Federal Court  Cour fédérale

Date: 20110218

Docket: IMM-3202-10

Citation: 2011 FC 202

Vancouver, British Columbia, February 18, 2011

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

RUTH MUTHONI CHEGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant, Ms. Ruth Muthoni Chege, a 29-year-old woman and a citizen of Kenya, seeks judicial review of the May 20, 2010 decision of a panel of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Panel) wherein it was determined that the Applicant was neither a "Convention refugee" nor a "person in need of protection" under sections 96 and 97(1) of the *Immigration and Refugee Protection Act* (IRPA).

Factual Background

[2] After the death of her father in 2005, the Applicant's uncle evicted her family, including three brothers, three sisters and her mother, from her home in the Kiambu District. The family relocated to Naivasha Town, Nakuru District in Rift Valley. The Applicant worked in Nairobi and visited the family on weekends.

[3] Election violence in 2008 caused the Applicant to move back to Naivasha Town and eventually back to Nairobi with her family where they were taken in by an old friend of the father's, John Karume.

[4] In April 2008, Mr. Karume took an interest in the Applicant and began to invite her to accompany him to various functions. She refused these invitations. Mr. Karume eventually asked the Applicant to marry him indicating that if she refused he was going to throw the family out of his home. Her brothers pressured her to marry him for their own advantage since Mr. Karume was wealthy and a marriage would improve their economic situation. They threatened that if she did not agree to marry Mr. Karume, she would suffer the consequences. The Applicant states that her older brother had assumed the position of head of the household since the death of her father in 1995, and according to cultural norms, she was expected to obey him.

[5] The Applicant managed to keep her brothers at bay by convincing them the marriage was a possibility, but that she wanted to finish her education first. In the circumstances, the Applicant decided to leave Kenya and come to Canada, a country she knew by reason of a prior visit during

World Youth Day in 2002. She fled Kenya without informing her brothers and arrived in Canada on July 31, 2008.

[6] She claimed refugee protection on September 12, 2008, because she feared retribution from her brothers for having disobeyed them and for leaving Kenya without telling them.

The Decision under Review

[7] The Panel found that the Applicant was not a Convention refugee as she did not have a well-founded fear of persecution in Kenya. The Panel also found that the Applicant was not a person in need of protection in that her removal to Kenya would not subject her personally to a risk to her life or to a risk of cruel and unusual treatment or punishment. The Panel also determined that the Applicant had not rebutted the presumption of state protection.

[8] The Panel found the Applicant to be a credible witness but not to have a well-founded fear of persecution. It accepted that she had a subjective fear of her brothers, but found this fear to be totally speculative and unsupported by the evidence. The Panel noted that the treatment she suffered does not amount to a serious harm in that it was not repetitive, it was not systematic, and it did not amount to a fundamental violation of her human rights. Further, she had not been in contact with her brothers since July 2008, and other than one recent phone call, there is no evidence that they tried to contact her or that they are continuing to threaten her. The Panel also observed that there is no evidence to show that any of the Applicant's other siblings who are not married have been threatened or harmed by the Applicant's brothers in order to obtain financial gain. The only evidence of recent violence was an attack by the Applicant's brother on her mother in 2010.

There is no evidence that this incident is in any way connected to the Applicant who was in Canada at the time.

[9] Regarding state protection, the Panel observed that states are presumed to be capable of protecting their citizens except in situations where the state is in a complete breakdown. The Panel found that Kenya is not in a state of complete breakdown and that the Applicant does not rebut the presumption of state protection simply by questioning its effectiveness and not testing it. The Panel found that the Applicant gave two examples from her own experience where state protection was sought and provided. The first, when her brother was arrested and imprisoned for assaulting his girlfriend, and the second, when her brother was detained for three days for attacking her mother and damaging her home.

[10] In its reasons, the Panel acknowledged the documentary evidence on country conditions in Kenya explaining the prevalence of domestic violence against women in Kenya, and that state officials were complicit in sexual violence acts during the election violence in 2008. The Panel noted that the country documents also indicate that rape is illegal, and while there is no legislation against domestic violence, assault is illegal. The domestic violence that the Applicant alleges in her claim is not even the type of domestic violence referred to in the country documents, as there is no spousal link.

Issues

[11] The Applicant raises the following issues:

1. Did the Panel err by misapplying the test for finding a well-founded fear of persecution?

2. Did the Panel take into account irrelevant facts?

3. Did the Panel err by misapplying the test for state protection?

4. Did the Panel make perverse findings related to the issue of violence against women?

Standard of Review

[12] The applicable standard of review for findings of fact and ultimate decision is reasonableness. The Court may only intervene if the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47).

[13] Issues relating to procedural fairness and the application of the correct legal test to be applied are reviewable on the correctness standard (*Khosa v. Canada (M.C.I.)*, 2007 FCA 24).

Analysis

1. Did the Panel err by misapplying the test for finding a well-founded fear of persecution and did it take into account irrelevant facts?

[14] The Applicant argues the Panel applied too high a standard of proof in applying the test for a well-founded fear of persecution when it found, "I did not find that you demonstrated that you would be persecuted if you returned to Kenya." It is submitted that the Panel misstated the test in that the test requires only that "a reasonable chance" of persecution be established. By finding as it did, the Applicant contends that the Panel committed an error of law. I disagree. In its reasons, the Panel on two occasions correctly articulated the proper test for determining a well-founded fear of persecution. In framing the test, it asked whether the Applicant "would face a serious possibility of

persecution if returned to Kenya." Later in its reasons, it found "there is no evidence to show that there is a serious possibility that they would persecute you". Reading the Panel's reasons as a whole, I am satisfied the Panel applied the correct legal test.

[15] The Applicant also challenges the Panel's finding that, "there is no evidence of any other siblings being sought after by Mr. Karume or your older brothers for any reason at all". The Applicant argues that this is irrelevant since there was never any suggestion by the Applicant that Mr. Karume wanted to marry any of her siblings or that her brothers contemplated such a thing. I disagree. A finding by the Panel which relates to whether the brothers or Mr. Karume had ever threatened the Applicant's siblings for "any reason" is a relevant factor for consideration in the circumstances. I do agree, however, that this finding could not be determinative.

[16] The Applicant further claims that while the Panel properly stated the test associated with a well-founded fear of persecution under section 96 as "forward looking", in its reasons it failed to take into account how the Applicant's leaving Kenya would be a factor in the analysis. It is argued that the Panel noted the Applicant had been able to keep her brothers "at bay until you left Kenya in July 2008, managing to avoid the marriage and carrying out of any threats." The Panel also acknowledged that she was able to avoid repercussions from her brothers because she managed to convince them the marriage was possible. The Applicant argues that this is no longer the case and looking forward, the situation is fundamentally different.

[17] The Applicant contends that while the Panel considered her treatment before she left Kenya, it failed to consider her circumstances if she were required to return to Kenya to face her brothers

after having deceived them and disobeyed them by lying about her intention of marrying Mr. Karume and leaving the country to avoid their authority.

[18] The Applicant argues that the Panel erred by concluding there was “no evidence to show” that there is a serious possibility she would suffer persecution at the hands of her brothers if returned to Kenya. The Applicant says there is evidence on the record that she would so suffer. She points to her own testimony about the culture of paternalism and the serious consequences of defying her brothers. She testified about her fear and she was found to be credible by the Panel.

[19] I reject the Applicant’s arguments. The Panel did consider the Applicant’s claim of how leaving Kenya for Canada could ground her fear of future persecution. At paragraph 18 of its reasons, the Panel stated, “You expressed a fear to return to Kenya due to the potential of eruption of political violence in the coming elections in 2010, as well as a fear of retribution from your two brothers whom I previously mentioned. This retribution is a result of having disobeyed them in regard to a marriage to Mr. Karume, as well as leaving the country without telling them. Culturally, you showed them disrespect”. The Panel expressly dealt with the Applicant’s allegation. It determined that she was merely speculating that her brothers were angry with her for leaving Kenya. It noted that the Applicant provided no supporting evidence for her assertions and found no evidence that her brothers are continuing to threaten her. The Panel further noted that the treatment she suffered did not amount to a serious harm in that it was not repetitive, it was not systematic, and it did not amount to a fundamental violation of her human rights.

[20] The Panel provided detailed reasons for rejecting the Applicant's refugee claim and its finding that she is not a person in need of protection. In so doing, I find that the Panel applied the correct legal tests, fairly considered all of the evidence and committed no reviewable errors in coming to its decision. The decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

2. Did the Panel err by misapplying the test for state protection and make perverse finding relating to the issue of violence against women?

[21] Since my above determination is dispositive of the application there is no need to consider the parties' arguments relating to the Panel's findings on state protection and its assessment of the country documentation relating to violence against women in Kenya. Any error committed by the Panel would not be determinative.

Conclusion

[22] For the above reasons, the application for judicial review of the May 20, 2010 decision of a Panel of the Refugee Protection Division of the Immigration and Refugee Board of Canada will be dismissed.

Certified question

[23] The parties have had the opportunity to raise a serious question of general importance as contemplated by paragraph 74(d) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27, and have not done so. I am satisfied that no serious question of general importance arises on this record. I do not propose to certify a question.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review of the May 20, 2010 decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada is dismissed.

2. No question of general importance is certified.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Peter Golden	**FOR THE APPLICANT**
Timothy E. Fairgrieve	**FOR THE RESPONDENT**

SOLICITORS OF RECORD:

Peter Golden **Barrister & Solicitor** **Victoria, B.C.**	**FOR THE APPLICANT**
Myles J. Kirvan **Deputy Attorney General of Canada** **Vancouver, BC**	**FOR THE RESPONDENT**