

Federal Court



Cour fédérale

Date: 20181010

Docket: IMM-4969-17

Citation: 2018 FC 1010

Ottawa, Ontario, October 10, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

**ROSITA NOELLIEN
AVRYA TRACIA NOELLIEN (MINOR)
AVRY IVIN GIDDINGS (MINOR)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Ms. Rosita Noellien and her two children Avrya and Avry, are citizens of St. Lucia. Upon arrival in Canada in 2012, they sought protection, reporting that they feared domestic violence perpetrated by Ms. Noellien's former common law husband.

[2] The Refugee Protection Division [RPD] determined the applicants are neither Convention refugees nor persons in need of protection. The applicants submit that this determination was unreasonable and that the RPD violated their procedural fairness rights by not providing an interpreter.

[3] As is explained in greater detail below, the application is dismissed. The applicants have not demonstrated that there was a breach of procedural fairness or that in assessing the claim the RPD committed any error warranting the Court's intervention.

II. Background

[4] Ms. Noellien has an older daughter named Mudicia. Mudicia, who is bisexual, arrived in Canada in 2009 and was accepted as a Convention refugee on the basis of her sexual orientation. The applicants' claim is based on a fear of domestic violence as Ms. Noellien's former common law husband reportedly perceives that Ms. Noellien, having supported Mudicia, is also bisexual.

III. The Decision under Review

[5] The RPD found credibility and state protection were determinative issues.

[6] In addressing credibility, the RPD first noted the difficulties and stress associated with the hearing process and indicated that Guideline 4 addressing Gender-Related Persecution and Guideline 9 relating to Sexual Orientation and Gender Identity [Chairperson's Guidelines] had been considered and applied.

[7] The RPD addressed the applicants' three-month delay in initiating their claims. The RPD acknowledged the delay was not lengthy but noted the absence of any cogent response to explain the delay. The RPD found the delay was not determinative but, noting Ms. Noellien's evidence to the effect that she had no intention of claiming protection upon arrival in Canada, did call into question her intentions.

[8] The RPD then addressed Ms. Noellien's testimony concerning her daughter. Ms. Noellien first stated her daughter was in a bisexual relationship in Canada but later acknowledged that she was married to a man and had two children. The RPD also noted that Ms. Noellien did not know when Mudicia had been married and that Mudicia's affidavit made no mention of her sexual orientation.

[9] The RPD also found that Ms. Noellien's fear of being perceived as bisexual was not well founded. She had testified that this perception did not arise between 2009 (when Mudicia left St. Lucia) and 2012 (when Ms. Noellien came to Canada). The RPD found there was no reason to believe the perception would arise upon her return, after an even further passage of time. The RPD concluded the claims failed on this issue and then addressed the question of state protection.

[10] The RPD acknowledged Ms. Noellien's evidence to the effect that she had sought police protection on numerous occasions and had obtained a protection order, which her ex-husband contravened. However, the RPD took issue with evidence, noting she (1) could not describe her police visits in much detail; (2) never informed the courts that her husband breached the

protection order; (3) did not have a copy of the order because it was lost in a hurricane; (4) contradicted an affidavit from a friend that said she never received a copy of the order; and (5) could not even give an approximate date the order was issued.

[11] The RPD noted that it was cognizant of Ms. Noellien's lack of education and sophistication. However, the inconsistencies and absence of corroborative evidence, including the inability to identify even approximate dates of important events and the lack of any evidence that Ms. Noellien suffered from any cognitive or memory impairments, undermined the claims.

[12] The RPD found that there was not enough evidence to conclude that Ms. Noellien's ex-husband would harm the applicants if they returned to St. Lucia. They had had no contact for five years, and Ms. Noellien had testified that he was seeing other women.

[13] Turning to country condition documents on domestic violence, the RPD described the evidence as mixed. But, considering all of the documents, the panel found state protection for victims of domestic violence did, on a balance of probabilities, exist and that state protection was available to Ms. Noellien if she were to return to St. Lucia. With respect to the children, the RPD noted that Ms. Noellien had testified her son is frightened of her ex-husband; however, he had never harmed the children, and no further evidence was provided.

IV. Issues and Standard of Review

[14] The application raises the following issues:

- A. Was there a breach of procedural fairness?

- B. Is the RPD's decision unreasonable because:
- i. the subjective fear finding was unreasonable;
 - ii. the credibility findings were based on irrelevant issues;
 - iii. the state protection analysis was flawed; and/or
 - iv. there was a failure to assess the claims of the minor applicants individually?

[15] The applicants' procedural fairness issue will be reviewed against a standard of correctness. In doing so, the Court will consider whether the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[16] The RPD's decision is reviewable against a standard of reasonableness. A reviewing court will only intervene when reviewing a decision on a reasonableness standard where the elements of justification, transparency, and intelligibility within the decision-making process are absent or the decision does not fall within a range of possible, acceptable outcomes defensible in respect of the facts and law (*Cambara v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1019 at paras 13 and 14; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

A. *Was there a breach of procedural fairness?*

[17] The applicants submit that in the conduct of the hearing, the RPD violated the principles of natural justice by failing to provide an interpreter as Ms. Noellien was having difficulty understanding the panel member. The applicants submit that the RPD insisted on continuing because Ms. Noellien had completed and signed her Personal Information Form [PIF] in English.

[18] There was no breach of procedural fairness in this case. The panel member inquired as to the need for a translator at the outset of the hearing, and neither Ms. Noellien nor her counsel indicated a translator would be required.

[19] A review of the hearing transcript does demonstrate that Ms. Noellien expressed some concerns about her capacity in English, but neither she nor her counsel identified any other language in which she had a greater ability or capacity. The transcript also discloses that the panel member was aware of some hesitation in her responses and sought confirmation that she understood. There was a need to repeat and clarify questions, but where necessary the panel member did so, and on occasion Ms. Noellien's counsel intervened to ensure a question was understood.

[20] In written submissions supporting this application, counsel for the applicants stated that a request was made to the panel member to halt the proceeding so an interpreter could be provided. I have not identified any such exchange in the transcript, nor has counsel for the applicants

pointed to such an exchange in either their written or oral submissions. To the contrary, in making submissions to the RPD, Ms. Noellien's counsel attributed the need to repeat and clarify questions to Ms. Noellien's education level, a circumstance the RPD expressly acknowledged and accounted for in the decision.

[21] Counsel for the applicants have not identified any instance where the RPD moved on without ensuring that a question was understood and that Ms. Noellien was provided an opportunity to answer. Having considered all of the circumstances, I am unable to conclude there was a breach of procedural fairness.

B. *Is the RPD's decision unreasonable?*

(1) Was the RPD's subjective fear finding unreasonable?

[22] The applicants submit that, although a delay in making a claim is a relevant factor in assessing credibility, the RPD was required to consider any reasonable explanation provided for the delay.

[23] The RPD did consider Ms. Noellien's explanation. In doing so, the RPD concluded that her explanation of the delay—unfamiliarity with the refugee process and her daughter's lifestyle—did not amount to a cogent explanation for the delay. In support of this conclusion, the RPD noted that Mudicia's refugee claim was successful and that Ms. Noellien herself was not bisexual.

[24] These conclusions were reasonably available to the RPD. The RPD did not err in considering the delay in initiating a claim, a delay the RPD acknowledged was not determinative of the issues before it.

(2) Were the RPD's credibility findings based on irrelevant issues?

[25] The applicants take issue with the RPD's credibility findings relating to whether Mudicia was living with a man or a woman and Ms. Noellien's failure to provide a copy of the protection order naming her ex-husband. They submit these findings were in respect of issues that were irrelevant to the claim.

[26] The issues were not irrelevant to the claim. Mudicia's bisexuality and Ms. Noellien's perceived support for her daughter's sexual orientation underpinned the claim for protection. It was not an error for the RPD to note inconsistencies in Ms. Noellien's evidence in respect of her daughter's current relationships.

[27] The RPD was also concerned with the absence of corroborative documentation in light of the claim of domestic violence and the steps reported to have been taken in St. Lucia in response to that violence. It was not unreasonable for the panel member to comment on Ms. Noellien's failure to produce a copy of the protection order. Similarly, it was not unreasonable for the RPD to note the absence of efforts to obtain a copy of the order in light of its relevance to the narrative and the documentary evidence indicating such documents can be obtained.

[28] It was also reasonably open to the panel member to take issue with the inconsistency between Ms. Noellien's testimony stating that the order had been lost in a hurricane and the affidavit evidence of Ms. Magdalene Johnny to the effect that Ms. Noellien had never received a copy of the order.

(3) Was the state protection analysis flawed?

[29] The applicants submit the RPD made selective use of the documentary evidence relating to state protection. They argue the RPD focused on evidence of government efforts to reduce domestic abuse to the exclusion of evidence indicating those efforts had not translated into real protection. In this respect, they point to Ms. Noellien's evidence that she had made multiple police reports but received no assistance. Again, I disagree.

[30] The RPD did not engage in a selective consideration of the country condition documentation. The RPD noted that the documentary evidence relating to the treatment of domestic and gender violence in St. Lucia was mixed. The RPD also considered the documentation submitted by the applicants but noted it was dated and based on news reports, rendering it less reliable. The applicants do not point to any specific evidence that is directly contradictory to the RPD's conclusions.

[31] I would also note the RPD's finding that there was insufficient credible evidence to find the agent of persecution would have reason to harm Ms. Noellien now, as they had had no contact for five years and she understood him to be seeing other women.

[32] Essentially, the applicants take issue with the RPD's weighing of the state protection evidence. This is not a ground for judicial review.

(4) Was there a failure to assess the claims of the minor applicants individually?

[33] The applicants submit that the RPD erred by concluding the children were not at risk because they had not been physically harmed. They argue that Ms. Noellien's evidence established they were present when she was attacked, they had been threatened by the agent of persecution, and they had filed separate PIFs although they relied on Ms. Noellien's narrative. It is argued that in the circumstances, the RPD's assessment of their claims was grossly deficient.

[34] While the three claims are separate and distinct, they all rely on a single narrative and are indisputably related. In this case, Ms. Noellien's claim was unsuccessful as there was insufficient credible evidence to support key aspects of her narrative; the same narrative relied on by the minor claimants. In light of the RPD's credibility concerns, concerns that were reasonable, it is not apparent how a different result was available in respect of the minor claimants. The applicants have not identified what evidence would have supported a different result.

[35] This case is readily distinguishable from the circumstances in *Asfaw v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15822 (FCTD) [*Asfaw*], a case upon which the applicants rely. In *Asfaw*, two claims were joined where unrelated claimants were from the same town. It was in this unique circumstance that the court noted the "Board took care in dealing with the two cases, to deal with them separately, [and to] render separate reasons in each case" (*Asfaw* at para 5). I cannot interpret the comments in *Asfaw*, made in the unique circumstances of that

case, as imposing an obligation on the RPD to render separate detailed reasons in respect of minor claimants relying upon the narrative of a parent.

[36] In this case, the RPD clearly turned its mind to, addressed, and assessed the circumstances of the minor applicants. It did not err in its assessment of their claims.

VI. Conclusion

[37] The application is dismissed. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-4969-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and
2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4969-17

STYLE OF CAUSE: ROSITA NOELLIEN, AVRYA TRACIA NOELLIEN
(MINOR), AVRY IVIN GIDDINGS (MINOR) v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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