Date: 20080327

Docket: IMM-2069-07

Citation: 2008 FC 386

BETWEEN:

ALICE MARIA Da MOTA , CABRAL De MEDEIROS
JOAO CARLOS CABRAL De MEDEIROS
PEDRO MIGUEL CABRAL De MEDEIROS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow the hearing of an application for judicial review of a decision of a Pre-Removal Risk Assessment Officer (the "Officer"), dated the 5th of April, 2007, wherein the Officer concluded:

> To summarize, as the above analysis indicated that the state of Portugal made serious efforts to provide protection services for victims of domestic violence at the operational level, it is concluded that state protection is available for the applicants if they need assistance from the state and approach the state to seek assistance, and therefore, their PRRA application does not meet the requirements either under s. 96 or s. 97 of IRPA. As a result, their application can not be granted.

In the foregoing quotation, the reference to "IRPA" is, of course, a reference to the *Immigration and Refugee Protection Act.*[1]

BACKGROUND

[2] The Applicants are citizens of Portugal. Alice Maria Da Mota Cabral De Medeiros (the "Principal Applicant") is the mother of the other two (2) Applicants.

[3] The Applicants arrived in Canada from Portugal with the husband of the Principal Applicant who is also the father of the other two (2) Applicants. Together with the husband and father, they filed Convention refugee claims. Their claims were rejected. They were determined by the Refugee Protection Division (the "RPD") to be economic migrants.

[4] A Pre-Removal Risk Assessment application was filed on the 6th of December, 2005. The husband and father was marginally involved in that application. The application was rejected. On consent, this Court returned the Pre-Removal Risk Assessment application for redetermination. It was apparent that the husband and father had turned to domestic abuse, particularly against his wife, and that he was no longer involved in any way in their Pre-Removal Risk Assessment application. In fact, he had been removed from Canada, to Portugal, in June of 2006. The Applicants allege a fear that they will be killed by their husband and father if they are required to return to Portugal. Their fear is based upon threats from the husband and father. In effect, the redetermination of the

[1] S.C. 2001, c. 27.

Applicants' Pre-Removal Risk Assessment application was based on a "sur place" claim arising out of family violence in Canada.

THE DECISION UNDER REVIEW

[5] The Officer was satisfied that the determinative issue before him was the availability of state protection for the Applicants in Portugal. He wrote:

> With no serious concern raised over the applicants' credibility regarding their fear of domestic violence by the principal claimant's separated husband and with a full acknowledgement of the problem of domestic abuse in Portugal as expressed in various governmental or non-governmental documents, the key issue in this PRRA application, in my opinion, is state protection. The reconsideration of and decision upon the application subsequent to the reconsideration will hinge on the availability or non-availability of state protection.

[6] It was not in dispute before the Court that the Officer considered the totality of the critical evidence before him. Rather, the dispute centered around the weight given the documentary evidence. The Officer chose to rely on country conditions documentation in preference to much more specific documentation regarding the experience of a similarly situated individual and an affidavit of a technical advisor for the Board of a Portuguese Victim Support organization, the particular focus of which was on victims of family violence.

[7] The Officer examined the question of state protection under two (2) headings: first, "Serious Efforts by a State", in this case Portugal, and "Operational Level of State Protection". He concluded with respect to both issues that, on the documentation before him, the Applicants had simply failed to rebut the presumption of state protection. In essence, while the Officer acknowledged the high level of family violence in Portugal he concluded that adequate, but

certainly not perfect, state protection was available to the Applicants in their particular circumstances.

THE ISSUES

[8] While a broader range of issues was identified in written materials filed on behalf of the Applicants, at hearing, counsel for the Applicants focused essentially on two (2) issues which I would characterize as: first, the Officer's weighing of the evidence before him, which counsel for the Applicants would characterize as perverse; and secondly, a misapplication of the guidance from *Canada (Attorney General v. Ward)*[2] that a claimant might overcome the presumption of state protection, particularly in a democratic nation such as Portugal, by advancing the testimony of similarly situated individuals let down by the state protection arrangements in that nation. In counsel's submissions, it was urged that, in the Officer's reasons supporting his decision, he misinterpreted the test as being one of testimony from domestically abused women in which state protection did not materialize.

[9] In addition to the foregoing issues, the Court is obliged to examine the issue of standard of review on an application for judicial review such as this.

ANALYSIS

a) Standard of Review

[2] [1993] 2 S.C.R. 689.

[10] Until very recently, it has been generally accepted that the standard of review of a decision on a Pre-Removal Risk Assessment, when taken as a whole, is reasonableness *simpliciter*.[3] Further, it has generally been accepted that conclusions of pure fact drawn by a Pre-Removal Risk Assessment Officer are reviewed on a patent unreasonableness standard.

[11] On Friday, the 7th of March, the world changed. In *Dunsmuir v. New Brunswick*,[4] the Supreme Court eliminated the "patent unreasonableness" standard of review and reduced the standards from three (3) to two (2), those being "correctness" and "reasonableness". The Court further re-identified the concept "pragmatic and functional analysis" with the same process now to be referred to as "standard of review analysis."[5]

[12] A few paragraphs from the majority judgment delivered by Justices Bastarache and Lebel are of interest here. At paragraph [51], the Justices wrote:

> Having dealt with the nature of the standards of review we now turn our attention to the method for selecting the appropriate standard in the individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

I read the foregoing paragraph as justifying the continuation of the past practice of this Court in

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[3] *Kim v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 540 at paras 8-22 (QL).
[4] 2008 S.C.C. 9, March 7, 2008.
[5] *Dunsmuir*, *supra*, paragraph [63].

identifying the standard of review of a pre-removal risk assessment decision, when viewed generally, as "reasonableness".

[13] Justices Bastarache and Lebel continued at paragraph [57] of their reasons:

> An exclusive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard…this simply means that the analysis required is already deemed to have been performed and need not be repeated.

I regard the foregoing paragraph as being equally applicable in the determination of questions that generally fall to be determined according to the "reasonableness" standard. Based on earlier jurisprudence of this Court, I am satisfied that here the analysis generally required has already been performed and therefore need not be repeated.[6]

[14] The Court did not address paragraph 18.1(4)(d) of the *Federal Courts Act*[7]. The relevant portions of subsection 18.1(4) reads as follows:

18.1 (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	**18.1** (4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
…	…
(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	*d*) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
…	…

[6] See: *Kim*, *supra*, note 3.
[7] R.S.C. 1985, c. F-7.

I am satisfied that it remains clear that, where this Court is called upon to review a finding of a federal board, commission or other tribunal, the decision of which is under judicial review by this Court, this Court is still entitled, and indeed obliged, to grant relief if it determines that the finding is indeed a finding of fact and that it was made in a perverse or capricious manner or without regard for the material before the federal board, commission or other tribunal. This "standard of review" has been interpreted as akin to the now abolished standard of "patent unreasonableness".[8]

[15] Justices Bastarache and Lebel also commented at some length on the concept of the deference owed by Courts to administrative boards, commissions and other tribunals specialized expertise. I am satisfied that Pre-Removal Risk Assessment Officers are specialized administrative "tribunals" with decision-making responsibilities and that significant deference is owed to their decisions, and, in particular, their decisions regarding the weight to be given to evidence presented before them.

b) The weighing of the documentary evidence before the Officer

[16] In the absence of a hearing or interview in the course of a Pre-Removal Risk Assessment, and here there was none since the Officer accepted the credibility of the Applicants, the Officer's weighing of the documentary evidence regarding country conditions, in this case, specifically

[8]See: *Sketchley v. Canada (Attorney General)* 2005 FCA 404, [2005] F.C.J. No. 2056 (QL) at para. 65.

relating to state protection, is at the heart of the Officer's role. He or she is specialized in the performance of that function and, I am satisfied, is entitled to substantial deference in his or her conclusions in that regard. Once again here, it was acknowledged that the Officer took into account all of the critical documentary evidence in front of him. As earlier indicated, he preferred general country conditions documentation on state protection against family violence in Portugal to more specific and case-oriented documentation. Counsel for the Applicants urged that this constituted reviewable error. I disagree.

[17] The burden was on the Applicants to overcome a presumption in favour of the existence of state protection, particularly in a democratic and stable state such as Portugal. The Officer reviewed the evidence and concluded that the Applicants in this matter had failed to rebut that presumption. While I might have reached a different conclusion, and certainly counsel for the Applicants would have reached a different conclusion on the weighing of the evidence, that is not relevant. I am satisfied that the Officer's analysis was thorough and his conclusion was open to him. In the result, the Applicants simply cannot succeed on this ground.

c) Testimony of Similarly Situated Individuals

[18] Counsel for the Applicants also raised the issue of the distinction between testimony of similarly situated individuals and testimony from similarly situated individuals. I am satisfied that this distinction which appears on the face of the Officer's reasons is nothing more than a drafting issue. It is simply not an issue of substance. Once again, the Applicants cannot succeed on this ground.

CONCLUSION

[19] Based upon the foregoing brief analysis, this application for judicial review will be dismissed.

CERTIFICATION OF A QUESTION OR QUESTIONS AND EXTENSION OF AN EXISTING ORDER FROM THIS COURT STAYING THE REMOVAL OF THE APPLICANTS FROM CANADA

[20] Upon counsel being advised at the close of hearing of the Court's conclusions with regard to this application for judicial review, counsel for the Applicant proposed the following three (3) questions for certification:

> 1. Where, in a judicial review from a PRRA, in which credibility and the facts are not in dispute or issue, is the question of whether "effective state protection" is available, under *Ward*, on those facts, a question of: (a) law? (b) fact? Or (c) mixed fact and law?
>
> 2. Where, in a judicial review from a PRRA, in which credibility and the facts are not in dispute or issue, is the question of whether "effective state protection" is available, under *Ward*, on those facts, reviewed on the standard of (a) "correctness" or (b) "reasonableness *simpliciter*"?
>
> 3. Where, in a judicial review from a PRRA, in which credibility and the facts are not in dispute or issue, on the question of whether "effective state protection" is available, under *Ward*, on those facts, is the Federal Court, in the event the decision is set aside, under a duty, pursuant to ss. 7 and 24(1) of the *Charter* and *Suresh*, to grant substantive remedy and direct the result of conferring protection?

[21] Counsel for the Applicant further proposed that the Court extend the earlier Order of this Court enjoining removal of the Applicants from Canada until such time as any appeal from the Court's Order herein is disposed of. The Court expressed doubt as to its authority to grant such an extension of the outstanding injunction.

[22] Counsel for the Respondent requested an opportunity to consult his client on the questions proposed for certification and to make written representations regarding certification. Counsel for the Respondent also agreed to provide written representations regarding this Court's jurisdiction to extend the current injunction. I agreed to provide such an opportunity with regard to the proposed questions for certification of a question and welcomed the offer to provide submissions on extension of the injunction.

[23] These reasons will be distributed. Counsel for the Respondent will have seven (7) days from the date of such distribution to serve and file written submissions on the proposed questions for certification and on the issue of extension of the injunction. Thereafter, counsel for the Applicants will have seven (7) days to serve and file responding submissions. Only thereafter will an Order issue giving effect to these reasons.

"Frederick E. Gibson"

JUDGE

Ottawa, Ontario.
March 27, 2008

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2069-07
STYLE OF CAUSE:	ALICE MARIA Da MOTA, CABRAL De MEDEIROS JOAO CARLOS CABRAL De MEDEIROS PEDRO MIGUEL CABRAL De MEDEIROS and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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REASONS FOR ORDER:	GIBSON J.
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