Federal Court  Cour fédérale

Date: 20101125

Docket: IMM-6689-09

Citation: 2010 FC 1167

Ottawa, Ontario, this 25th day of November 2010

Before: **The Honourable Mr. Justice Pinard**

BETWEEN:

DANIELE DONETTE NELSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Daniele Donette Nelson (the "applicant") is seeking judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board") under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The Board concluded that the applicant was not a Convention refugee or a person in need of protection.

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[2] The applicant is a citizen of Saint Vincent who claims to be a victim of domestic violence.

[3] She was a single mother to her son when she met Mr. Elroy Barnum in 2002. She states that he was very kind to her and helped her provide for herself and her son. Eventually, they became romantically involved, moved in together, and she became pregnant with a daughter.

[4] However, the relationship quickly turned violent. She claims that he would frequently hit her and call her names, control her movements, follow her, and stay home just to watch her; he also raped her on at least one occasion.

[5] In December 2006, she was waiting for the bus to go home when she saw a crowd on the street. When she went to see what was going on, she noticed the body of a young woman. Her head was cut off. She states that witnesses told her that the victim's abusive boyfriend had killed her. It was then that the applicant says that she decided to leave Saint Vincent.

[6] She contacted her mother, who began saving money to bring her to Canada. The applicant asked her brother if he could take care of the children while she went to Canada, and he agreed. A couple of days before she was scheduled to leave, she told Mr. Barnum that she did not want to be with him anymore. She claims that he beat her severely and threatened to kill her if she left him. She states that she left that night and stayed with her brother until her flight. She also claims that Mr. Barnum still calls her sister, asking if she knows where the applicant is and repeating his threat to kill her.

[7] The applicant arrived in Canada on August 5, 2007, on a six-month visitor visa, and submitted her refugee claim only on February 14, 2008.

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[8] The Board first considered the applicant's credibility. Although the Board ultimately concluded that her story was plausible, the Board expressed concern over the delay between the applicant's arrival in Canada and the submission of her refugee claim. The Board noted that she waited approximately six months before submitting her claim, and that she testified that the reason for the delay was that she was not aware of the refugee protection program and that she had come to Canada to relax and seek help. The Board further noted that she first decided to come to Canada after witnessing the murder of a young woman in Saint Vincent, and that the Immigration Officer's notes indicate that the applicant came to Canada out of fear. However, the Board found that the applicant made no effort to find out about the options available to her, and that her delay in claiming was not consistent with someone who fears for her life. Although the Board concluded that the delay affected the credibility of the applicant's subjective fear, it found that this was not a decisive factor.

[9] The Board's primary reason for rejecting the applicant's claim was because the applicant had not discharged her burden of demonstrating that the state of Saint Vincent is unable or unwilling to protect her. The Board noted that the applicant had not made any attempt to seek help from the police prior to seeking protection in Canada, her reason being that Mr. Barnum was always watching her and that the police would not do anything. The Board acknowledged that state

protection in Saint Vincent is not perfect, but found that the country does have a police force and that its government apparatus had not completely broken down.

[10] The Board then discussed the documentary evidence indicating that the *Domestic Violence (Summary Proceedings) Act 1995* provides protection to victims of spousal or common-law partner abuse. The Board further noted that the government of Saint Vincent has been making serious efforts to fight violence and to inform police officers and justice workers about domestic violence and to encourage the application of the *Domestic Violence Act*. The Board also noted evidence indicating that it was not futile to seek police protection because:

> … From January to … October 2007, out of a total of 177 protection orders filed, 75 were granted, 70 were "struck out", 13 were denied, 7 were dismissed and 5 were withdrawn …. For the same period, a total of 33 arrests for domestic violence were registered, leading to 222 [*sic*] convictions, 7 dismissals and 5 cases registered as "offer[ing] no evidence"….
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> (As pointed out by counsel for the applicant, the number 222 in the above citation appears to be the result of a clerical mistake as in fact the record shows that the 33 arrests resulted in 22, not 222, convictions.)

[11] The Board cited jurisprudence indicating that "[d]oubting the effectiveness of state protection when [the claimant] did not really test it does not rebut the presumption of state protection". As a result, the Board concluded that the applicant did not discharge her burden of proof and demonstrate that state protection was inadequate.

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[12] The applicant has raised the following issues:

A. Did the Board err in concluding that the applicant lacked subjective fear?

B. Did the Board err in concluding that there was state protection available to the applicant?

[13] Regarding the question of the Board's analysis of the applicant's subjective fear, Mr. Justice Michael Kelen recently confirmed in *Cornejo v. Minister of Citizenship and Immigration*, 2010 FC 261, that the applicable standard of review is reasonableness. Regarding the Board's analysis of the existence of state protection, the Court of Appeal in *Hinzman v. Minister of Citizenship and Immigration*, 2007 FCA 171, found that the applicable standard of review is reasonableness.

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A. *Did the Board err in concluding that the applicant lacked subjective fear?*

[14] The applicant submits that in concluding that the delay in submitting her refugee claim affected the credibility of her subjective fear, the Board did not consider her explanations. The applicant notes that she was in Canada legally for six months and was at no risk of deportation. She also testified that she did not know anything about the refugee process until shortly before the expiration of her visitor's visa. She submits that the failure to consider these explanations renders the decision unreasonable.

[15] As noted by the respondent, the Board was certainly entitled to consider the applicant's delay in claiming when assessing her subjective fear of persecution. However, delay is not normally

determinative of a claim (*Espinosa v. Minister of Citizenship and Immigration*, 2003 FC 1324). This is precisely what the Board found in this case. While it did express concerns over the subjective fear of the applicant based on her behaviour, the Board ultimately concluded that the delay was not decisive, and still concluded that the applicant was credible regarding her story. There is nothing unreasonable about the Board's conclusion on this matter.

B. *Did the Board err in concluding that there was state protection available to the applicant?*

[16] The applicant submits that the decision of the Board regarding the existence of state protection is unreasonable because the Board ignored evidence indicating that victims of domestic violence have little recourse available to them and that police officers frequently treat victims as though they asked for such treatment, as well as the applicant's testimony indicating that her common-law partner had threatened to kill her if she went to the police.

[17] As noted by the respondent, the applicant bears the burden of satisfying the Board, with clear and convincing evidence, that state protection was not available to her (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689). While this evidence certainly provides support for the applicant's position, I am not convinced that this is "clear and convincing" evidence of the state's inability to provide protection.

[18] Indeed, there is serious evidence in support of the Board's finding of availability of state protection. Considering that the Board is presumed to have considered all the evidence before it (*Florea v. Canada (Minister of Citizenship and Immigration)*, [1993] F.C.J. No. 598 (C.A.) (QL))

and it is under no obligation to refer to every piece of evidence (*Kumar v. Minister of Citizenship and Immigration*, 2009 FC 643), it would be inappropriate for this Court to substitute its own appreciation of the facts to that made by the Board. In this context, I am of the view that in essence the following comments made by Madam Justice Marie-Josée Bédard in *Rocque et al. v. The Minister of Citizenship and Immigration Canada*, 2010 FC 802, and by Mr. Justice Maurice Lagacé in *Dean v. The Minister of Citizenship and Immigration*, 2009 FC 772, apply *mutadis mutandis* to the present case.

[19] In *Rocque et al.*:

> [19] In this case, the Board concluded that Saint Vincent is a parliamentary democracy with an effective judiciary and that there are in force in that jurisdiction clear laws protecting persons such as the Applicants from assault. This conclusion was based on the evidence, among which were included the Saint Vincent and the Grenadines National Documentation Package and the Country Reports on Human Rights Practices for 2008. Having read all the documentary evidence presented to the Board regarding the country conditions, I am of the view that the Board's finding was not unreasonable and that it did not make this finding without regard to the evidence.

[20] In *Dean*:

> [17] In spite of the allegations of threats and fear for the safety of her mother, brother and sister because of the influence her stepfather purportedly enjoyed as a producer and dealer of drugs, the applicant never filed a complaint with the authorities before leaving Saint Vincent and the Grenadines to come to Canada to claim refugee protection.
>
> [18] The granting of international protection must only be an ancillary measure of last resort. Consequently, the RPD was entitled to presume that a foreign state was capable of protecting its citizens. The burden was on the applicant to establish, through clear and

convincing evidence, her country of origin's inability to provide protection for her. Except in situations where the state apparatus has broken down completely, it should be presumed that it is capable of protecting its citizens (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 725-726; *Mendivil v. Canada (Secretary of State)* (1994), 167 N.R. 91, 95 (F.C.A.); *Roble v. Minister of Employment and Immigration* (1994), 169 N.R. 125, 130 (F.C.A.); *Canada (Minister of Employment and Immigration) v. Villafranca*, [1992] F.C.J. No. 1189 (F.C.A.) (QL), at paragraphs 6-7).

[19] The RPD weighed the documentary evidence before concluding that the protection provided by the government of Saint Vincent and the Grenadines was adequate. It also examined the reasons why the applicant never filed a complaint with the police regarding the assaults by her stepfather, but did not find them to be satisfactory. The RPD found that the applicant's explanations did not constitute clear and convincing evidence of inadequate state protection.

[20] When an applicant comes from a democratic state such as Saint Vincent and the Grenadines, it is even more incumbent upon them to seek the protection of that state first. Accordingly, the applicant must show that he or she exhausted all reasonable courses of action available in his or her country to obtain the necessary protection of the national authorities, before contemplating seeking protection from a foreign country (*Kadenko v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1376 (F.C.A.) (QL)). While the applicant may very well cite incidents which occurred during her youth to justify not having sought the protection of her country, nothing however prevented her from claiming such protection when the incidents occurred after she had reached adulthood, before she chose to leave for Canada.

[21] In this case, the applicant did not establish the "complete breakdown of the state apparatus" in her country of origin. As the RPD rightly noted, the applicant demonstrated only a subjective reticence to file a complaint but did not show any denial or lack of state protection.

[22] Moreover, the RPD relied on objective documentary evidence indicating that the country has an independent judiciary that enforces the law in cases of spousal violence and violence against minors. It is not the Court's place to substitute its opinion for that of the RPD, a specialized administrative tribunal with all the necessary expertise to analyze the evidence and make the appropriate findings.

[21] As I find that none of the Board's findings regarding state protection were unreasonable and that, on the contrary, they fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190), the intervention of the Court is not warranted and the application for judicial review is dismissed.

[22] No question is certified.

JUDGMENT

The application for judicial review of the decision rendered on November 26, 2009 by the Refugee Protection Division of the Immigration and Refugee Board is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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