Federal Court  Cour fédérale

Date: 20101220

Docket: IMM-2252-10

Citation: 2010 FC 1313

Ottawa, Ontario, December 20, 2010

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

ANTHEA JANELL CATO and KOREY KYLE JAYVORN CATO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review submitted pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c27 (the "Act") of a decision of the Refugee Protection Division (the "Board"), dated March 10, 2010, wherein Anthea Cato (the principal applicant) and Korey Cato (the child applicant) were found not to be Convention refugees or persons in need of protection.

[2] The relevant legislation is attached as Annex A to these reasons.

Background

[3] The applicants are a thirty (30) year-old mother and her three (3) year-old son, both citizens of St. Vincent and the Grenadines.

[4] Their refugee claim is based on physical and emotional abuse from Edwin Johnson, the principal applicant's ex-husband and child applicant's father.

[5] The principal applicant claimed that her ex-husband has been abusive from the very beginning of their relationship in 1999. Despite the abuse, when she became pregnant, she stayed with Mr. Johnson for financial support.

[6] The principal applicant also claims to have repeatedly reported the abuse to police authorities in St. Vincent, who failed to take action.

[7] The applicants moved out when Mr. Johnson stopped providing support, at which time the threats intensified. The principal applicant claims that, by then, she was living in constant fear.

[8] The applicants first came to Canada in December 2006 for a three-week visit at Christmas time and returned to St. Vincent.

[9] On December 15, 2007, the applicants returned to Canada on a temporary resident permit and they claimed refugee protection on February 26, 2008.

The decision under review

[10] The Board identifies credibility and lack of evidence that the applicants face a serious possibility of persecution as determinative issues in this case.

Issues

[11] With respect to the credibility findings, the applicants contend essentially that the Board erred in its assessment of the principal applicant's credibility because it failed to take into consideration her medical condition, post- traumatic stress disorder (PTSD), and its effect on her ability to testify.

[12] The principal applicant also contends that there was a reasonable apprehension of bias.

The standard of review

[13] These are questions of facts and mixed facts and law which attract a standard of reasonableness. The Court has held that the Board's decisions on both credibility and lack of evidence of fear of persecution should be reviewed on a standard of reasonableness (*Aguirre v Canada* (*Minister of Citizenship and Immigration*), 2008 FC 571, 2008 FCJ No 732 (QL), at para14). Accordingly, the Court will only intervene if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, 2008 1 SCR 190 at para 47).

[14] The applicants submit that the member's conduct at the hearing demonstrated bias towards the principal applicant and her counsel and that such conduct compromised the integrity of the hearing. The Supreme Court has found that issues of procedural fairness attract a standard of correctness (*Khosa v Canada* (*Minister of Citizenship and Immigration*), 2009 SCC 12, [2009] 1 SCR 339 at para 43), in which case this Court will intervene if it finds that there was a reasonable apprehension of bias.

Analysis

[15] Did the Board err in dismissing the principal applicant's claim on the basis of a lack of credibility?

[16] The principal applicant submits that the Board erred in law for not having taken into account the particular characteristics of the individual and that the Board relied on errors to impugn her credibility.

[17] The principal applicant also submitted in evidence that was before the Board, a letter from her social worker, a letter from her psychiatrist attesting to the fact that she is suffering from PTSD and a copy of a medical prescription, all of which the principal applicant claims corroborate her testimony with respect to her fear of persecution from her ex-spouse.

[18] The Board claimed that it took into consideration the chairperson's *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* in reaching its decision in this case. It also

claims to have taken into consideration the letter from the principal applicant's psychiatrist, Dr. Janique Harvey.

[19] However, the Board found that the principal applicant had contradicted herself in her testimony, had made several omissions in her PIF and was adjusting her testimony, thereby reinforcing the Board's conclusion that she was not credible with respect to her fear of persecution from her ex-spouse if she returned to St. Vincent.

[20] The Board indicated in its reasons that both the principal applicant's testimony and that of her mother "leave many questions unanswered about the female claimant's actual intentions during her trip in 1999 and about her refusal to recall the reasons why she was not allowed entry into Canada at the time".

[21] The Board's negative credibility findings rest partly on erroneous findings of facts.

[22] The Board outlined the principal applicant's testimony about an incident in 2003 when she had sought police protection as an example of how the principal applicant was adjusting her testimony. The Board concluded that the principal applicant had adjusted her testimony in recounting the incident because she had forgotten that she had claimed to be living with her ex-husband at the time of the incident. The Board found that the principal applicant had never lived with her ex-husband because there were no corresponding address changes in the PIF when, in fact, the reason for the lack of corresponding address changes is that there are no civic addresses in the

village of Biabou where the principal applicant resided before, during and immediately after the relationship with her son's father.

[23] The Board determined that the principal applicant's PTSD did not contribute to her inability to recall the details of her December 1999 visit to Canada because the trip preceded the abuse from her ex-husband when, in fact, the principal applicant was already pregnant at the time of the trip and had been in the abusive relationship for several months.

[24] The member also found that the principal applicant's willingness to phone her ex-husband from Canada in December of 2007 so that her son could speak with him was incompatible with the alleged continuing threats. The principal applicant states that there is nothing incompatible in her former willingness to maintain her son's contact with his father, and that she continues to suffer from PTSD.

[25] The respondent's counsel did not address these specific errors of facts in her submissions, but concentrated on discrepancies between the principal applicant's PIF and her testimony and, more particularly, a specific incident where her ex-husband would have showed up at her place of work and tried to kill her, as well as the 1999 trip to Canada, neither of which was mentioned in the PIF.

[26] The principal applicant had provided an explanation in both instances. With respect to the attempted murder, the principal applicant stated that she had told her lawyer and didn't know why it

was not described in the PIF, and as to the 1999 trip, her counsel explained that her inability to recall the precise details was a result of PTSD.

[27] The Federal Court of Appeal stated in *Siad v Canada* (*Secretary of State*), [1997] 1 FC 608, 123 FTR 79, that "the tribunal is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within 'the heartland of the discretion of triers of fact' are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence".

[28] At the hearing before this Court counsel for the principal applicant focused primarily on the Board's failure to properly consider the evidence provided with respect to the memory problems encountered by sufferers of PTSD.

[29] Counsel for the principal applicant submitted that the medical evidence offered a plausible explanation that could rebut the negative inference with respect to the principal applicant's credibility, and so consideration of the medical evidence was of central importance to the credibility finding and to the applicant's claim.

[30] The impugned decision makes no mention of the evidence that was filed by counsel for the principal applicant at the December 23rd continuation. The evidence included articles that purport to explain the memory problems encountered by sufferers of PTSD.

[31] Whilst this Court has held that there is no obligation to comment on every document presented in evidence, it is also clear that there exists an obligation to comment on documentary evidence presented when such evidence goes to the very heart of the matter, as in this case (*Gill v Canada* (*Minister of Citizenship and Immigration*) 2003 FCT 656 at para 16). The document intended to explain the memory problems encountered by the principal applicant.

[32] It is apparent in this case that the Board misconstrued some key facts, and more importantly, ignored some key evidence in concluding that the principal applicant was not credible.

[33] This Court therefore finds that these errors are fatal to the Board's decision.

[34] In view of this conclusion, the Court finds no need to decide on the merits of the other argument presented by the principal applicant, that of reasonable apprehension of bias.

[35] The application for judicial review is allowed.

[36] No question was proposed by the parties for certification pursuant to subsection 74(d) of the *Immigration and Refugee Protection Act*, and I agree that no such question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The Board's decision dated March 10, 2010 is set aside. The claim is returned for reconsideration by a newly constituted panel; and

THIS COURT'S FURTHER JUDGMENT is that no question of general interest is certified.

"André F.J. Scott"
Judge

ANNEX A

Immigration and Refugee Protection Act, SC 2001, c 27

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
(iii) the risk is not inherent or

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2252-10
STYLE OF CAUSE:	ANTHEA JANELL CATO and KOREY KYLE JAYVORN CATO and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Québec
DATE OF HEARING:	November 30, 2010
REASONS FOR JUDGMENT:	SCOTT J.
DATED:	December 20, 2010

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