Federal Court  Cour fédérale

Date: 20100318

Docket: IMM-4057-09
IMM-4058-09

Citation: 2010 FC 311

Ottawa, Ontario, March 18, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

CAROL DAVEY JOHNSON &
CANDICE JOHNSON & MATHEW JOHNSON
by their Litigation Guardian
CAROL DAVEY JOHNSON

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION AND
THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review concerns a woman who challenges a negative Humanitarian and Compassionate (H&C) decision and a negative Pre-Removal Risk Assessment (PRRA) in respect of her return to the U.K. Her fear and therefore the risk are entirely subjective – her own fear of

returning to a place where she had experienced abuse but where there is adequate state protection and medical treatment. The fear described is akin to the emotional response experienced on return to a place of personal hurt – a form of “flashback”.

II. FACTS

[2] Mrs. Johnson was born in Scotland but her family moved to Jamaica when she was a child. She eventually married Paul Johnson. She had a daughter in 1991 in Jamaica and a son in 1996 in the U.K. where she had moved with her husband so that he could pursue his accounting career.

[3] Her marriage deteriorated and the evidence confirms that she was subjected to significant physical, mental, emotional and sexual abuse. The children were often witnesses to that abuse. For largely religious reasons, Mrs. Johnson did not leave her husband but she did call police in London during one particularly brutal incident. The police arrived but she refused to press charges for the sake of the children.

[4] The Applicant and her children came to visit relatives in Canada at different times and returned to the U.K. Ultimately she moved to Canada and began to receive counselling from a psychologist.

[5] The Applicant’s husband followed her to Canada and created an incident which resulted in the police being called. The husband had moved from the U.K. back to Jamaica but has remained in touch with his children by telephone.

[6] Since arriving in Canada, the Applicant has been employed as a chartered accountant. The children are doing well in school; her daughter has been accepted at the University of Toronto.

[7] The Applicant's claim for refugee status and protection was denied. The Refugee Protection Division (RPD) found her failure to claim when she had been in Canada two previous times, her reavailment and delay belied her subjective fear. Furthermore, the RPD found that the U.K. would make serious efforts to provide protection if asked.

[8] In the negative H&C decision the Officer covered the Applicant's concerns. The hardship test was not met even with the psychologist's report. The Officer found that there was insufficient evidence that the Applicant would not receive state protection or therapy in the U.K. Jamaica was also analysed but it is irrelevant since the Applicant intends to go to the U.K. where she will experience this "fear".

[9] The H&C decision also addressed the "best interests of the children" and noted that there would be a period of adjustment but also considered that the children had had experience in the U.K. school system.

[10] The PRRA decision, which is the decision that is really under attack, was made by the same Officer who did the risk assessment in the H&C. It is hardly surprising that the Officer relied on the PRRA decision in the H&C decision on the topic of risk.

[11] Having considered the psychologist's reports, the Officer found that the evidence of abuse and of the Applicant's subjective fear did not overcome the evidence of state protection.

III. ANALYSIS

[12] The real issue is the PRRA decision's finding and weighing of evidence. That aspect of a PRRA decision is subject to a reasonableness standard of review (*Suppiah v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1170).

[13] Justice Zinn granted a stay of removal pending this hearing. In his endorsement Justice Zinn commented that the issue of alleged risk to the Applicant's psychological state arising from being in the U.K. where the abuse had occurred, had not been assessed. The learned judge found irreparable harm based not on physical harm but on psychological risk. The Applicant contends that these conclusions of the learned judge are findings of fact binding on the Court as to what was not assessed and the existence of the risk the Applicant would face.

[14] Justice Zinn's comments on the legal issue are made in the context of the test on a stay application of "serious issue" – a low threshold. The findings on irreparable harm are also in the context of a stay where the issues are not fully and finally argued and analysed. Except in the clearest of cases, a judge's comments on a stay do not bind or necessarily impact the judge hearing the full judicial review. I do not interpret Justice Zinn to have sought to bind the judicial review hearing nor is this one of those "clearest cases".

[15] As to psychological risk, in this case it is purely subjective and the psychological evidence is based on the Applicant's expression of her own feelings. The reports lack clarity or explanation of why the Applicant would have the same fear and the same intensity (the form of "flashback") in each and every part of the U.K. where she could live.

[16] There are limits to the impact subjective fears may have in a PRRA assessment. In this case the psychological fears were assessed in the H&C. The PRRA process, focused as it is on s. 97 risk, is principally related to objective risk which includes the analysis of state protection.

> I can not conclude, on the basis of the evidence that was before it, that the RPD could not reasonably determine that state protection exists in Costa Rica for these applicants. I also find no error regarding the board's treatment of the psychological report. The report concluded that the applicants would be "at a high risk for retraumatization" should they be forced to return to Costa Rica. However, I agree with the respondent that the report does not deal with the applicants' ability to access state protection in Costa Rica. In my view, the report speaks to the applicants' subjective fear, but it does not assist in relation to the objective issue of state protection.
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> *Chinchilla v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 534, para. 18

[17] As held in *Varga v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 617 at para. 29, *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 343 at paras. 14 and 15 and *Farias v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 578, psychological harm is not relevant to a state protection analysis.

[18] In *Nadjat v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 302 at paras. 55-57, the Court held that under s. 97, the section requires objective fear, purely subjective fear is insufficient and not relevant.

[19] The fear, as reported by the psychologist and as argued forcefully by counsel, is subjective. It is, at best, a fear that in the U.K. the Applicant will suffer flashbacks and experience extreme anxiety and stress.

[20] It was not an error to not delve into or analyse the purely subjective fears advanced by the Applicant. The Applicant's argument, that the PRRA Officer ought to have assessed what could happen in the U.K. if the Applicant's fears were reasonable, finds no support in law.

[21] In assessing state protection, the Applicant had to address any new evidence since the RPD determination. It is trite law that a PRRA is not a rehearing or review of the RPD finding.

[22] Of the 91 pages submitted as evidence, only one document was new. There was nothing in the Record which undermined the finding of adequate state protection in the U.K. That finding finds support in the DOS Reports and was considered by the Officer.

[23] Therefore, the PRRA decision was reasonable.

IV. H&C DECISION

[24] The Applicant submits that the H&C decision was in error in part because the Officer's erroneous PRRA analysis infected the H&C analysis. Since the Court has found no error with the PRRA decision, this contention must fail.

[25] Contrary to the Applicant's submissions, the Officer did consider the Applicant's psychological condition (see Certified Tribunal Record, page 5) but found that there was insufficient evidence that the U.K. could not provide adequate protection and therapy.

[26] The Officer was alert, alive and sensitive to the interests of the children. The Officer was aware of the Applicant's psychological difficulties and aware that the Applicant was the primary caregiver and sole emotional and financial support for the children.

[27] The Officer's use of the H&C test of "unusual, undeserved and disproportionate" in respect of the "best interests of the child" is somewhat problematic (see *Lewis v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 790) although similar wording was accepted in *de Zamora v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1602. However, a fair reading of what the Officer did is more important and in that regard, the Officer exhibited being alert, alive and sensitive to the interests of the child.

[28] Therefore, the Officer discharged the duty to be "alert, alive and sensitive" and consequently committed no error which justifies the Court's intervention.

V. CONCLUSION

[29] For these reasons, this judicial review will be dismissed.

[30] The Court has considered the Applicant's request to "state a question" but the issues raised here are not novel and this decision is too fact specific.

[31] The Applicant asked for costs. There is no basis for such an award. Given the result, the Court suspects that the Applicant would now, and rightly so, take the position that there are no special circumstances warranting a cost award against her. Requests for costs can "cut both ways".

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

"Michael L. Phelan"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4057-09 and IMM-4058-09
STYLE OF CAUSE:	CAROL DAVEY JOHNSON & CANDICE JOHNSON & MATHEW JOHNSON by their Litigation Guardian CAROL DAVEY JOHNSON and THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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