Date: 20080708

Docket: IMM-61-08

Citation: 2008 FC 844

Ottawa, Ontario, July 8, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

STANLEY BERNARD GONSALVES, PAULA SUSAN GONSALVES, BRANDON JOSH GONSALVES, TRISTAN MARK GONSALVES, TIFFANY AMANDA GONSALVES, and KRYSTAL MARIE GONSALVES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The principal applicant, Stanley Gonsalves, his wife, Paula Gonsalves, and their children Brandon Gonsalves, Tristan Gonsalves, Tiffany Gonsalves, and Krystal Gonsalves, bring this application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated December 10, 2007. In that decision the Board concluded that the applicants are neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

FACTS

[2] The applicant family are citizens of Guyana of Indo-Guyanese descent. They arrived in Canada in August 2006 alleging a well-founded fear of persecution on the basis of their race and ethnicity. Specifically, the applicants allege that as Indo-Guyanese individuals, they have been subject to persecution at the hands of the country's majority ethnicity, the Afro-Guyanese.

[3] The applicants state that the most serious incident of persecution occurred in May 2006 when the principal applicant was accosted at his auto repair garage by five Afro-Guyanese individuals who demanded all his money and jewellery. The principal applicant states that the five men forced themselves into his home, which is attached to the auto repair garage, and that the men beat him, fondled his wife, and hit his children. After the principal applicant gave the men jewellery and between 200,000 and 300,000 Guyana dollars, the thieves bound the applicants' hands and feet and threatened the family before leaving and allegedly firing several shots into the house.

[4] The applicants were later set free by neighbours, who told the applicants that they had called the police. However, the police did not attend to the scene because, according to the neighbours, they did not have a vehicle. Because the police were allegedly unable to attend to the scene, the applicants' neighbours drove them to the police station, where they filed a police report and were provided with the necessary documentation to be seen by a doctor. Following the incident, the police did visit the scene, several persons were questioned about the robbery, and one individual was arrested and charged one week later. Three months later, in August 2006, the applicants fled

Guyana. The principal applicant is unaware of whether the police were able to apprehend other suspects.

[5] In his Personal Information Form (PIF), the principal applicant also cites a number of other incidents of harassment and ill-treatment at the hands of the Afro-Guyanese, including:

1. a night in which an Afro-Guyanese individual broke the principal applicant's bedroom window and tried to gain entry into the applicants' home;
2. a time when the principal applicant repaired the vehicle of an Afro-Guyanese man who then refused to pay the bill and told the principal applicant that if he reported the incident to police, the man would burn down his house and garage;
3. times in which the applicants felt they were being followed by Afro-Guyanese people; and
4. incidents wherein the principal applicant's children were threatened and harassed at school by Afro-Guyanese students and teachers. The principal applicant states that the treatment got so bad that they placed the children in Catholic school, believing that the treatment would be better. However, the principal applicant states that the children received similar treatment in the Catholic school and that, in any event, the applicants can no longer afford to continue sending their children to Catholic school.

In addition, the female applicant also cites an incident in her PIF narrative in which she was accosted at a school fair with her daughters in 2005. In that incident, the female applicant states that two Afro-Guyanese men followed them around the fair grounds and eventually confronted them and threatened to sexually assault the female applicant and her daughters.

Decision under review

[6] On December 10, 2007, the Board concluded that the applicants are not Convention refugees or persons in need of protection. In reaching its decision, the Board accepted, on the basis of the evidence proffered, that the applicants were beaten and robbed by Afro-Guyanese thieves in May 2006. In this regard, the Board stated at page 3 of its decision:

> The panel accepts that the claimants were unfortunately robbed and beaten in May 2006. This was substantiated by the police and medical reports by the claimants.

[7] However, despite finding the applicants credible with respect to the May 2006 incident, the Board held that the applicants had failed to rebut the presumption that state protection would be available to them in Guyana, stating at page 3:

> The panel is not convinced, as it must be, that the state would not be reasonably forthcoming with serious efforts to protect the claimants if they were to return to Guyana. The panel finds that the totality of the evidence does not support a conclusion of state breakdown, nor does it rebut the presumption that a state is able to protect its nationals from crime. A state is not expected to be able to provide perfect protection to its citizens.

[8] Accordingly, after reviewing the evidence before it, the Board gave more weight to the documentary evidence that state protection was available, and concluded that the applicants left Guyana before allowing the state authorities to finish their investigation. The Board stated at pages 7-8 of its decision:

> … The panel finds that the claimants left Guyana too quickly to allow the authorities to be able to prosecute the perpetrators of the robbery and assault on the family. …
>
> The panel finds that when analysing the issue of state protection in the context of the documentary evidence, the claimants have failed to

> rebut the presumption of state protection with clear and convincing evidence.

ISSUES

[9] There are two issues to be considered in this application:

1. Did the Board err in concluding that state protection would be reasonably forthcoming if the applicants were to return to Guyana; and
2. Did the Board err in failing to make an independent assessment with respect to the children's claims?

STANDARD OF REVIEW

[10] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL), the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question."

[11] In *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 362 N.R. 1, the Federal Court of Appeal affirmed at paragraph 38 that questions as to the adequacy of state protection are "questions of mixed fact and law ordinarily reviewable against a standard of reasonableness." This standard had been previously applied in a number of decisions of this Court: see *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, 45 Imm. L.R. (3d) 58; *Nunez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1661, 51 Imm. L.R. (3d)

291; and *Franklyn v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1259, [2005] F.C.J. No. 1508 (QL).

[12] I agree with this reasoning and conclude that the appropriate standard to apply to the Board's decision in this case is that of reasonableness. Accordingly, so long as the Board's reasons are "tenable in the sense that they can stand up to a somewhat probing examination," then the decision is reasonable and the Court will not interfere with the Board's decision: see *Franklyn*, above, at para. 17. For pure questions of fact, the standard is as set out in paragraph 18.1(4)(d) of the *Federal Courts Act.*

ANALYSIS

Issue No. 1: <u>Did the Board err in concluding that state protection would be reasonably forthcoming if the applicants were to return to Guyana?</u>

[13] The starting point in any assessment of state protection lies with the Supreme Court of Canada decision in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689. In that case, the Court held that refugee protection is a form of "surrogate protection" intended only in cases where protections from the home state are unavailable.

[14] Further, the Court held at page 725 that except in situations where there has been a complete breakdown of the state apparatus, there exists a general presumption that a state is capable of protecting its citizens:

> … Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of

> complete breakdown of state apparatus … it should be assumed that the state is capable of protecting a claimant.

[15] While the presumption of state protection may be rebutted, this will only be the case where a refugee claimant proffers "clear and convincing" evidence confirming the state's inability to provide protection. As Mr. Justice La Forest stated at pages 724-725 of *Ward*, such evidence can include the "testimony of similarly situated individuals let down by the state or the claimant's own testimony of past personal incidents in which state protection did not materialize."

[16] However, it must also be noted that the Court in *Ward* made clear that while a refugee claimant must proffer "clear and convincing" evidence of the state's inability to provide protection, they need not risk their lives in seeking such protection merely to demonstrate its ineffectiveness. Mr. Justice La Forest stated at page 724:

> Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.

See also *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1211, [2007] F.C.J. No. 1563 (QL) per Shore J.

[17] In considering the issue of state protection in the case at bar, the Board relied on both the documentary evidence as well as the applicants' own evidence surrounding the robbery and beating in May 2006. With respect to the May 2006 incident, the Board concluded that the applicants' evidence established that the police were in the process of conducting an investigation into the robbery and beating and that, accordingly, the applicants left "too quickly to allow the authorities to

be able to prosecute the perpetrators of the robbery and assault on the family." In this regard, the Board stated at page 7 of its decision:

> Notwithstanding the fact that the claimants were assisted by the authorities and that an individual was arrested in regard to the robbery, the authorities made sure that the family received adequate medical attention, the authorities took their report, continued their investigation and arrested a perpetrator.

[18] With respect to the documentary evidence, the Board relied upon both the 2007 U.S. Department of State Country Report on Guyana (Certified Tribunal Record at pages 163-172), and a document dated October 13, 2006 entitled "Whether Indo Guyanese are targeted because of their ethnic origin by different sectors of society, such as the police, criminal gangs and political groups" (Certified Tribunal Record at pages 173-174). In effect, the Board used this evidence, which it stated was drawn from "reliable and independent sources," to conclude that adequate state protection would be available to the applicants in Guyana. Accordingly, the Board concluded that the applicants failed to rebut the presumption of state protection as set out in *Ward*, above.

[19] The applicants, however, argue that the Board erred in its conclusion, as the evidence relied upon demonstrates the existence of long-standing tensions between Guyana's Afro- and Indo-Guyanese people, and that such tensions have created a clear lack of trust in the ability of the authorities to provide effective protection to the Indo-Guyanese in situations of race-related criminal activity.

[20] Having reviewed the documents in question, as well as a document dated February 2, 2006 entitled “Guyana: Criminal violence and police response; state protection efforts,” which was also contained in the Board’s National Documentation Package on Guyana, I conclude that this evidence demonstrates the existence of long-standing racial tensions between Guyana’s Afro-and Indo-Guyanese people, and the inability of state authorities to provide the Indo-Guyanese with effective protection due to poor training and equipment, understaffing, and an acute lack of resources. In particular, the document dated February 2, 2006 concerning criminal violence and police response in Guyana provides clear evidence that the effectiveness of police protection has been eroded by the racial tensions that exist in the country:

> With regard to racial polarization, Freedom House noted that law enforcement has been “seriously eroded” by allegations of racial bias: a number of Indo-Guyanese claim that the mainly Afro-Guyanese police ignores them, while many Afro-Guyanese maintain “that the police are manipulated by the government for its own purposes”….

[21] A similar finding was made by Mr. Justice Teitelbaum in *Katwaru v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 612, 62 Imm. L.R. (3d) 140, where he stated at paragraph 19, after reviewing the very same documents currently before the Court:

> ¶ 19 The documentary evidence indicates that the effectiveness of the Guyana Police Force is “severely limited” due to poor training, poor equipment, chronic understaffing, lack of resources, and acute budgetary constraints…. It also indicates that there are other factors affecting police effectiveness including the populace’s lack of trust in the police, racial polarization by officers and the general unprofessional conduct of the police…. In sum, it indicates that the deficiencies with the police are chronic and, as a consequence, the effectiveness of state protection is seriously compromised.

In *Katwaru*, Mr. Justice Teitelbaum went on to conclude that while the government was making "serious efforts" to address the problem of crime, there was no evidence indicating whether this had improved the availability of effective state protection.

[22] In the case at bar, while the Board cites the documentary evidence as providing an unbiased statement that adequate state protection is available to the applicants in Guyana, a review of that evidence raises serious questions as to the effectiveness of the protection available. For instance, while the police were in the process of conducting an investigation into the robbery, the evidence is that the effectiveness of such investigations is seriously hampered by the racial tensions existing within the country.

[23] The Board's decision does not address how these problems impact upon the effectiveness of the protection allegedly available to the applicants in Guyana. Given that this evidence contradicts the Board's ultimate finding, such a consideration was warranted in the Board's analysis: see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 (T.D.) per Evans J. (as he then was). On this basis, the Court concludes that the Board ought to have addressed this evidence before its conclusion. This is a reviewable error and, accordingly, the Board's decision must be set aside for these reasons.

[24] In addition, the Court finds that the Board confined its analysis to the May 2006 incident without addressing the other incidents of perceived persecution raised by the applicants, most

specifically the concerns raised by the principal applicant about the treatment of the applicant children, and the threats of sexual assault raised by the female applicant in her PIF narrative.

[25] Whatever the case may be, the incidents raised by the applicants are relevant to an assessment of the adequacy of state protection in Guyana, and the Board's failure to address them in its reasons amounts to a reviewable error.

[26] The applicants argue that this Court should send the matter back to the Board with a direction that the Board find the applicants to be Convention refugees. I do not agree. It is not for this Court to decide whether effective state protection is available in Guyana, but rather to review the Board's decision to determine whether it was reasonable. Having concluded that that decision was not reasonable, this matter must be returned to a differently constituted panel for redetermination.

Issue No. 2: <u>Did the Board err in failing to make an independent assessment with respect to the children's claims?</u>

[27] The applicants further argue that the Board erred by not independently assessing the claims of the applicant children which, according to the applicants, had their own independent aspects that needed to be assessed. However, as the respondent points out, the PIF narratives of the applicant children do not forward any individual claim, but rather, simply request that their claim be based on that of their parents.

[28] While I accept the respondent's position in this regard, the principal applicant, in his PIF narrative, provided extensive evidence on the ill-treatment and harm experienced by his children at the hands of Afro-Guyanese children and teachers. Further, the female applicant also cites an incident in which two Afro-Guyanese men threatened to sexually assault both her and her daughters at a school fair in 2005.

[29] As I stated above, none of these issues were canvassed or considered by the Board in its decision. Accordingly, to the extent that these concerns formed part of the PIF narratives of the principal applicant and his wife, the Board was required to consider the effect that such treatment had on the children. In failing to do so, the Board's decision was unreasonable and cannot stand up to a somewhat probing examination. Accordingly, it must be set aside for this reason as well, and remitted to a differently constituted panel of the Board for redetermination.

CERTIFIED QUESTION

[30] The applicants proposed two questions for certification about the state of the jurisprudence with respect to state protection – whether state protection must be "effective or adequate" and how that relates to the jurisprudence that it does not have to be "perfect". The respondent opposes the certification of these questions because the issue has already been decided by the Federal Court of Appeal. I find that these questions are not determinative of the case before me, and accordingly ought not to be certified. I will not comment on whether these issues have already been addressed by the Federal Court of Appeal since such a finding is not necessary in this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed; and
2. This matter is remitted to the Board for redeterminatin by a differently constituted panel.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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