

Federal Court



Cour fédérale

**Date: 20160621**

**Docket: IMM-4447-15**

**Citation: 2016 FC 698**

**Toronto, Ontario, June 21, 2016**

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

**BETWEEN:**

**SHERIKA COLEENA GREEN  
CASEY LANAE BRYAN  
(A MINOR BY HER LITIGATION  
GUARDIAN, SHERIKA COLEENA GREEN)**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Background**

[1] This application, brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], seeks to set aside the September 9, 2015 decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [IRB],

dismissing the applicants' appeal from the Refugee Protection Division [RPD] of the IRB. The RAD rejected the applicants' refugee claim after finding they were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the IRPA respectively.

[2] The RAD decision is a redetermination. The initial negative RAD decision was returned for reconsideration by Justice Catherine Kane in *Green v Canada (Minister of Citizenship and Immigration)*, 2015 FC 536 [*Green*]. I am of the view that the RAD has again failed to address the issue of credibility in the conduct of its state protection analysis. This application is granted and the matter returned for a second reconsideration for the reasons that follow.

A. *Facts*

[3] The applicants are Sherika Coleena Green [Principal Applicant or PA] and her 6 year old daughter Casey Lanae Bryan. The applicants are both citizens of Jamaica.

[4] The applicants claimed refugee protection in this country on the basis of the PA's stated fear of domestic violence. The applicants fear the PA's former boyfriend and Casey's father, Hannif Bryan. The applicants state that the PA's relationship with Mr. Bryan began in April of 2007, however he became abusive with the threats and harassment escalating after the PA became pregnant with Casey.

[5] In October of 2009, the PA states she was choked by Mr. Bryan. The PA reports that this was the last time the applicants had direct contact with Mr. Bryan, however he continued to try

to contact both the PA and the PA's mother via text and email. On two occasions he attempted to abduct Casey from her daycare centre, and on two separate occasions unknown assailants attacked the PA with a knife.

[6] The applicants left Jamaica for Canada in December, 2012 and claimed refugee protection in April, 2013.

B. *Previous Decisions*

(1) RPD Decision

[7] The RPD rejected the applicants' refugee claim, finding that the determinative issue was the availability of adequate state protection and concluding on a balance of probabilities that the PA did not rebut the presumption that adequate state protection is available to the applicants in Jamaica.

[8] The RPD found the PA was not a completely credible witness, noting embellishment by the PA when addressing what she feared Mr. Bryan would do to Casey. The RPD found the PA's answers in this regard were not direct and that she had not testified in a straightforward and spontaneous manner on this issue. The PA explained that this occurred due to her nerves, an explanation the RPD rejected. The RPD however did not disbelieve the PA's allegations as they related to domestic abuse at the hands of Mr. Bryan.

[9] Based on the RPD's credibility finding above, the RPD did not accept that the PA reported to the police on five or six occasions as she testified but rather that she had only reported to the police once, a visit that was corroborated by a police report [Police Report]. The RPD also rejected the PA's assertion, again based on the prior credibility finding, that the information in the Police Report evidencing that one visit was not accurate in that she had never been advised to visit the Court office to seek a threat summons against Mr. Bryan as indicated in the Police Report.

(2) First RAD Decision

[10] The RAD dismissed the applicants' appeal notwithstanding that the RAD found errors in the RPD's credibility assessment [First RAD Decision].

[11] The RAD found the RPD's conclusion that the PA lacked credibility did not have sufficient support in the evidence. Furthermore, the RAD found that in light of the RPD's finding that the PA was a victim of domestic violence the RPD had failed to adequately consider the Gender Guidelines. Despite this, the RAD determined it was reasonable for the RPD to find that the PA did not rebut the presumption of state protection. In support of this conclusion the RAD noted that the RPD considered the PA's situation and that the PA approached the authorities but failed to make formal reports of alleged threats to the police as advised to do. The RAD then set out the RPD's findings on state protection and concluded those findings were reasonable since the PA failed to follow through on the police's advice notwithstanding that the PA is a well-educated and resourceful individual.

(3) Decision in *Green*

[12] Justice Kane allowed the applicants' judicial review application from the First RAD Decision because the RAD erred in (1) performing a judicial review type function rather than an appellate function and (2) relying on the RPD's credibility findings, findings which the RAD found unreasonable, as a basis to conclude that the PA did not rebut the presumption of state protection.

[13] Justice Kane noted that the RAD recognized that the RPD indicated that the state protection findings it made were based on the credibility findings. Justice Kane further noted that the RAD, having found that those credibility findings were unreasonable, had no basis to uphold the RPD's finding that the applicants failed to rebut the presumption of adequate state protection.

[14] Justice Kane returned the matter to the RAD for reconsideration.

C. *Decision under Review*

[15] In reconsidering the matter, the RAD again confirmed the RPD's decision that the applicants are neither Convention refugees nor persons in need of protection (the RAD Redetermination Decision).

[16] The applicants sought to place new evidence, in the form of an affidavit explaining that stress and anxiety affected her testimony at the RPD, before the RAD. The RAD found the

affidavit addressed evidence fully canvassed at the RPD and was therefore not new evidence as contemplated under subsection 110(4) of the IRPA. In rejecting the new evidence the RAD also denied the applicants' request for an oral hearing under subsection 110(6) of the IRPA.

[17] The RAD then addressed the nature of its role relying on Justice Michael Phelan's decision in *Hurugulica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 at para 54-55, 30 Imm LR (4th) 115. The RAD concluded that its role was to conduct a hybrid appeal. The RAD described its role as reviewing all aspects of the RPD's decision and independently assessing the applicant's claim while recognizing it can respect the conclusions of the RPD on issues of credibility where the RPD enjoys a particular advantage.

[18] The RAD then confirmed the RPD's decision finding that the applicants failed to rebut the presumption of adequate state protection in Jamaica and that the PA had not made a reasonable and diligent effort to seek state protection. The RAD found, based on the objective evidence, that adequate state protection is available for victims of sexual/domestic abuse in Jamaica and the applicants would be able to seek state protection were they to face risk from Mr. Bryan. While the RAD acknowledged that the "RPD had some credibility concerns" it did not address the credibility findings beyond noting in its discussion of the RAD's role that it "can recognize and respect the conclusions of the RPD on issues such as credibility."

## II. Position of the Parties

### A. *Applicants' Position*

[19] The applicants argue that the RAD erred in failing to admit the PA's proposed new evidence relating to her state of mind before the RPD. The applicants submit that the evidence dealt with issues of procedural fairness arising out of the actual conduct of the hearing, evidence that was unavailable prior to the hearing.

[20] The applicants further submit that the RPD erred in treating the issues of credibility and state protection as discrete. Instead the applicants argue that these matters were found to be linked by Justice Kane where she concluded in *Green* that the RPD based its state protection findings on its credibility findings. The applicants argue that the doctrines of issue estoppel and *stare decisis* prevented the RAD from concluding otherwise on redetermination without at least turning its attention to Justice Kane's findings.

[21] The applicant's further argue that even if the RAD was not bound by Justice Kane's conclusion in *Green*, the RAD's failure to address the issue of credibility constitutes an unreasonable error in its evaluation of the evidence before it. The applicants submit that they put the issue of the RPD's negative credibility findings before the RAD in their submissions and the RAD Redetermination Decision erred by failing to address the issue of credibility in the redetermination. There was, the applicants argue, no reasonable basis to conclude that the RPD's state protection findings were not reliant upon the RPD's credibility findings.

B. *Respondent's Submissions*

[22] The respondent argues that the RAD conducted an independent assessment of the evidence, deferring to the RPD on the question of credibility and reaching a reasonable conclusion that adequate state protection would be forthcoming to the applicants in Jamaica.

[23] The respondent argues that Justice Kane's decision was not binding upon the RAD in its independent assessment of the evidence on redetermination and as such there is no merit to the issue estoppel argument. The respondent further argues that Justice Kane issued no direction in respect of the redetermination and made no conclusions of fact regarding the reasonableness of the RPD's credibility analysis. As a result, the RAD did not ignore *Green* or breach the principle of *stare decisis*.

[24] The respondent also submits that the applicant has misread Justice Kane's decision when stating that credibility was identified as a central issue on appeal to the RAD. Finally, the respondent argues that the RAD reasonably found the proposed affidavit was not new evidence under subsection 110(4) of the IRPA.

III. Issues and Analysis

[25] While the applicant has identified a number of issues, the RAD's failure to address the RPD's credibility findings despite: (1) the RPD's linking of credibility to the issue of state



protection in its decision; and (2) the applicants' arguments before the RAD that the RPD's negative credibility findings impacted the state protection determination, is determinative.

[26] In reaching its state protection determination, the RPD relied on two core findings: (1) the PA only went to the police on one occasion contrary to her allegation of making five or six visits; and (2) the PA did not follow the instructions in the Police Report notwithstanding her allegations that the Police Report was not accurate. In rejecting the PA's evidence in these two key areas the RPD expressly and unequivocally points to the RPD's "previous credibility findings" as the basis for rejecting the PA's evidence.

[27] This is not a case where the RPD found the applicant not to be credible in respect of her alleged fear of persecution or risk and then concluded that even if it was wrong in that regard adequate state protection exists. This is a situation where the credibility findings relate to the operational adequacy of state protection where the RPD did not disbelieve the applicants' fear of persecution or risk.

[28] In this case the RPD did not disbelieve that the PA was a victim of domestic violence, that Mr. Bryan had attempted to abduct Casey and that the PA had been attacked on two occasions by unknown assailants. Instead, the RPD did not accept the PA's evidence as it related to her efforts to seek state protection, evidence that was rejected on the basis of prior credibility findings. Having rejected the PA's evidence relating to her efforts to seek state protection the RPD concluded that the applicants failed to rebut the presumption of state protection.

[29] In appealing the RPD's decision to the RAD the applicants consistently submitted to the RAD, initially and on redetermination, that the RPD erred on the issue of credibility and that those credibility findings were contrary to the Gender Guidelines. The applicants also consistently advanced the argument that the RPD's credibility findings led the RPD to erroneously conclude that the PA went to the police on only one occasion and that the Police Report accurately reflected the police response on that occasion.

[30] The applicants' having raised the RPD's credibility findings as an issue in the state protection analysis triggered the obligation on the RAD to consider the alleged errors on redetermination (*Huruglica v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 93 at para 103).

[31] The Redetermination Decision however does nothing more than acknowledge that "the RPD had some credibility concerns". It then ignores these concerns in addressing what it characterizes as the determinative issue in the claim, state protection.

[32] Although it does not actively consider or analyse the RPD's credibility findings, the RAD nonetheless implicitly endorses these findings by relying on the contents of the Police Report to conclude adequate state protection would be forthcoming for the applicants. It is not evident how or on what basis the RAD reached this conclusion on redetermination.

[33] The failure of the RAD, in re-determining the appeal, to address the very issues raised by the applicants that were central to the appeal of the RPD's decision is a reviewable error that undermines the transparency of the RAD Redetermination Decision rendering it unreasonable.

[34] In light of my conclusion I need not address the legal effect of Justice Kane's decision in *Green*.

[35] The applicants also argue that the RAD erred in refusing to accept the applicants' new evidence. I respectfully disagree. I am satisfied that the RAD's decision not to admit the evidence pursuant to subsection 110(4) on the basis that the evidence was canvassed before the RPD and in the applicants' Memorandum of Fact and Law submitted to the RAD was reasonable.

#### IV. Conclusion

[36] The matter is returned for a second redetermination that is to recognize that the RPD's state protection findings are dependent upon and directly linked to the findings of credibility.

[37] The parties did not identify a question for certification.

V. Costs

[38] In oral submissions the applicants' counsel argued that this matter warranted an award of costs pursuant to Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22.

[39] The crux of the argument advanced was that the respondent had unreasonably and unnecessarily prolonged the proceedings by not agreeing to return the matter for a second redetermination in light of an obvious error. Rule 22 provides that "No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders."

[40] The jurisprudence establishes that the threshold for establishing the existence of "special reasons" is high and the issue must be assessed based on the particular circumstances of each case (*Dhaliwal v Canada (Minister of Citizenship and Immigration)*, 2011 FC 201 at paras 29 and 30, 384 FTR 261 [*Dhaliwal*]).

[41] A party's conduct that unreasonably and unnecessarily prolonged the proceedings has previously been found to amount to "special reasons". However the jurisprudence also makes clear that the Minister's opposition to an application for judicial review does not give rise to special reasons for costs (*Dhaliwal* at para 33). While I am sympathetic to the circumstances of the applicants in this matter, the respondent has not acted unfairly, oppressively, or improperly or unreasonably prolonged proceedings in opposing the application for judicial review (*Johnson v*

*Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262 at para 26, 52 Imm LR (3d)

76). The special reasons threshold has not been met here, no costs will awarded.

**JUDGMENT**

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

1. The application is granted;
2. The matter is returned to the a differently constituted panel of the RAD for redetermination;
3. In redetermining the matter the RAD is to:
  - a. recognize that the RPD's state protection findings are dependent upon and directly linked to the RPD's findings of credibility; and
  - b. take into account these reasons and the reasons of Justice Kane in *Green v Canada (Minister of Citizenship and Immigration)*, 2015 FC 536.
4. Costs are not awarded; and
5. No question is certified.

"Patrick Gleeson"

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Judge

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

**DOCKET:** IMM-4447-15

**STYLE OF CAUSE:** SHERIKA COLEENA GREEN, CASEY LANAE  
BRYAN et. al. v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 4, 2016

**JUDGMENT AND REASONS:** GLEESON J.

**DATED:** JUNE 21, 2016

**APPEARANCES:**

Jason Currie FOR THE APPLICANTS

Ian Hicks FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Jason Currie FOR THE APPLICANTS  
Barrister and Solicitor  
Windsor, Ontario

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of  
Canada  
Toronto, Ontario