Date: 20090914

Docket: IMM-5096-08

Citation: 2009 FC 906

OTTAWA, Ontario, September 14, 2009

PRESENT: The Honourable Louis S. Tannenbaum

BETWEEN:

JOY ITOHAN OKPIAIFO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the September 15, 2008 decision of Pre-Removal Risk Assessment ("PRRA") Officer A. Mazzotti.

Background

[2] The Applicant is a thirty-five year old citizen of Nigeria. In March 2003 she entered into an arranged marriage. After she became pregnant, her husband's parents requested that the Applicant undergo female circumcision prior to delivering her child. The Applicant had heard of the serious risks associated with this procedure, which is also known as female genital mutilation ("FGM"), and

refused to accede to the requests. Her husband supported her decision and her parents attempted to appeal to the community elders, but they were rebuffed.

[3] The stress of this situation began to take a toll on the Applicant, who says she began to suffer certain complications related to her pregnancy. She fled Nigeria for the United States, arriving on July 9, 2004. She arrived in Canada on August 27, 2004. She gave birth to her daughter on September 10, 2004.

[4] The Applicant filed an application for refugee protection, which was denied on September 8, 2005 upon the basis of credibility and due to her failure to file for refugee protection elsewhere prior to entering Canada. Leave to judicially review this decision was denied on March 27, 2006.

[5] On December 21, 2005, the Applicant gave birth to her second child, who was fathered by another man. The Applicant states that subsequently, her husband divorced her and now demands that their daughter be returned to Nigeria to face FGM. She provided a letter from her former husband dated November 29, 2005 in support of this fact. She also provided a letter from her father dated July 17, 2006 indicating that he was being threatened and harassed by her husband and his family.

[6] The Applicant's PRRA application was based upon her membership in a particular social group, that being women at risk of FGM in Nigeria.

[7] The Officer concluded that much was being done to combat the practice of FGM in Nigeria, that the Applicant could relocate to a more ethnically diverse area such as Lagos or to Edo or Osun, where the practice had been banned, and that ultimately, State protection would be available to the Applicant if she returned.

Issues

[8] The issues are as follows:

1. Did the Officer err in respect of his conclusions regarding the adequacy of State protection?

2. Did the Officer err in failing to properly consider the evidence of risk raised by the Applicant?

Standard of Review

[9] In *Rosales v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 257, Justice Gibson noted that the standard of patent unreasonableness applies to determinations of fact within the context of a state protection analysis. The two deferential standards of review have since merged into the single standard of reasonableness: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 45. I conclude that a finding respecting the adequacy of state protection and the availability of an internal flight alternative ("IFA") should be subject to the standard of reasonableness.

[10] Whether the Officer failed to consider the evidence before him is a question of fact and thus also appropriately made subject to review on the standard of reasonableness: *Kim v. Canada (Minister of Citizenship and Immigration) et al.* (2005), 272 F.T.R. 62 at para. 20 (F.C.).

Law and Argument

1. Did the Officer err in respect of his conclusions regarding the adequacy of State protection?

[11] The Applicant argues that the Officer's finding as to the adequacy of State protection was directly contradicted by the evidence before him. She submits that the evidence reveals that despite opposition by the authorities to the practice of FGM, the federal police refuse to become involved in stopping it, as they consider the practice a family matter.

[12] The Respondent argues that the State is presumed to be capable of protecting its nationals absent clear and convincing proof to the contrary. The burden rests with the Applicant in this regard: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689. The Respondent submits that the Applicant has failed to rebut this presumption. In addition, when there is evidence, as there is in this case, upon which an officer could reasonably conclude that State protection would be available, the Court should not intervene in a decision to that effect: *Jahan v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 987 (F.C.T.D.).

[13] The simple fact that an applicant can point to some evidence that supports her argument does not mean that an officer has erred by reaching a conclusion contrary to that evidence. It is often the case that the documentary evidence before an officer will conflict. It is therefore the officer's duty to weigh that evidence and to reach a reasonable conclusion upon the basis of all of the information before him.

[14] An officer should be afforded considerable deference in undertaking this task and his decision should not be disturbed if it falls within a range of possible and acceptable outcomes, defensible on the facts and law: *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 872 at para. 16; *Dunsmuir*, at para. 47.

[15] Further, while the Applicant argues that the Officer failed to provide an example of a situation in which the FGM law has been enforced in Nigeria, I note that the burden is on the Applicant to rebut the presumption of State protection, and not upon the Officer to establish its existence: *Flores Carrillo v. Canada (Minister of Citizenship and Immigration)*, [2008] 4 F.C.R. 636 at paras. 18-19, 38 (F.C.A.).

[16] The Officer supported his conclusion respecting the adequacy of State protection by reference to the evidence before him, including that which revealed that the Applicant possessed an IFA in Nigeria. I find that the Officer's decision is reasonably supported by the evidence and as such, can see no basis to intervene on this ground.

2. Did the Officer err in failing to properly consider the evidence of risk raised by the Applicant?

[17] The Applicant argues that the Officer failed to recognize the new risk that arose following the rejection of the Applicant's refugee claim and the documentary evidence tendered in support. The evidence to which she refers is contained within the letters from her father and her former husband. She contends that the letters constitute new evidence demonstrating the risk that she and her daughter would face if returned to Nigeria. She submits that it is a reviewable error for an

officer to reach a conclusion without regard to the evidence before him: *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 106 at 113 (F.C.A.).

[18] The Respondent contends that the Officer considered all of the evidence before him, and gave proper consideration to the risk raised by the Applicant.

[19] The Officer considered the two letters and found that there was no indication that the Applicant's former husband continued to maintain any interest in the Applicant or her daughter.

[20] I observe that the letter from the Applicant's father, dated approximately eight months after that from her former husband, contradicts this conclusion in part, as it refers to the Applicant's husband's continued desire to see his daughter returned in order that she undergo FGM.

[21] That point having been made however, the risk raised by the Applicant relating to her daughter is not personal to the Applicant. While such evidence may be ripe for consideration upon the basis of a humanitarian and compassionate application, the Officer was under no obligation to consider it in the present context: *Kim*, at para. 70.

[22] While the Applicant also raised in her submissions to the Officer the risk she would face at the hands of her husband given the patriarchal nature of Nigerian society, I have found above that the Officer reasonably concluded that the Applicant possesses a viable IFA such that she could relocate to an area away from her former husband if she is returned.

[23] In sum, the Applicant has failed to point to any new evidence arising since her refugee decision was made that would support the argument that she herself would face a risk at the hands of her former husband or his family if returned to Nigeria. As such, the Officer's decision should not be disturbed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question of general importance has been submitted for certification and none will be certified.

"Louis S. Tannenbaum"
Deputy Judge

Authorities consulted by the Court

1. *Sicaja-Gonzalez v. M.E.I.*, (F.C.T.D.), Oct. 7, 1993), A-326-92
2. *Owusu-Ansah v. Canada (M.E.I.)*, (1989), 8 Imm.L.R. (2d) 106
3. *Singh and Narang v. M.E.I.*, (1993), 69 F.T.R. 142 (T.D.)
4. *Dunsmuir v. New Brunswick*, 2008 SCC 9
5. *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12
6. *De Medeiros v. Canada (M.C.I.)*, 2008 FC 386
7. *Bayavuge v. Canada (M.C.I.)*, [2007] F.C.J. No. 111
8. *Elezi v.M.C.I.*, 2007 FC 240 (CanLII), 2007 FC 240
9. *Gyorfi v. Solicitor General of Canada*, 2005 FC 176 (Can LII), 2005 FC 176
10. *Yousef v. Canada (M.C.I.)*, 2006] FCJ No. 1101
11. *Selliah v. Canada (M.C.I.)*, 2004 FCA 261
12. *Ferguson v. Canada (M.C.I.)*, 2008 FC 1067
13. *Augusto v. Canada (S.G.)*, 2005 FC 673
14. *Figuardo v. Canada (S.G.)*, 2004 FC 241
15. *Cupid v. Canada (M.C.I.)*, 2007 FC 176
16. *Kim v. Canada (M.C.I.)*, 2005 FC 437
17. *Paul v. Canada (M.C.I.)*, 2007 FC 398
18. *Rodriguez Zambrano v. Canada (M.C.I.)*, 2006 FC 883

FEDERAL COURT

SOLICITORS OF RECORD

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