Federal Court  Cour fédérale

Date: 20100210

Docket: IMM-1920-09

Citation: 2010 FC 138

Toronto, Ontario, February 10, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

BIJOU KAMWANGA KAYUMBA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated March 2, 2009, where the Board refused Bijou Kamwanga Kayumba's (the Applicant) claim for asylum.

Factual Background

[2] The Applicant is a citizen of the Democratic Republic of the Congo and lived in the city of Lubumbashi. Her claim is based on events that took place after the accidental death of her husband in November 2006. After the death of her husband, the Applicant was summoned to the village where her husband's family lived. She had never been to this village before, nor had she met his family previously. The family accused her of lying about her husband's death and confined her in a room for a week.

[3] Eventually, the Applicant was told that she would have to marry her brother-in-law. She was beaten for refusing to do so and was again confined. Days later, she was told that she must marry her father-in-law and that she would be killed if she refused. The Applicant was raped by her father-in-law, multiple times, over a period of several weeks. She was eventually brought to another village for medical treatment at which point she escaped from her captors.

[4] The Applicant fled her country, leaving behind her six children, arrived in Canada on September 4, 2007 and claimed protection.

Impugned Decision

[5] In its decision, the Board accepts the Applicant's testimony about the forced marriage and rape as credible but remarks that this alone does not guarantee refugee status. It notes that refugee status cannot be granted if there is an internal flight alternative.

[6] The Board goes on to identify Kinshasa as an internal flight alternative. The Board notes that this possibility was brought up at the hearing and that the Applicant stated that she cannot go live in Kinshasa as she does not speak lingala (the local language) and she does not have any brothers there who could help her. The Board rejects these reasons on the basis that they are socio-economic considerations and are not of a persecutory nature. It further finds that it would be reasonable for the Applicant to relocate to Kinshasa as she would not be subjected to a physical danger in either travelling there or living there.

[7] Moreover, the Board adds that it is unlikely that the Applicant's father-in-law, an 80 year old poor peasant who lives in a remote village, would leave his village and undertake the journey to Kinshasa for the sole purpose of finding the Applicant and making her his wife. Accordingly, on a balance of probabilities, the Board finds it unlikely that the Applicant would run a risk if she went to live in Kinshasa.

[8] Finally, the Board finds that the internal flight analysis applies equally to the application under subsection 97(1) of the Act.

Questions at issue

[9] The questions at issue are as follows:

a. Did the Board err in determining that an internal flight alternative exists by not analysing the Applicant's particular circumstances in view of the Gender Guidelines?

b. Did the Board err by rendering a finding of an internal flight alternative without referring to any documentary evidence in support of its assessment?

[10] The application for judicial review shall be allowed for the following reasons.

Relevant Legislation

[11] Immigration and Refugee Board of Canada, *Guideline 4: Women Refugee Claimants Fearing Gender -Related Prosecutions* (November 13, 1996).

If required, determine whether there is a possibility of an internal flight alternative.	S'il y a lieu, déterminez s'il existe une possibilité de refuge intérieur (PRI) :
Considerations:	
- Whether there would be undue hardship for the claimant, both in reaching the location of the IFA and in establishing residence there.	- tenir compte de la capacité de la revendicatrice de se rendre dans l'autre partie du pays qui offre une PRI et d'y rester sans difficultés excessives;
- Religious, economic, social and cultural factors, among others, may be relevant in determining the reasonableness of an IFA for a woman fearing gender-related persecution.	- les facteurs religieux, économiques, sociaux et culturels, entre autres, peuvent servir à évaluer le caractère raisonnable d'une PRI pour une femme qui craint d'être persécutée en raison de son sexe.

Analysis

Standard of review

[12] Both of the parties submit that the standard of review applicable to the questions at issue is reasonableness. They allege the availability of an internal flight alternative is a factual inquiry and the jurisprudence of this Court has established that as such it will be reviewed on a reasonableness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 51 and 62; *Khokhar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 449, [2008] F.C.J. No. 571 at paragraph 21 (QL); *Agudelo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 465, [2009] F.C.J. No. 583 at paragraph 17 (QL)). The second question concerns the interpretation and assessment of evidence and also attracts a reasonableness standard (*Dunsmuir*, above; *N.O.O. v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045, [2009] F.C.J. No. 1286 at paragraph 38 (QL)).

[13] I agree with these submissions and that these fact based decisions require deference. As the Supreme Court of Canada stated, «[t]here might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome» (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59).

Did the Board err in determining that an internal flight alternative exists by not analysing the Applicant's particular circumstances?

[14] The Applicant submits that the Board's analysis of the two prong test set out in *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.) and *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (C.A.) is unreasonable. The test requires, first, that the claimant show, on balance of probabilities, that there is a serious risk of persecution throughout the country including the suggested internal flight alternative. Secondly, it requires that the proposed alternative not be unreasonable given the circumstances of the individual claimant.

[15] The Applicant contends that the Board's analysis under both prongs of the test is unreasonable. With regard to the first prong, the Board concluded that it was unlikely that the Applicant's father-in-law would follow her to Kinshasa. She submits that she testified that she was threatened and abused by the entire family, not only her father-in-law. Therefore, the analysis is unreasonable given that she never indicated that her fear was solely limited to her father-in-law. Furthermore, contrary to the statement of the Board, she never indicated that her father-in-law is a poor peasant and it was an error to add this to the evidence.

[16] With respect to the second prong of the test, the Applicant argues that the analysis must be tailored to the circumstances of each claimant and sensitive to her specific circumstances. Specifically, she claims that the Board committed a reviewable error by failing "to exhibit the knowledge required, and to apply it in an understanding and sensitive manner when deciding

domestic violence issues in order to provide a fair result" (*Griffith v. Canada (Minister of Citizenship and Immigration)* (1999), 171 F.T.R. 240 at paragraph 24 (F.C.T.D.)). She argues that her testimony showed that, in her case, her basic survival would be at issue if she were to relocate to Kinshasa and that socioeconomic problems of this nature can make an internal flight alternative untenable.

[17] Moreover, she submits that, in adherence with the Gender Guidelines, the Board should have taken into account the religious, economic and cultural factors and considered how these factors would affect her specific situation. The Applicant presented evidence showing that she suffers from anxiety and post-traumatic stress disorder and is being treated. She also testified that she does not speak lingala, has never been to Kinshasa, does not have family there and would have difficulties because as a rape victim she would be an outcast. She adds that the Board discounted and ignored these factors and failed to make any comment on the evidence of her specific situation.

[18] The Respondent argues that there is a high threshold that must be met by the claimant who is contesting an internal flight alternative finding. He submits that a lack of relatives and the inability to speak the local language are not hardships of the nature that would render an internal flight alternative unreasonable (*Flores v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 410, [2009] F.C.J. No. 525 (QL); *Maskini v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 826, [2008] F.C.J. No. 1039 (QL)).

[19] With respect to the Gender Guidelines, the Respondent underlines that a failure to apply the Gender Guidelines does not necessarily result in a reviewable error (*Sy v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 379, [2005] F.C.J. No. 462 (QL); *Diallo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1450, [2004] F.C.J. No. 1756 (QL)). In this case, there is no reviewable error as the Applicant was able to adequately convey her story and the nature of her fear to the Board. Also, no medical evidence was presented showing the Applicant's medical condition would make relocation to Kinshasa an unduly harsh proposition.

[20] I am satisfied that the reasons demonstrate that the Board correctly applied the first prong of the test and considered whether the Applicant would be safe from the claimed persecution. Despite the Applicant's argument, I find that the decision on the first prong of the test was not unreasonable and falls within a range of possible, acceptable outcomes.

[21] However, I cannot find that the analysis under the second prong of the test was reasonable. The Board concluded that it was not unreasonable for the Applicant to seek refuge in Kinshasa on the basis that her inability to speak lingala and the absence of her brothers would not be an undue hardship. There is no analysis in the reasons of the Applicant's gender or personal circumstances – including that fact that she is a rape victim. This despite the fact that in her testimony, the Applicant indicated that she would be discriminated against in Kinshasa should someone find out that she is a rape victim.

[22] The Applicant put forward the issue of the Gender Guidelines which specify that particularly relevant considerations in determining the reasonableness of woman's recourse to an

internal flight alternative including economic and cultural factors and how these factors affect women in the proposed internal flight alternative.

[23] I am not satisfied that the Board considered the Gender Guidelines as related to the internal flight alternative. The documentary evidence shows that women who are victims of rape, along with their children, are ostracised and face discrimination throughout Congo, often leading them to live in isolation and being unable to support themselves. The Applicant also explained this in her testimony. The Board did not comment on this and the Court cannot presume that it took it into consideration in reaching its conclusion.

[24] The Federal Court of Appeal in *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 164, reiterated that the unreasonableness test for an internal flight alternative sets a high threshold. But it also said that a factor or combination of factors would meet the threshold if they establish that a claimant's life or safety would be jeopardized (at paragraph 15).

[25] However, the Board could not reasonably conclude that this threshold was not met as it did not take into account the factors set out in the Gender Guidelines, nor how the Applicant’s personal circumstances in combination with those factors impact the reasonableness of the finding of the internal flight alternative. One would have to conduct such an analysis in order to reasonably decide whether or not, as the Applicant contends, considering the pertinent socioeconomic factors along with the her personal circumstance would indeed lead to the claimant’s life essentially being jeopardized. Therefore, the Court's intervention is warranted.

Did the Board err by rendering a finding of an internal flight alternative without referring to any documentary evidence in support of its assessment?

[26] The Applicant recognizes that it is not necessary for the Board's decision to refer to every piece of evidence. However, she submits that evidence that supports a claimant's position must be considered and the Board should not selectively refer to evidence that supports its conclusion without also referring to the contrary evidence (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 (F.C.T.D.)).

[27] Moreover, the Applicant argues that the Board could not make an internal flight alternative finding without referring to any documentary evidence in support of its assessment (*Cuevas v. Canada (Minister of Citizenship and Immigration),* 2005 FC 1169, [2005] F.C.J. No. 1425 at paragraph 12 (QL)). She submits that the documentary evidence put before the Board shows that Congo overall, and Kinshasa more specifically, is fraught with insecurity and dangers for women – particularly women who have been raped and are the subject of social discrimination and rejection by communities. She contends that, not only did the Board err by not mentioning any evidence in support of its finding, it further erred my not mentioning any of the above noted evidence which is contrary to its finding.

[28] The Respondent argues that the Board did not need to take into account the evidence on the discrimination felt by women who have been raped in Congo as the Applicant's claim, as set out in her Personal Information Form, was based only on the forced marriage issue. Besides, the general

documentary evidence describing violence against women was not so compelling or relevant to the Applicant's claim that the failure to refer to it was an error of law.

[29] The reasons provided by the Board are very brief, particularly the portion on the reasonableness of the internal flight alternative. The Board, after dismissing the Applicant's reasons opposing the internal flight alternative, states that the internal flight alternative is reasonable as the Applicant will not face a physical danger or undue hardship in reaching Kinshasa or in relocating there.

[30] The Board did not refer to any documentary evidence in support of its conclusion. The tribunal record does not contain documents that would clearly have supported that conclusion, the only documents included in the tribunal record is the RPD Index for Congo and articles submitted by the Applicant at the hearing pertaining to the prevalence of rape in Congo and the treatment of rape victims. It is unknown what information the Board relied on when it concluded that the Applicant would not be subject to any undue hardship in relocating to Kinshasa, this despite the Applicant's testimony that she would be discriminated against as a rape victim along with numerous other hardships stemming from cultural factors. The Board erred in reaching its conclusion without any justification or calling upon any documentary evidence (*Cuevas*, above).

[31] Neither party has proposed a question for certification and none arises.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is allowed. The matter is remitted back for redetermination by a newly constituted Board. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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