

Federal Court



Cour fédérale

Date: 20121009

Docket: IMM-2508-12

Citation: 2012 FC 1176

Ottawa, Ontario, October 9, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SHANNON SHENIKA BIBBY-JACOBS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board [Board] who determined that the applicant, a citizen of Saint Vincent and the Grenadines, was neither a Convention refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act].

[2] Given that the determinative issues in this case are the absence of subjective fear and the availability of state protection, the standard of review of reasonableness applies (*Cornejo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 261; *Hinzman v (Canada) Minister of Citizenship and Immigration*, 2007 FCA 171, 282 DLR (4th) 413). The present application must be allowed.

[3] Assessing the fear of persecution has two components: (1) the claimant must subjectively fear persecution; and (2) this fear must be well-founded in an objective sense (*Ward v Canada (Minister of Employment & Immigration)*, [1993] 2 SCR 689, 103 DLR (4th) 1). This test was articulated and applied in *Rajudeen v Canada (Minister of Employment & Immigration)* (1984), 55 NR 129 (Fed CA) at 14:

The subjective component relates to the existence of the fear of persecution in the mind of the refugee. The objective component requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear.

[4] Guideline No 4 on Women Refugee Claimants Fearing Gender-Related Persecution [Gender Guidelines] can be very useful in the assessment of fear of persecution in the case of woman refugee claimants. The Gender Guidelines are not law, nor are they binding for the Board, they were issued in order to assure a certain coherence in the tribunal's decisions: when the panel is faced with a case where the applicant has made a claim of persecution based on her membership in a particular social group (i.e. women victims of violence) in all fairness, the claim cannot be examined without reference to the Gender Guidelines.

[5] The credibility of the applicant is not in issue. The applicant is a young woman who has been victimized by a sexual predator, a prominent businessman in Saint Vincent [the businessman]. The latter comes from a rich and powerful family related to the Prime Minister and his brother is an Ambassador. The businessman has sexually harassed and assaulted the applicant over a period of three years during which she was employed by him as an office clerk. The applicant fears that if she publicly denounces the businessman in his home country, she will be persecuted and at risk.

[6] The Board's finding that the applicant has not been able to establish persecution is unreasonable as it lacks proper motivation. Although the Board states that "the claim must be determined based on an analysis of section 96 [of the Act] in that the claimant alleges that she fears persecution", there is a complete failure in the impugned decision to grasp and address this key issue. The Board's corollary finding that section 97 is not involved in this case because a sexual assault or sexual harassment cannot amount to persecution is untenable without any form of rational analysis of the evidence and the law.

[7] The Board essentially based its conclusion of absence of well founded fear of persecution or risk to life on the fact the applicant has continued to work for the businessman after the alleged incidents. The Board concluded that this strongly implied that the applicant did not have a subjective fear stating that "if the risk were of a level of severity that could be described as persecution, the claimant would have left her job." This particular use of the concept of "subjective fear" by the Board member is hardly applicable in a sexual harassment case. In any event, the Board member has completely forgotten to address in his reasons the plausible explanation advanced by

the applicant for not leaving earlier. The Board member missed the point and shows a complete misunderstanding of the available options in a sexual harassment case.

[8] In the case at bar, the Board also fails to mention in the impugned decision the Gender Guidelines. While a failure to consider the Gender Guidelines is not necessarily a prelude to a successful judicial review, I find that in this case, the Board member did not demonstrate the sensibility and understanding of gender related persecution. It is apparent that key findings were made without any regard to the applicant's cultural, social and personal circumstances. It is not sufficient to claim today that the Board member accommodated the applicant at the hearing. The sensitivity must also be reflected in the rationale for refusing the refugee claim.

[9] Despite the fact that the Board accepted the applicant's story and found her credible, one gets the impression that the Board member somewhat seeks to excuse the persecution by an appalling trite characterization of the persecutor. Here, the strong reliance by the Board on the fact that the businessman is now relatively old – he is only 57 years old – and that he has prostate cancer is misplaced and only provides further ground to question the Board member's sensitivity to gender related claims. Perhaps sexual assault or harassment is not uncommon but their long lasting consequences on the victim should never be trivialized.

[10] The persecutor is not an agent of the state. Nonetheless, objectively speaking, the Board was called to determine whether the applicant's reasons not to approach the state were unreasonable in the circumstances. I find that the conclusion that the applicant did not rebut the presumption of state protection is untenable.

[11] As decided by the Supreme Court in *Ward*, above, absent some evidence, it should be assumed that the state is capable of protecting a claimant. However, a claimant is able to rebut the presumption by submitting relevant evidence of the state's inability or unwillingness to protect an individual in a given case of persecution. This supposes that the Board looks at the situation of similarly situated individuals, apart from the claimant's reasons for not making a complaint to the police, as the case may be. In this case, we are not dealing with domestic abuse at home involving a husband and wife, but with sexual harassment or assault at the workplace involving a prominent businessman and a vulnerable young woman. Moreover, the persecution has taken place in a small island of the Caribbean's.

[12] In the case at bar, contrary to the factual situation described by the applicant in her testimony, the Board gratuitously suggests that her understanding that the state cannot protect her is "subjective". In a generic way, the Board concludes that state protection would be available because Saint Vincent makes claim to democratic values and the protection of human rights; there is adequate protection for victims of sexual assault because "rape, including spousal rape, is illegal, and the government generally enforced the law"; and because police are being trained to better deal with gender related assaults.

[13] It is apparent that the Board member's so called "objective analysis" of the state protection issue is itself the Board member's own subjective view of the situation in Saint Vincent. Indeed, the Board member's reasoning appears truncated and biased considering the totality of the evidence on record. There is no real attempt in the Board's decision to assess the evidence in light of the

personal circumstances of the applicant. However, there was ample evidence on record supporting the applicant's view that state protection would not be reasonably forthcoming because of the persecutor's social status and high profile (see notably Tab 5.1 of the Saint Vincent National Package under the subtitle "attitudes toward victims"). Moreover, sexual harassment, as stated by the 2012 US Country reports, is not even a crime in Saint Vincent. In selectively reading the documentary evidence, the Board committed a reviewable error which taints the conclusion that state protection would be forthcoming.

[14] For these reasons, the application for judicial review will be allowed. Counsels agree that no question of general importance arises in this matter.

JUDGMENT

THIS COURT’S JUDGMENT is that the present application of judicial review is allowed; the decision dated February 14, 2012, is set aside and the matter is remitted back to the Refugee Protection Division of the IRB for reconsideration by a differently constituted panel. No question is certified.

“Luc Martineau”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2508-12

STYLE OF CAUSE: SHANNON SHENIKA BIBBY-JACOBS v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: October 2, 2012

REASONS FOR JUDGMENT: MARTINEAU J.

DATED: October 9, 2012

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