

Federal Court



Cour fédérale

Date: 20110613

Docket: IMM-4289-10

Citation: 2011 FC 675

Ottawa, Ontario, June 13, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

KATY NYOTA, ERIC NONDA & LUC NONDA

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated June 30, 2010, wherein the applicants were determined not to be Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

[2] The applicants request that the decision be set aside and the claim remitted for redetermination by a different member of the Board.

Background

[3] Katy Nyota (the principal applicant) was born in Lubumbashi, Democratic Republic of the Congo (DRC) on November 24, 1982. She is married to Papy Nonda with whom she has two children, Luc and Eric Nonda (the minor applicants). Her husband also has a son from a previous relationship.

[4] The principal applicant lived with her family in Lubumbashi, DRC until 2001. There, she alleges that she faced discrimination and feared violence on the basis of her mixed ethnicity of Hutu and Tutsi. The principal applicant eventually moved to Mweso, north of Goma, DRC with her husband and children.

[5] In August 2008, rebels entered Mweso and began killing local people and raping women and girls. They also kidnapped young men and boys.

[6] The principal applicant alleges that the rebels entered her house and demanded money which she and her husband had earned from their business. The rebels threatened to decapitate the principal applicant's baby. They then raped and beat the principal applicant in front of her children. The principal applicant's husband and step son were taken and she has not heard from them since.

[7] With her children, the principal applicant escaped to Goma, DRC, where there was continued violence. She was able to buy a flight to Lubumbashi, where she encountered a man with whom she previously did business who helped her escape to Canada.

[8] The principal applicant arrived in Calgary on October 15, 2008 and filed for refugee protection.

Board's Decision

[9] The Board found a nexus between the principal applicant's claim and a Convention ground, as she was a victim of past sexual violence. The Board also found a nexus for the minor applicants on the ground of their mixed ethnicity.

[10] The Board did not find that the principal applicant faced a serious possibility of persecution on the basis of a Convention ground. She and her children were caught in localized crime and were not specifically targeted. Even if they were specifically targeted, it was for money and there was no indication that they would be pursued in the future. The Board also noted that financial extortion cannot found the basis for a refugee claim.

[11] The Board further determined that the principal applicant did not face a serious possibility of persecution on the basis of her ethnicity. The discrimination the principal applicant described arose

over a period of less than three years in Lubumbashi and did not amount to the level of persecution contemplated by the Act.

[12] The Board found that the same analysis of section 96 applied to section 97 and the evidence did not persuade the Board that the applicants would face a personalized risk of life, torture or cruel treatment if they returned to the DRC.

Issues

[13] The issues are as follows:

1. What is the appropriate standard of review?
2. Did the Board err in finding that the applicants did not face persecution on the basis of a Convention ground?
3. Did the Board err by not conducting a separate section 97 analysis?
4. Did the Board fail to address the psychological report submitted by the applicants?
5. Did the Board err by not assessing the risk faced by the minor applicants of recruitment or kidnapping?

Applicants' Written Submissions

[14] The principal applicant submits that the Board found a nexus to a Convention ground based on her gender. However, despite finding a nexus, the Board erred in failing to analyze the evidence before it concerning gender based violence in the DRC. The evidence demonstrated that sexual violence in the DRC is used as a weapon of war against women and girls and legislation has been

largely unable to combat such violence. The Board's finding of generalized crime does not preclude a finding of persecution on a Convention ground.

[15] The applicants also submit that the Board merely provided a conclusion on section 97 without undergoing a proper analysis.

[16] Finally, the applicants submit that the Board did not properly address the matter of risk of psychological deterioration addressed in the psychological report prepared by Dr. Beverly Frizzell. The Board also failed to assess the risk of forced recruitment or kidnapping of the two minor applicants if returned to the DRC.

Respondent's Written Submissions

[17] The respondent submits that membership in a social group is not sufficient for a finding of persecution. The onus is on the applicants to satisfy the Board that there is a serious risk of harm that is more than a mere possibility. The Board did not discount a finding of persecution based on general risk. Rather, it examined the evidence and found a nexus to Convention grounds and assessed the likelihood of risk to the applicants if returned to the DRC on a balance of probabilities.

[18] The respondent submits that the Board conducted a sufficient section 97 analysis in conjunction with a section 96 analysis and that it was entitled to conduct such analyses concurrently.

[19] The respondent submits that the Board specifically referred to Dr. Frizzell's psychological report. The applicants have not shown that the Board failed to consider this evidence or the psychological consequences if the applicants return to the DRC.

[20] The Board acknowledged the risks of living in the DRC but found that the applicants would not face a personalized risk of cruel and unusual treatment, punishment or torture if they returned to the DRC. This included the risks faced by the minor applicants.

Analysis and Decision

[21] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[22] The issue of whether the Board erred by not applying a section 97 analysis is a question of law reviewable on a standard of correctness. As I held in *Marshall v Canada (Minister of Citizenship and Immigration)*, 2008 FC 946 at paragraph 28, the Board's conclusion as to whether a refugee claimant faces persecution or a risk to her life or of torture or cruel and unusual punishment is a question of mixed fact and law and is therefore subject to review on a standard of reasonableness.

[23] Any failure by the Board to consider the totality of the evidence is an error of law also reviewable on the correctness standard (see *Morales v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1267 at paragraph 12).

[24] **Issue 2**

Did the Board err in finding that the applicants did not face persecution on the basis of a Convention ground?

The Board found that the principal applicant belonged to the particular social group of victims of past sexual violence. I agree with the respondent that in *Dezameau v Canada (Minister of Citizenship and Immigration)*, 2010 FC 559, Mr. Justice Yvon Pinard held that membership in a social group is not adequate, alone, to result in a finding of persecution. At paragraph 29 he held:

This is not to say that membership in a particular social group is sufficient to result in a finding of persecution. The evidence provided by the applicant must still satisfy the Board that there is a risk of harm that is sufficiently serious and whose occurrence is “more than a mere possibility”.

[25] The Board found that the principal applicant was a victim of sexual violence. It made no adverse credibility findings and therefore accepted the principal applicant’s allegations that she was raped and beaten in front of her children. This sexual violence was taken out on the principal applicant and not her husband or step son. Despite these findings, the Board did not assess the possibility of persecution on the basis of gender.

[26] In addition, the Board did not assess the documentary evidence before it concerning persecution based on gender. The principal applicant presented documentary evidence of the

persecution that women face in the DRC. Among other evidence before the Board was an article by the Internal Displacement Monitoring Centre: Democratic Republic of the Congo “Massive Displacement and Deteriorating Humanitarian Conditions” which stated that:

Despite all initiatives undertaken to counter sexual violence, rape continues to be widespread. According to an Oxfam survey, sexual violence has increased dramatically since the military offensives against the FDLA began in January 2009 (Oxfam, 14 July 2009).... Thousands of women have also been abducted and kept as slaves in the forces’ camps to provide sexual, domestic and agricultural services.

Government soldiers and rebel fighters have committed widespread sexual violence to attack the fundamental values of the community, to scare the civilian population into submission, to punish them for allegedly supporting enemy forces or to provide gratification for the soldiers or militia members.

[27] Further, the United Nations Security Council Twenty-ninth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2009/472 observed that:

Sexual violence in the Democratic Republic of the Congo remained severe during the reporting period, with rapes and other forms of sexual violence perpetrated by armed groups, security forces and, increasingly, civilians. In North and South Kivu, in some areas where operation Kimia II was being conducted, humanitarian organizations were either unable to access sites to provide services, or survivors were unable to access medical services due to ongoing fighting. High incidences of sexual violence were reported in Shabunda in South Kivu, and Lubero and Walikale in North Kivu, but access to those areas remained especially difficult.

[28] Finally, the Human Rights Watch report, *Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of the Congo* was also before the Board. This report outlined that:

In the Democratic Republic of Congo, tens of thousands of women and girls have suffered horrific acts of sexual violence. The government army, the *Forces Armées de la République Démocratique du Congo (FARDC)*, is one of the main perpetrators, contributing to the current climate of insecurity and impunity in eastern Congo. FARDC soldiers have committed gang rapes, rapes leading to injury and death, and abductions of girls and women. Their crimes are serious violations of international humanitarian law. Commanders have frequently failed to stop sexual violence and may themselves be guilty of war crimes or crimes against humanity as a consequence. Although other armed groups also commit brutal acts of sexual violence against women and girls, the sheer size of the Congolese army and its deployment throughout the country make it the single largest group of perpetrators.

[29] The evidence before the Board was of extreme sexual violence directed at women and girls in the DRC. While the Board need not refer to every document before it, its conclusion must acknowledge any contradictory evidence (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 (FCTD)). It was an error for the Board to omit any analysis of this documentary evidence.

[30] The principal applicant was a victim of this violence when she was raped and assaulted by rebels in Mweso. Through personal testimony and documentary evidence, the principal applicant argued that there was more than a mere possibility that she would be persecuted on the basis of membership in the particular social group of women in the DRC. The Board was required to analyze the risk of persecution on the basis of gender.

[31] **Issue 3**

Did the Board err by not conducting a separate section 97 analysis?

Instead of undergoing an analysis of the gender based claim of persecution, the Board determined that the principal applicant has experienced localized crime in the form of extortion and that “financial extortion cannot found the basis for a refugee claim.” The Board’s conclusion is an inaccurate statement of the law.

[32] The Board relied on *Prato v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1088. However, I disagree with the Board that in this case Mr. Justice Pinard held that extortion can never form the basis of a refugee claim. Rather, he held that the Board’s finding that in that case, extortion had no connection to a Convention ground, was supported by the documentary evidence.

[33] Recent jurisprudence from this Court indicates that in some instances, extortion may amount to persecution. For example, in *Sinnasamy v Canada (Minister of Citizenship and Immigration)*, 2008 FC 67, Mr. Justice Yves de Montigny held at paragraph 25:

As demands for bribes by the police are a form of extortion, they may also, in relevant circumstances, amount to "persecution" for the purposes of the Convention: see *Kularatnam v. Canada (Minister of Citizenship & Immigration)*, 2004 FC 1122 (F.C.), at paras. 10-13.

[34] The Board was required to assess whether the risk of extortion amounted to persecution under section 96 or a risk under section 97.

[35] Given the above errors, the application for judicial review is allowed.

[36] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[37] **IT IS ORDERED that** the application for judicial review is allowed, the decision of the Board is set aside and the matter is remitted to a different member of the Board for redetermination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions*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.

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 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,

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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

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) 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.

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 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

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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves 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 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.

(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,

(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.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4289-10

STYLE OF CAUSE: KATY NYOTA, ERIC NONDA
& LUC NONDA

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: January 19, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: June 13, 2011

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