Federal Court  Cour fédérale

Date: 20140904

Docket: IMM-4601-13

Citation: 2014 FC 842

Ottawa, Ontario, September 4, 2014

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

CHARL WILLEM NEL
NAIRA NEL

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants were refused protection by the Refugee Protection Division of the Immigration and Refugee Board [the Board]. They now seek judicial review of that decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicants ask the Court to set aside the negative decision and return the matter to another panel of the Board for redetermination.

I. Background

[3] Charl Nel (the principal applicant) and his family are citizens of South Africa who claimed they fear persecution because they are white. His wife, Naira Nel, and daughter, Serena Nel, also claimed to fear persecution because they are women. They left South Africa on April 27, 2010 and after a layover in the London airport, arrived in Canada on April 28, 2010. They applied for refugee protection shortly thereafter.

II. Decision

[4] On May 21, 2013, the Board decided that the applicants were neither Convention refugees nor persons in need of protection.

[5] The Board took a negative view of the applicants' credibility. Originally, only the principal applicant had supplied a narrative, but he eventually supplemented it with another statement to record what he alleged were changes in the country. The Board said there had been no significant changes and viewed this update as an attempt to amplify a situation of fear. As well, the principal applicant's wife added a statement about her fears of being raped and the Board was critical of this too since these claims had already been recorded in the principal applicant's original narrative.

[6] The Board then noted that many of the incidents recorded in the narratives did not personally affect the applicants. For the few that did, the Board said they were vaguely dated and internally contradictory. For instance, one was an alleged break-in at the principal applicant's mother's home. The narrative said that his mother went to the police while her letter describing the incident said that she called her children and they called the police. The Board thought this was a contradiction. As well, the applicants did not remember what month of the year that incident or any other happened. The Board concluded they were all lies.

[7] Every other incident they describe happened to other people and the Board said they did not demonstrate that they had any racist connotations. Indeed, there was no indication of racial violence in the country documentation; the high crime rate was mostly inspired by poor economic conditions and white people were not any more likely to be victimized by that crime than anyone else. As well, the Board said that there are resources available to help victims of rape and the government does take action to counter this.

[8] The Board then reviewed the documents submitted by the applicants, rejecting some because of his earlier findings. He also discussed the large package of news articles and other documents submitted by the applicants and noted that a lot of them were opinion pieces. The Board rejected them in favour of the documentary evidence from independent organizations such as Amnesty International and Human Rights Watch, which the Board says are more objective and show no racial violence problem.

[9] The Board then briefly discussed state protection, but said that mere distrust of the police is not enough. Since it did not believe the applicants or anyone they knew had ever been attacked, there was never any need to seek state protection or an internal flight alternative and the Board held that the presumption therefore could not be rebutted.

[10] Next, the Board decided that when a woman fears being raped simply because of generalized criminality and not any particular circumstances, this cannot be a fear that attracts section 96 protection (citing *SM v Canada (Minister of Citizenship and Immigration)*, 2011 FC 949, [2011] FCJ No 1224 [*SM*]; *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331 at paragraph 23, 70 Imm LR (3d) 128 [*Prophète*], aff'd 2009 FCA 31 at paragraph 10, 387 NR 149). In the Board's view, the danger of rape is just a symptom of the endemic criminality in South Africa that affects both men and women equally. After that, the Board applied the same reasoning to subsection 97(1) of the Act and said that the applicants would not be personally targeted.

[11] The Board then observed that the applicants flew through the United Kingdom to get to Canada and the Board said that if they really feared persecution, they would have claimed asylum there. For that reason, it said they had no subjective fear and were simply trying to abuse the refugee protection system as a means to settle in Canada.

[12] Finally, the Board noted that the two female applicants had at one time been citizens of Armenia and was unsure whether or not they still were. However, it did not explore this issue

any further since it did not accept that they had any fear of returning to South Africa or any risk once there.

III. Subsequent History

[13] All three applicants originally applied for judicial review, but Serena Anne Nel has since discontinued her application. I would therefore order her name deleted from the style of cause.

IV. Issues

[14] The applicants submit three issues:

1. Did the Board err in its credibility findings?
2. Did the Board misapply the law in assessing whether the applicants have been persecuted in the past or would face persecution in the future?
3. Did the Board err by not extracting the Convention ground elements in the criminal activity the applicants stated they feared and by not applying section 96 of the Act to those elements?

[15] The respondent says the only issue is whether the Board's decision was reasonable.

[16] I would rephrase the issues as follows:

A. What is the standard of review?

B. Did the Board misunderstand the tests?

C. Was the decision otherwise unreasonable?

V. Applicants' Written Submissions

[17] Relying on *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at paragraphs 20 to 22, [2013] FCJ No 1099 [*Ruszo*], the applicants submit the Board must correctly understand the tests, but reasonableness is the standard of review otherwise.

[18] The applicants argue that the Board's decision was unreasonable. They complain that it gave the impression that Mrs. Nel's fear of rape was added as an afterthought when it had plainly been included in the original narrative from the beginning. Further, the Board had rejected the principal applicant's updated narrative on the basis that it saw no significant changes in South Africa between 2010 and 2013. The applicants counter this perversely ignores that over this interim, both the president of the country and the African National Congress' youth leader had sung songs about killing white people on political platforms and Genocide Watch had elevated South Africa to stage 6 of the 8 stages of genocide.

[19] Moreover, the applicants say the Board's credibility findings focused on trivial details and ignored the main thrust of their claims, which were fears of genocide and rape. The precise dates of particular events from 2003 and 2004 were irrelevant and the alleged contradictions were questionable at best. For instance, the applicants say there is no contradiction between the principal applicant saying his mother "went" to the police and someone else having called the police. It was unreasonable for the Board to say otherwise. Further, the Board made no comment about the incidents in their updated narratives.

[20] As for the finding that they lacked subjective fear because they did not claim asylum in the United Kingdom, the applicants say they explained that this was because they wanted to be represented by the same lawyer who helped another South African find refuge here. The Board did not say why this explanation was rejected or unacceptable and the applicants say it was unreasonable.

[21] The applicants also argued that the Board wrongly required the applicants to show that they had been persecuted in the past. They point out that at several points, the Board observed that "nothing had happened to them personally" and that the incidents described in the narratives "happened to other people." This, the applicants say, reveals that the Board did not recognize that evidence about similarly situated people could also satisfy their burden (see *Fi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1125 at paragraphs 13 to 16, [2007] 3 FCR 400 [*Fi*]).

[22] Indeed, the applicants say the Board failed entirely to consider how the risk other white South Africans faced could be relevant to their claim. It rejected the evidence for lacking definitive proof that the crimes had racial connotations, but they say that they explained what those connotations might be in their narrative. They pointed out that the crimes against white people frequently involved mutilation and brutality even when nothing was stolen; they observed that political leaders had sung songs about killing white people even after a South African court had declared the song racist; and they also provided expert evidence from a reporter, Adriana Stuijt, and the president of Genocide Watch, Dr. Gregory Stanton, indicating these crimes were

racially motivated. If it was to be rejected, they say they were owed reasons. Here, the Board did not decide whether the applicants feared these genocide-like conditions.

[23] The applicants also criticize the Board for its conclusions regarding the female applicants' claims. They say it erred by requiring them to show that only white women are raped, when they could be refugees simply by showing that all women are endangered.

[24] Beyond that, the applicants also say the Board erred for rejecting its evidence because they were "opinion" pieces when all documentary evidence is prepared by individuals and could therefore be characterized the same way. Anyway, the applicants say that even the country documentation that the Board accepted showed that rape is a serious problem in South Africa.

[25] Moreover, they criticize the Board for concluding that rape was just a symptom of the overall criminality and distinguish *SM* on the basis that the risk in that case was generated by family relationships. They say the Board erred by finding the risk of rape is not persecutory merely because other crimes are also endemic in the country (see *Josile v Canada (Minister of Citizenship and Immigration)*, 2011 FC 39 at paragraphs 26, 30 and 31, 382 FTR 188 [*Josile*]).

VI. Respondent's Written Submissions

[26] The respondent says that the applicants have challenged only the respondent's findings of fact and mixed fact and law and for these questions the standard of review is reasonableness.

[27] In its original memorandum, the respondent defends the Board's credibility findings. Specifically, the applicants had failed to provide even basic dates and facts about the events they had described and had made significant omissions and contradictions regarding who called the police when the principal applicant's mother was allegedly attacked. In its view, the Board was entirely reasonable to disbelieve the applicants in light of that.

[28] Moreover, the respondent argues that the Board's findings that white South Africans were not targeted by criminals on the basis of their race was reasonable and well supported by the country documentation. It was entitled to prefer that evidence over that submitted by the applicants. In its view, the applicants are really just asking the Court to reweigh the evidence, which it cannot do.

[29] As for the female applicants' alleged fear of rape, the respondent says that the Board correctly stated the law. This argument was expanded in its further memorandum, where the respondent says that the Board reasonably found that the applicants really only feared criminality and insecurity, not sexual assault, and had therefore established no link to a Convention ground (citing *Frederic v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1100, [2010] FCJ No 1386 [*Frederic*]).

[30] As well, since any risk faced by the applicants was generalized, the respondent says the Board's dismissal of any section 97 claim was also reasonable. Though that would be enough to defeat the claim, the respondent notes that the Board went even further and reasonably decided that the applicants had failed to rebut the presumption of state protection. Moreover, there was

no need to consider the existence of any internal flight alternative because the applicants had never had any problems there.

[31] Besides, the Board also found that the applicants lacked a subjective fear since they failed to claim asylum in the United Kingdom and went forum shopping instead. This alone would have been enough to dismiss the section 96 claim.

VII. Analysis and Decision

A. *Issue 1 – What is the standard of review?*

[32] I disagree with the respondent that this application raises only questions of law or of mixed fact and law. Rather, the applicants have also argued that the Board failed to apply tests that have been well established by the jurisprudence and such questions attract a correctness standard of review (see *Ruszo* at paragraphs 20 to 22). However, when it comes to the application of those tests to the facts or the findings of facts themselves, I agree with the respondent that reasonableness is the standard of review (see *Ruszo* at paragraphs 20 to 22; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 53, [2008] 1 SCR 190 [*Dunsmuir*]).

[33] This means that I will not intervene if the decision is transparent, justifiable, intelligible and within the acceptable range of outcomes (see *Dunsmuir* at paragraph 47; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708). As the Supreme Court held in *Canada (Citizenship and*

Immigration) v Khosa, 2009 SCC 12 at paragraphs 59 and 61, [2009] 1 SCR 339, a reviewing court cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Did the Board misunderstand the tests?*

[34] I agree with the applicants that it would be an error to reject a section 96 claim on the basis that the applicant had not been personally persecuted in the past (see *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at paragraph 137, 128 DLR (4th) 213 [*Chan*]; *Fi* at paragraphs 13 to 16), but I disagree that the Board did so. The applicants' argument hinges on the Board's observation that nothing had happened to the applicants personally, but that hardly means the Board required them to have been personally persecuted. Indeed, the Board expressly denied this at the hearing during the following exchange:

> BY COUNSEL (to presiding member)
>
> This suggests to me, sir, that you're [*sic*] understanding of the law is that for him to be found to be persecuted something must have happened to him personally.
>
> Is that your understanding of the law, sir?
>
> BY PRESIDING MEMBER (to counsel)
>
> I didn't say that. I was just asking if something happened to him personally, that's all and that's it.

[35] Whether or not it is the only way to prove a serious possibility of persecution, a claimant's personal experiences can still be relevant both to the subjective and objective branches of the test. The Board committed no error by asking the claimants about it, nor by observing in its reasons that the claimants answered they had not been. Further, the Board did not

fail to consider evidence about similarly-situated people; it simply preferred the country documentation to it. I see no indication that the Board made the error of which it is accused.

[36] However, the Board's reasons regarding the female applicants' fear of rape do reveal some serious misunderstandings of the law. The respondent attempted to rescue the decision by citing *Frederic* and arguing that the applicants had simply failed to link their alleged fear to gender, but those were not the Board's reasons. Rather, the Board said this at paragraph 57:

> Many other Federal Court decisions, particularly *Prophète*, have ruled that when circumstances demonstrate that a woman fears being raped because of generalized criminality in a country, as opposed to a situation where a woman might fear being raped because of a particular situation, this fear cannot be considered a valid fear by means of membership in a particular social group of women, as per section 96 of the Act. [Footnotes omitted]

[37] *Prophète* had nothing at all to do with either a woman fearing rape or section 96; it was about a businessman who was afraid because he was perceived as being wealthy and there was no nexus to a Convention ground. The case was entirely about subsection 97(1) and the application was refused pursuant to subparagraph 97(1)(b)(ii) of the Act because the slightly elevated risk faced by the claimant was still one "faced generally by other individuals in or from that country." However, that subparagraph does not apply to section 96 and the Board misplaced reliance on *Prophète*.

[38] Moreover, the Board's reasons themselves betray the interpretation the respondent has tried to impose and show that it was really applying a generalized risk analysis and ignoring the Convention ground. The Board justified its decision by saying that "[c]riminals kill, steal and

rape for their own advantages at all times. Women and young girls are therefore no more likely to be victims of abuse than members of other population groups."

[39] However, rape does not become a gender-neutral crime merely because all people in the country face some risk of other types of violence. Rather, the applicants rightly directed my attention to *Josile* at paragraphs 24 to 32, where Mr. Justice Luc Martineau considered a similar situation regarding the risk of rape in Haiti. I can say it no better than he does at paragraphs 24 to 26:

> [24] With respect to the establishment of nexus, the Court in *Dezameau* at paragraphs 34 and 35, notes that "it is well established in Canadian law that rape, and other forms of sexual assaults, are grounded in the status of women in society", and adds to this effect that "[t]he notion that rape can be merely motivated by common criminal intent or desire, without regard to gender or the status of females in a society is wrong according to Canadian law".
>
> [25] Canadian jurisprudence is also emphatic on the point. For example, in *R. v. Osolin*, [1993] 4 S.C.R. 595, Justice Cory for the majority of the Supreme Court of Canada stated that "it cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women" (*Osolin*, above, at paragraph 165).
>
> [26] Indeed, rape is referred to as a "gender-specific" crime in Guideline 4. The latter specifically categorizes rape as a gender-specific crime:
>
> > The fact that violence, including sexual and domestic violence, against women is universal is irrelevant when determining whether rape, and other gender-specific crimes constitute forms of persecution.
>
> [Justice Martineau's emphasis]

[40] Therefore, the "real test is whether the claimant is subject to persecution by reason of his or her membership in that particular social group." (*Josile* at paragraph 31), and the Board derailed itself by importing into its section 96 analysis the concept of generalized risk.

[41] Moreover, this is not saved by the Board's state protection analysis, since the Board said this at paragraph 54 of its decision:

> [T]he panel does not believe the claimants and, therefore, is of the opinion that they did not need to request protection from the state. Therefore, the claimants cannot demonstrate through clear and convincing evidence that the state of South Africa and its agents are not willing or able to protect them.
>
> [Emphasis added]

[42] The Board there misstated the test for state protection, since it suggests that only claimants who have approached the state for protection can satisfy the test. However, that is not the case. Claimants can also rebut the presumption of state protection by showing "that their home state, on an objective basis, could not be expected to provide protection" (see *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraph 37, 282 DLR (4th) 413; see also *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 55 and 56, 103 DLR (4th) 1).

[43] Nor does the remainder of the analysis reveal that the Board applied the correct test despite the misstatement. Rather, the Board failed to address any of the evidence that might support the futility argument, like the report from the United States Department of State, "South Africa", Country Reports on Human Rights Practices for 2011 (24 May 2012). There, the authors observed that "there were 56,272 reported cases of rape and indecent assault during the year and

a total of 66,196 reported sexual offence cases," and "only 4.1 percent of reported rape cases resulted in conviction." Moreover, the authors said "the true incidence of rape was thought to be much higher," and they referred to surveys on which between 25% and 37.4% of men questioned admitted to raping one or more women. The fact that the Board did not consider this evidence at all would have been suspicious even had it stated the test correctly and combined with the misstatement, it suggests that the Board applied the wrong test.

[44] By themselves, however, these errors would not be fatal. This is because the Board also found that the applicants had no subjective fear and if that finding was reasonable, there was no need to consider whether the fear would have been well-founded (see *Chan* at paragraph 120). As such, it is still necessary to consider the applicants' other arguments.

C. *Issue 3 - Was the decision otherwise unreasonable?*

[45] Several of the applicants' arguments are unfounded. Although the Board questioned Mrs. Nel's motives for submitting a narrative late, it did not imply that she had just invented the gender-based fear recently. Rather, one of the reasons the Board gave for doubting her explanation for the late submission was precisely that "the male claimant, in his initial narrative, had already indicated that he feared that his wife and his daughter might be raped." Moreover, while the Board mentioned that white women were at no greater risk than anyone else, that was a direct response to Mrs. Nel's statement in her narrative that they were. It does not indicate that the Board failed to consider the situation of women generally and indeed the entire section of the decision devoted to that issue shows that the Board did not misconstrue that ground however inadequately it was assessed.

[46] As for the dates of events, it was reasonable for the Board to expect that people who are the victims of break-ins and other crimes would remember the month and year they happened in. Also, the Board criticized the applicants for originally saying that two of the events were only a couple of months apart and that the second event was in the fall, but not knowing when the first event occurred. The applicants reply that they did identify them consistently and the Board simply forgot that the seasons were different in the southern hemisphere, but the transcript tends to support the Board's doubts:

> BY CLAIMANT: MARA [*sic*] NEL: (to presiding member)
>
> That must have happened by the end of (inaudible) because it was certainly warm weather, I didn't have the door closed again. Yeah, it's open so it's certainly end of 2003, end quarter.
>
> BY PRESIDING MEMBER (to claimant: mara [*sic*] nel)
>
> A couple of months - - a couple of months, and you said the first one happened at the beginning?
>
> BY CLAIMANT: MARA [*sic*] NEL: (to presiding member)
>
> At beginning, yeah, the (inaudible) ---
>
> BY PRESIDING MEMBER (to claimant: mara [*sic*] nel)
>
> So a couple of months. It's not twelve months, madam.
>
> BY CLAIMANT: MARA [*sic*] NEL: (to presiding member)
>
> Yes, that's what I mean, probably not twelve months. Then the first month probably happened not in summer. Then it was winter because that time year it was certainly warm. She was playing by the door and it was open, yes, that I remember.

[47] The Board did not imagine this inconsistency and the applicants were wrong to suggest that it simply forgot what hemisphere South Africa was in.

[48] While I may not have assigned the vague timing the same weight that the Board did since these events allegedly happened eight or nine years before the interview, it is not my place to second-guess it now. The assessment of credibility is ultimately up to the Board who heard the testimony.

[49] That said, some of the applicants' other complaints are meritorious. Specifically, the Board's assessment of the principal applicant's updated narrative is puzzling. In it, the principal applicant said that he had become more fearful of returning to South Africa because Julius Malema, then the youth leader of the African National Congress (the governing party), had since sung a revolutionary anti-apartheid song called "Kill the Farmer, Shoot the Boer," which he felt threatened by since he says "boer" is a word for a South African white person. Even after a South African court ruled that the song was hate speech, Mr. Malema continued to sing it and Jacob Zuma, the president of the country, also sang it at the 100th anniversary of the African National Congress. Over that same time period between the making of the claim and the hearing, Genocide Watch also updated the situation to stage 6 of the 8 stages of genocide because of political shifts and warned white Afrikaners (of which Mr. Nel is one) to leave South Africa.

[50] The Board dismissed the updated narrative on the basis that these were not significant changes and concluded it was only done with the intent of amplifying a situation of fear. However, it never explained why it felt the singing of this song by political leaders at political forums or the updated Genocide Watch opinion could not have legitimately inspired a further subjective fear of political persecution in the applicants. While it could have had good reasons

for doing so, the absence of any explanation by the Board makes it hard to understand why it felt this updated narrative damaged the principal applicant's credibility.

[51] Moreover, I agree with the applicants that the contradiction regarding who phoned the police when the principal applicant's mother was allegedly attacked was essentially invented by the Board. The applicant said that his mother "went to the police", while his mother said that she called her family and "[t]hey phoned the Police." In this context, saying that someone went to the police is a perfectly ordinary expression meaning that they reported the crime and it implies nothing about who precisely phoned the police or from where they reported the crime. In any event, it is a trivial detail and would hardly be evidence of their lack of credibility (see *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444 (QL), 99 NR 168).

[52] Still, considering that some other aspects of the credibility finding were reasonable, I do not view these errors as alone revealing a microscopic analysis since I cannot say they were used to dispose of the case (see *Konya v Canada (Minister of Citizenship and Immigration)*, 2013 FC 975 at paragraph 22, [2013] FCJ No 1041).

[53] However, the finding regarding the lack of subjective fear is more problematic. The applicants explained to the Board that they decided to claim protection in Canada because they had heard about another white South African whose claim had been successful here and had already contacted the lawyer who had represented him.

[54] Unfortunately for them, their flight plan took them through the United Kingdom and the Board seized upon this brief layover as reason enough to conclude that they must have lacked any subjective fear. The Board said the applicants' explanation for not claiming protection immediately upon arriving in the United Kingdom was invalid and that claimants must claim refugee protection as soon as possible when traveling through another country that is a signatory to the Convention (see *Skretyuk v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 783 at paragraph 3, 47 Imm LR (2d) 86 [*Skretyuk*]).

[55] That was unreasonable. First of all, nothing in the decision allows me to understand why the Board decided that the applicants' explanation is invalid. While the respondent condemns it as forum shopping and that might be relevant to public policy, it is certainly not something that is incompatible with a subjective fear of persecution. On the contrary, it is unsurprising that someone who actually fears persecution would want to go to a country where their claim has the best chance of success, since the price of failure is a return to the persecution they fear. At the very least, it cannot be summarily rejected without explanation and that made this crucial finding non-transparent.

[56] Further, while it is true that delay in claiming protection can indicate a lack of subjective fear, it is a highly fact-specific determination. In these circumstances, precedent is a very poor substitute for logic. In *Skretyuk*, the claimants had lived for two months in London before coming to Canada and then waited three more weeks to claim refugee protection (at paragraph 1). In such circumstances, it can be reasonable to infer that they lacked subjective fear because a

person's status in a foreign country is usually unstable and they were risking being removed to their country of origin by failing to make a claim.

[57] Here, the applicants spent approximately seven hours in an airport in the United Kingdom while waiting for a flight to Canada, where they had already obtained a temporary resident visa and booked a hotel room. There was never any realistic danger that the United Kingdom would deport them to South Africa and the Board never explains why this was incompatible with a subjective fear.

[58] Moreover, many cases recognize that simply travelling through another country should not prejudice a claimant's request. In *Tung v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 292 at paragraph 16, 124 NR 388 (FCA), a claimant was in transit for five weeks and the Board said his failure to claim protection in any of the countries through which he traveled was inconsistent with his fear. The Federal Court of Appeal rejected that logic at paragraph 20, partly because it did not feel that the Board could judicially notice that those countries were signatories to the Convention but also because "the appellant was at all times in transit to Canada and had already decided to claim Convention refugee status after he arrived here."

[59] Indeed, this case is very similar to *Ilunga v Canada (Minister of Citizenship and Immigration)*, 2006 FC 569 at paragraph 14, [2006] FCJ No 748, where Mr. Justice Yvon Pinard said the following:

> [T]he Board in the case at bar made a patently unreasonable error in determining that the applicant's stay in England of less than a

> day in duration undermined her subjective fear of persecution, for, she had already decided to claim Convention refugee status in Canada, and was at all times in transit to Canada.

The same can be said here.

[60] Of course, the Board also decided that the applicants' motives were improper at paragraph 72 of its decision:

> On Mr. Kaplan's advice, undoubtedly, they took advantage of a situation where a positive decision was rendered for a white South African, and chose to claim refugee protection as the means to an end to settle in Canada.

[61] However, that implicitly relied on the earlier decision that the delay was invalidly explained, which was unreasonable.

[62] All that said, the general finding of a lack of credibility might have alone been sufficient to find a lack of subjective fear since there would be no credible evidence of their fear (see *Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238 at 8, 71 DLR (4th) 604). However, those were not the reasons given by the Board and it instead tied its finding of a lack of subjective fear directly to the failure to claim asylum in the United Kingdom. In my view, that was an unjustifiable inference and an unreasonable one. Therefore, because the objective fear analysis was also tainted by applying the incorrect tests, I am of the view that the decision as a whole was unreasonable.

[63] Finally, there was also some question about whether the female applicants were citizens of Armenia. While the Board expressed some doubts at paragraphs 73 to 76 of its decision, it declined to make any definite finding since it disposed of the claim on other grounds. As such, that also cannot save the decision.

[64] I would therefore set aside the decision and return the matter regarding Charl and Naira Nel to another panel of the Board for redetermination. I would also delete Serena Anne Nel's name from the style of cause since she had discontinued her application.

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

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is referred to another panel of the Board for redetermination.

2. The applicant, Serena Anne Nel's name is deleted as an applicant in the style of cause.

"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 themself 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 themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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,	(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(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) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
…	…

126. Every person who knowingly counsels, induces, aids or abets or attempts to counsel, induce, aid or abet any person to directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act is guilty of an offence.

126. Commet une infraction quiconque, sciemment, incite, aide ou encourage ou tente d'inciter, d'aider ou d'encourager une personne à faire des présentations erronées sur un fait important quant à un objet pertinent ou de réticence sur ce fait, et de ce fait entraîne ou risque d'entraîner une erreur dans l'application de la présente loi.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4601-13
STYLE OF CAUSE:	CHARL WILLEM NEL, NAIRA NEL v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 4, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	O'KEEFE J.
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APPEARANCES:

Russell Kaplan	FOR THE APPLICANTS
Max Binnie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Russell Kaplan Barrister and Solicitor Ottawa, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT