marital home, became intoxicated and attempted to rape the applicants in their bedroom. Ms. Kandha, who heard the screams, fought off the assailants while the applicants ran out of the house. Mr. Rooplal chased the applicants, pulled their hair, slapped them in the face and threatened to kill them. When neighbors arrived at the scene, Mr. Rooplal dared them to call the police.

[7] Ms. Kandha attempted to report incidents to the police several times in 2013. Each time, police officers refused to file a report and refused to assist her. Ms. Kandha successfully filed a report to the police in November 2014 when she began to receive phone calls from an unknown person threatening to kidnap, rape and kill, her and the applicants. This time, the police filed a report but nothing further was done.

[8] Following the applicants' and Ms. Kandha's departure, Ms. Kandha contends Mr. Rooplal has been looking for her at her mother's home and at her former neighbours' residence

in Trinidad and Tobago. Ms. Kandha testified that Mr. Rooplal threatened to kill her if she does not return to him.

### III. Impugned Decision

[9] The RPD accepted that the applicants and Ms. Kandha are nationals of Trinidad and Tobago. It found Ms. Kandha to be a credible witness and concluded that she provided credible and trustworthy evidence to support her claim. The RPD also accepted that Ms. Kandha went to the police on more than six occasions in 2013 and 2014. Given the circumstances and the number of times she sought protection without success the RPD concluded Ms. Kandha successfully rebutted the presumption of state protection. The RPD therefore accepted Ms. Kandha's claim that there is a serious possibility of persecution on a Convention ground, that is, based on her membership in a particular social group (as a woman fearing domestic violence). As for the applicants' claims, the RPD found they had not rebutted the presumption of state protection and had failed to establish the existence of a serious possibility of persecution on a Convention ground. The RPD also concluded the applicants failed to establish, on a balance of probabilities, that they would personally be subjected to a danger of torture or face a risk to their lives or a risk of cruel and unusual treatment or punishment if they returned to Trinidad and Tobago.

[10] The applicants appealed the RPD decision to the RAD. They raised the following issues: (1) the applicants' kinship to their mother makes them vulnerable claimants; (2) the RPD erred in concluding that the existence of democratic institutions is demonstrative of adequate state protection; and, (3) the RPD erred in its analysis of the availability of state protection.

[11] With respect to the first issue, the RAD rejected the applicants' contention that the RPD had a judicial duty to assess their claim through the lens of "vulnerable persons" as that term is used in the *Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB*. The RAD noted that in order to be provided with this procedural accommodation, an individual must be identified as a vulnerable person by the Immigration and Refugee Board [IRB]. The Guideline provides that this identification must be made as soon as possible, and that counsel for the claimant is best placed to advance such a claim. The RAD noted that the applicants did not submit any such claim and concluded, on the basis of the audio recording of the hearing, that the applicants were "dealt with professionally" (RAD decision, Applicant's Application Record at p 12).

[12] With respect to the state protection analysis, the RAD concluded it was appropriate for the RPD to refer to the democratic nature of the government of Trinidad and Tobago when assessing the availability of state protection. It further noted that Ms. Kandha did not follow up on any of the police reports. Furthermore, she did not communicate to the police her suspicions regarding Mr. Rooplal's criminal activities (drug and weapons trafficking). The RAD concluded Ms. Kandha's failure to disclose her suspicions regarding drugs and weapons limited the ability of the state to respond. The RAD also concluded that Ms. Kandha's and the applicants' fear of Mr. Rooplal do not constitute a credible explanation for having failed to fully disclose all relevant facts to the police. While the RAD accepted the contention that the applicants and Ms. Kandha did not report the Christmas 2012 incident out of fear and embarrassment, it pointed to documentary evidence demonstrating that legislation prohibits rape and sexual assault and that assistance, police and otherwise, is available to victims of such crimes in Trinidad and Tobago.

The RAD concluded that state protection need not be perfect, and that the state was making “serious efforts” to combat rape and sexual assault.

[13] Finally, the RAD found that the applicants’ familial association with Ms. Kandha does not place them at an increased risk of harm since they are both adults, they have a choice over where they will reside in Trinidad, the most recent threats from Mr. Rooplal were not directed at them specifically and they have a number of family members living in Trinidad who are able to provide a support network.

#### IV. Issue

[14] In my view, the sole issue on this application is whether the RAD’s conclusion on state protection meets the test of reasonableness.

#### V. Standard of Review

[15] Because the issue of the adequacy of state protection raises questions of mixed fact and law, it is to be assessed on the reasonableness standard of review (*Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] FCJ No 584; *Burai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 565, [2013] FCJ No 633 at para 26; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47 [*Dunsmuir*]). This Court will only intervene if the RAD’s decision is not justified, transparent and intelligible, or if it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, above at para 47).

VI. Analysis

[16] The jurisprudence of this Court recognizes that a board need not refer to every piece of evidence that was submitted (*Hassan v Canada (Minister of Employment and Immigration)*, 147 NR 317, [1992] FCJ No 946). If a board states it has considered all the evidence, that statement will often suffice. Furthermore, a board is presumed to have reviewed all of the evidence presented (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598). However, when important evidence that supports a claimant's position is not mentioned, reviewing courts may be less inclined to demonstrate deference to the decision-maker (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, [1998] FCJ No 1425 at para 17). In the circumstances, I am not satisfied the RAD's analysis on state protection reveals a proper assessment of the evidence available on Trinidad and Tobago's ability to protect women in general, and the applicants in particular.

[17] The RAD stated that documentary evidence confirms the existence of legislation prohibiting rape and sexual assault and the availability of assistance to victims of such crimes. However, the applicants' fear does not rest upon a lack of legislation to protect women against domestic violence, or the lack of a procedural framework (*Torres v Canada (Minister of Citizenship and Immigration)*, 2005 FC 660, [2005] FCJ No 812 at para 13). Rather, the applicants' fear rests on the ineffectiveness of the legislation and the procedural framework, based on their mother's prior experience with the police, and, in this particular case, the apparent ability of Mr. Rooplal to locate them in a small island country, and his apparent immunity from prosecution due to his position as a law enforcement officer.

[18] The RAD concluded that police take the issue of sexual assault seriously and that there are support mechanisms in place for victims. This assertion was not supported by country condition documentation. The RAD failed to mention relevant passages of the *US Department of State Country Report on Trinidad and Tobago's Human Rights Practices for 2013* which addresses the ineffectiveness of the laws and procedures in place, especially with regard to gender-related persecution. For example, the Report notes the following:

Public confidence in the police was very low because of high crime rates and perceived corruption;

Many incidents of rape and other sexual crimes were unreported, partly due to perceived insensitivity of police, exacerbated by a wide cultural acceptance of gender-based violence;

The law provides criminal penalties for corruption by officials; however, the government has not implemented the law effectively, and officials sometimes engage in corrupt practices with impunity;

Many community leaders asserted that abuse of women, particularly in the form of domestic violence, continued to be a significant problem;

While reliable national statistics were not available, women's groups estimated that as many as 50 percent of all women suffered abuse;

The NGO Coalition against Domestic Violence charged that police often hesitated to enforce domestic violence laws and asserted that rape and sexual abuse against women and children remained a serious and pervasive problem.

[19] In my view the RAD focused its analysis on the existence of legislation and on the country's serious efforts to protect its citizens. However, it failed to assess whether these frameworks actually translate into effective and adequate protection for the applicants in their particular circumstances. As a consequence, the RAD conflated the serious efforts test with the



adequate operational protection test adopted in recent jurisprudence (*Beri v Canada (Minister of Citizenship and Immigration)*, 2013 FC 854, [2013] FCJ No 908 at paras 35-37).

[20] The RAD acknowledged that the applicants and Ms. Kandha expressed their fear of Mr. Rooplal. However, it concluded this explanation lacked credibility since Ms. Kandha had approached the police on many occasions. I find this part of the analysis by the RAD to be unreasonable for the following reasons. First, the RPD concluded that Ms. Kandha's credibility was not at issue. Second, Ms. Kandha and the applicants repeatedly stated in their Basis of Claim narrative, as well as at the hearing before the RPD, that they were scared of Mr. Rooplal because of his connections to the police. Legitimate fear could explain the approach taken by Ms. Kandha in failing to follow-up on her reports and the applicants' failure to report. The RAD did not consider this explanation. While refugee claimants are required to take reasonable steps to obtain state protection, they are not required to exhaust all avenues of protection (*Jane Doe v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1579). Third, Ms. Kandha reported to the police, on several occasions, regarding Mr. Rooplal's violent crimes – namely, the beating and the rape. One would expect that the police would have acted to protect Ms. Kandha and the applicants on the basis of those allegations alone. Instead, the RAD raised the spectre of Ms. Kandha having failed to fully report by not mentioning the alleged drug and weapons trafficking. If a country is unable or unwilling to provide protection for violent and sexual crimes against women without a link to other crimes (in this case, alleged trafficking of drugs and weapons) it should be a clear indication that the country cannot provide adequate protection from gender-related violence. In this regard, I note that the RAD did not refer to the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* [Gender Guidelines]. While

the RAD is not required to explicitly mention the Gender Guidelines, it is expected to know and apply advanced knowledge on the issue of gender persecution in the dynamic of domestic violence (*Keleta v Canada (Minister of Citizenship and Immigration)*, 2005 FC 56, [2005] FCJ No 54 at para 14). In my view the facts of this case demonstrate it failed in this regard.

[21] Finally, I would note that one of the applicants was 16 years old when she was the victim of the attempted rape in December 2012. In *Zhu v Canada (Minister of Citizenship and Canada)*, 2001 FCT 884, [2001] FCJ No 1251 at para 28, Justice Muldoon explains that a claimant's reluctance to seek state protection must be assessed in light of his or her status as a minor, and the fact that children may be more reluctant to seek protection. I am of the view the RAD should have applied the same consideration to the youngest applicant, especially since the persecutor, Mr. Rooplal, held a position of authority in the household and in the country at large. The RAD failed to consider this important factor in its analysis of state protection.

## VII. Conclusion

[22] I am of the view the RAD's finding on state protection is unreasonable. The reasons, when read together with the outcome, do not fall within the range of possible, acceptable outcomes as set out in *Dunsmuir*, above at para 47, and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 14. I would therefore allow the application for judicial review and remit the matter to a different panel of the RAD for redetermination.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed;
2. The matter is remitted to a different panel of the RAD for redetermination;
3. There will be no order of costs; and
4. There is no question certified.

“B. Richard Bell”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4459-15

**STYLE OF CAUSE:** ANNASACHA DELINE KANDHA  
ANNEILA KANDHA v THE MINISTER OF  
CITIZENSHIP & IMMIGRATION CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MARCH 7, 2016

**JUDGMENT AND REASONS:** BELL J.

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