

Federal Court



Cour fédérale

Date: 20121219

Docket: IMM-4327-12

Citation: 2012 FC 1501

Montréal, Quebec, December 19, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN :

KENDRA VICTORIA ROTHWALL HAZELL

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision dated April 17, 2012, by the Refugee Protection Division [RPD] that Kendra Victoria Rothwall Hazell, a citizen of Saint Vincent and the Grenadines, was neither a “refugee” within the meaning of section 96 of the IRPA nor a “person in need of protection” under section 97 of the IRPA.

I. Facts

[2] The applicant is a citizen from Saint Vincent and the Grenadines (Saint Vincent). She suffered physical, verbal and sexual abuse at the hands of Mr. Julian Sergeant. The applicant claims that the abuse began in 1996 and lasted until 2009. The applicant has two children with Mr. Sergeant, who both live in Saint Vincent.

[3] The applicant explained that Mr. Sergeant burnt her leg with an iron in November 2000 and, when she complained to the police, she was informed that they would not intervene in domestic matters.

[4] In May 2001, the applicant fled to Canada. She left her two children with Mr. Sergeant's mother. She returned in December 2006 when the caregiver of her children died. She attempted to make a fresh start with Mr. Sergeant but the abuse began again in January 2007 and so she then left for Canada in February 2007.

[5] While in Canada, she received threatening phone calls from Mr. Sergeant up until 2009. On January 25, 2010, her permanent residence application based on humanitarian and compassionate grounds was refused. She claimed refugee protection on February 9, 2010.

II. Decision under Review

[6] The RPD's determination is that the applicant is not credible in her allegations.

[7] The main reason why the applicant is claiming refugee protection is that she fears returning to Saint Vincent because of her abusive ex-partner. The RPD therefore took the *Women Refugee Claimants Fearing Gender-Related Persecution (Guideline 4)* into consideration. The RPD came to the conclusion that the applicant is not credible because of inconsistencies in her testimony that undermine her credibility.

[8] First, whereas in her Personal Information Form (PIF), the applicant indicated that the physical abuse at the hands of her ex-partner started after her first daughter's birth in 1996, at the hearing, she stated that the physical abuse started one month into her pregnancy. When confronted with such contradiction, the applicant simply replied that after her daughter's birth, the abuse started to get worse.

[9] Second, the applicant submits that she was constantly threatened over the phone by Mr. Sergeant between 2001 and 2006, when she was in Canada. The RPD noted that the applicant during her testimony specified that she received about 20 phone calls, which is an important element of her claim that should have been mentioned in her PIF.

[10] Third, the applicant's children came to visit her in Canada in July 2007. As the applicant was aware at that time that some options were available to her to legalize her status, the RPD found that it was unreasonable for the applicant not to try to keep her children in Canada so that they would be protected from Mr. Sergeant, who could be a threat to her children as he is violent, uses drugs and drinks heavily. The applicant's explanation that it did not occur to her to take steps to keep her children safe was not accepted by the RPD. The decision-maker also considered that the

applicant adjusted her testimony by stating that although Mr. Sergeant was abusive with her, he was not abusive with her children.

[11] Fourth, the RPD considered the fact that the applicant never made any attempt to have her phone number changed in Canada to avoid Mr. Sergeant's threats points to a lack of subjective fear.

[12] Finally, the RPD determined that as Mr. Sergeant has not contacted the applicant since August 2009, she is not in a position to allege a prospective fear of returning to Saint Vincent.

[13] Moreover, the RPD came to the conclusion that it was unreasonable for the applicant not to have explored all possible avenues besides sponsorship by her employer to secure her stay in Canada in 2007, given that her employer had made a legal counsel available to her. It would also have been reasonable for the applicant to seek assistance from her employer if she was truly facing fear of returning to Saint Vincent.

[14] The RPD determined that although there is evidence that the applicant suffered physical injuries, it is not established that they are the result of Mr. Sergeant's abusive behavior. Therefore, the applicant was found to be neither a Convention refugee nor a "person in need of protection".

III. Applicant's Submissions

[15] The applicant first submits that the negative credibility finding regarding the date at which the physical abuse started is unreasonable and that the RPD committed a factual error. The applicant

specified that the decision-maker's question pertained to abuse generally and not specifically to physical abuse and that, therefore there was no contradiction between her PIF and her testimony.

[16] Second, the applicant is of the view that with regard to the threats received, the applicant provided detailed information in her PIF as to the nature of the threats received and therefore the RPD's finding is unreasonable.

[17] Third, the applicant submits that the RPD's conclusion that the applicant should have actively tried to find ways to keep her children with her in Canada is unreasonable as the applicant clearly explained that although at that time she had heard of the possibility to claim refugee protection, she was nevertheless told that this was not the appropriate channel for her and that she was preparing an application for permanent residence on humanitarian and compassionate grounds. The RPD ignored such explanations. Therefore, it was reasonable for the applicant to believe that a refugee claim would not be appropriate for her children either. Moreover, the RPD's finding that the applicant adjusted her testimony is unreasonable as the applicant volunteered the information pertaining to Mr. Sergeant's treatment of the children.

[18] Fourth, the RPD's conclusion that the applicant should have changed phone numbers is unreasonable considering that since her return to Canada in 2007, the applicant received only one phone call and therefore there was no need to change her phone number. The applicant adds that there is a strong probability that the applicant would start living with her ex-partner as this is common in cases of domestic violence.

[19] Finally, the applicant submits that the RPD erred in determining that she should have communicated her domestic abuse problem to her employer and that she did not actively seek alternative avenues to secure her stay in Canada. The applicant submits that a valid explanation was given: she had submitted a permanent residence application based on humanitarian and compassionate grounds and she was under no obligation to disclose details pertaining to her personal life to her employer.

IV. Respondent's Submissions

[20] The respondent generally submits that the applicant's testimony contradicts her earlier statement in her PIF, which undermines her credibility. First, the applicant's explanation pertaining to contradictions regarding the time when the abuse started was vague as she simply stated that "the abuse started to get worse". The RPD determined that such explanation is unsatisfactory, which is reasonable.

[21] Second, the respondent submits that the RPD rightly concluded that the applicant is not credible as she did not provide detailed information on the phone threats. Indeed, the applicant in her PIF does not make any mention of phone threats that allegedly occurred between 2001 and 2006.

[22] Third, the respondent is of the view that the RPD's finding that the applicant should have tried to keep her children with her in Canada is reasonable and that a person who fears returning to their home country should file a refugee claim at the earliest opportunity. The RPD considered the applicant's explanation that she had filed an application for permanent residence based on

humanitarian and compassionate to be unsatisfactory. Furthermore, it was not unreasonable to find that the applicant should have sought the assistance of her employer.

[23] Fourth, the respondent submits that the RPD's determination that the applicant's decision to keep the same phone number after receiving threats points to a lack of subjective fear is well-founded. Indeed, the applicant knew that her ex-partner had knowledge of her phone number but she deliberately decided not to change it.

[24] Moreover, the RPD rightly found that the applicant cannot establish a prospective fear of returning to Saint Vincent as she has not been contacted by her ex-partner since 2009.

[25] Finally, the respondent submits that the applicant is asking this Court to reassess the facts that were before the RPD and that the conclusion that the applicant does not face any subjective or objective fear is based on the evidence that was before the RPD.

V. Issue

[26] Did the Board err in its credibility findings regarding the applicant's alleged fear?

VI. Standard of Review

[27] The applicable standard of review to credibility determinations is that of reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)*, 160 NR 315 at para 4, 1993 CarswellNat 303 (FCA)).

VII. Analysis

[28] A credibility finding is a question of fact and this Court should therefore intervene only in cases where such finding is unreasonable (*Rajaratnam v Canada (Minister of Employment & Immigration)*, 135 NR 300 at para 14, 1991 CarswellNat 851 (FCA)). In the present case, all credibility findings are reasonable and no intervention of this Court is warranted.

[29] First, with regard to the RPD's determination that the applicant's testimony contradicted the statement contained in her PIF, such finding is reasonable. Indeed, contrary to what is argued by the applicant, a reading of the transcripts shows that the RPD first directed an open question as to the abuse suffered by the applicant. The decision-maker then asked specifically what kind of abuse occurred in 1995 when the applicant was pregnant to which she replied "both verbal and physical".

[30] Therefore, the RPD's negative credibility finding is justified in the circumstances as the applicant's testimony clearly contradicted the information included in her PIF, in which she specifically mentioned that the physical abuse at the hands of her ex-partner started after her child was born in 1996 (*Canada (Minister of Employment & Immigration) v Dan-Ash*, 5 Imm LR (2d) 78 at para 5, 93 NR 33 (FCA)).

[31] Second, the RPD's determination that there is a lack of details regarding the phone threats that allegedly occurred between 2001 and 2006 is reasonable. Indeed, as noted by the respondent, no mention of such threats is made in the applicant's PIF. Although the decision-maker does not raise this specific issue in his decision, he nevertheless made mention of the fact that no detailed information is provided in the applicant's PIF as to the nature and the number of phone threats

received by the applicant. Therefore, it was reasonable for the RPD to conclude that the absence of details as to phone threats in the applicant's PIF seriously undermines her credibility as it would have been important to mention such events in her PIF.

[32] Third, the RPD's finding that a mother who cares for her children would try to find any possible means to keep them safe from an abusive caregiver is reasonable. Regardless of whether Mr. Sergeant had or had not been abusive with the children, it remains that any reasonable parent would do anything possible to keep their children away from a person who has allegedly been abusive to them.

[33] After questioning the applicant as to why she did not try to keep her children in Canada with her, the RPD considered the applicant's explanation that she had filed a permanent residence application based on humanitarian and compassionate grounds as she had been advised that a refugee claim would not be the right channel for her and that it did not occur to her that she could have done something to keep her children in Canada. The RPD reasonably concluded that any parent fearing for his children's safety would take positive steps to keep them away from a dangerous caregiver and therefore validly rejected the applicant's explanation. Intervention of this Court is therefore not warranted (*Muthuthevar v Canada (Citizenship and Immigration)*, [1996] F.C.J. No. 207 at para 7, 1996 CarswellNat 211).

[34] Fourth, the RPD reasonably found that a person who fears a persecutor would change phone numbers in order to avoid threats. Such a conclusion is reasonable in the circumstances.

[35] Moreover, the RPD reasonably established that the fact that Mr. Sergeant has not tried to contact the applicant since 2009 is evidence of the applicant's lack of prospective fear. The applicant's argument that should the applicant return to Saint Vincent, she would certainly start seeing her ex-partner again cannot be accepted by this Court. Indeed, the applicant cannot raise the possibility that she would return to her ex-partner as the prospect of returning to an abusive relationship does not constitute the basis of a refugee claim. Moreover, the applicant did not submit any evidence showing that should she return to Saint Vincent, she would be forced to live with Mr. Sergeant. The conclusion of the RPD that the applicant has not demonstrated that she has a prospective fear of persecution is reasonable and based on the evidence.

[36] Finally, the RPD reasonably concluded that in February 2007, when her employer provided her with a legal counsel, the applicant should have actively tried to secure her stay in Canada through means other than a sponsorship application. The RPD rightly concluded that it would have been reasonable in the circumstances to seek help from her employer who had previously contracted a legal counsel to assist her. Indeed, if the applicant genuinely feared returning to Saint Vincent, she would have explored all possible avenues with her employer to regularize her status in Canada and would have therefore disclosed that she faces the risk of domestic abuse in Saint Vincent. The RPD assessed the applicant's behavior and concluded that it is not consistent with that of a person who fears for his safety.

[37] The parties were invited to submit a question for certification but none was proposed.

JUDGMENT

THIS COURT'S JUDGMENT IS THAT:

The application for judicial review is dismissed. No question is certified.

“Simon Noël”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4327-12

STYLE OF CAUSE: KENDRA VICTORIA ROTHWALL HAZELL
and MCI

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: December 17, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** NOËL S. J.

DATED: December 19, 2012

APPEARANCES:

Tatiana Gomez FOR THE APPLICANT

Sherry Rafai Far FOR THE RESPONDENT

SOLICITORS OF RECORD:

Tatiana Gomez FOR THE APPLICANT
Montréal, Quebec

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Montréal, Quebec