Federal Court | Cour fédérale

Date: 20110120

Docket: IMM-3669-10

Citation: 2011 FC 63

Ottawa, Ontario, January 20, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

THABATA PORTO GOMES SOUSA
KAUE GOMES SOUSA DE OLIVEIRA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The present application for judicial review seeks to have a decision of the Immigration and Refugee Board, Refugee Protection Division (the "Board") quashed and sent for redetermination. Leave was granted by Justice Campbell on October 19, 2010. In his decision of June 10, 2010, the Board member denied Thabata Porto Gomes Sousa and Kaue Gomes Sousa de Oliveira (the

"Applicants") status as Convention Refugees or persons in need of protection under the regime of the *Immigration and Refugee Protection Act* ("IRPA").

[2] Thabata Porto Gomes Sousa (the "Principal Applicant") alleges that she was the victim of domestic violence by her former spouse, Marcus, a man the evidence reveals to be violent and in prey to psychiatric issues and substance abuse problems. The Principal Applicant left her former spouse with her son, but returned to him upon learning that he had been admitted to a drug addiction treatment facility. However, Marcus escaped from the facility and renewed his threats towards the Principal Applicant. The Principal Applicant went to the police station to report the threats. The police advised her that not much could be done and that, at best, Marcus would only be condemned to paying a fine or making a charitable donation.

[3] During the course of the events, the Applicants moved in with Marcus' parents and Marcus, in an attempt to salvage the relationship. During the course of this stay, Marcus attacked the Principal Applicant, who then called the police. Her father-in-law, a man involved in the "animal game", a popular form of illegal gambling in Brazil, proceeded to hang up the phone when the Principal Applicant was making the call. Upon receiving an inquiry by the police about the events, her father-in-law instructed the police that the matter had been solved, and that it was nothing but a couple's quarrel. The father-in-law then threatened the Principal Applicant and made reference to the fact that he had connections within the police.

[4] The Board member focused on the following elements to conclude that the Applicants were not Convention Refugees or persons in need of protection:

a. The Principal Applicant did not present sufficient evidence to rebut the presumption of State Protection as set out in *Canada (Attorney General) v Ward*, [1993] SCR 689;

b. Marcus' father's influence with the police was not deemed sufficient to influence the police's decision to investigate a crime;

c. Although the evidence was mixed on this subject, several means for protection and programs were presented by the Board in support of the conclusion on sufficiency of state protection; and

d. State protection in Brazil was found to be sufficient, particularly since the state adopted a statute, namely the *Maria Da Penha* law, which criminalizes domestic violence.

Standard of Review

[5] The determinative issue in this case is that of the sufficiency of state protection, a question that is to be reviewed under the standard of reasonableness, as it is a mixed question of fact and law (*Dean v Canada (Citizenship and Immigration)*, 2009 FC 772; *Flores Dosantos v Canada (Citizenship and Immigration)*, 2010 FC 1174; *Dunsmuir v New Brunswick*, 2008 SCC 9). The application of the *Gender Guidelines* is a question that is to be reviewed on the standard of reasonableness (*Correa Juarez v Canada (Citizenship and Immigration)*, 2010 FC 890; *Montoya Martinez v Canada (Citizenship and Immigration)*, 2011 FC 13).

Analysis

[6] The Board's decision in regards to the sufficiency of state protection is unreasonable, in that it failed to adequately address the *Gender Guidelines* and made an unreasonable plausibility finding.

[7] It is clear that subjective reticence to engage with state authorities is not sufficient to rebut the presumption of state protection (*Canada (Attorney General) v Ward*, [1993] SCR 689). However, this case is not as in *Dean v Canada (Citizenship and Immigration)*, 2009 FC 772, at paragraph 21, where "the applicant demonstrated only a subjective reticence to file a complaint but did not show any denial or lack of state protection". In this case, proper consideration of the *Gender Guidelines* may have led to a finding that this reticence to engage the proper authorities was more than subjective.

[8] However, this Court is not mandated to make a finding of fact on this issue. It only notes that beyond the simple mention of the *Gender Guidelines* in the beginning of the Board's reasons, these were not considered in respect to the Principal Applicant's reticence to engage with authorities, particularly after her father-in-law's threats. Surely, the situation commanded that the *Gender Guidelines* receive more particular attention, as the Principal Applicant was a victim of domestic violence that was condoned by her father-in-law, who threatened her and made reference to his contacts within the police. It was unreasonable for the Board not to analyze the *Gender Guidelines* in light of the Principal Applicant's situation.

[9] Moreover, the Board made an implausibility finding in regard to these threats and Marcus' father's influence on the police, at paragraph 14 of its decision:

> "I am not persuaded that Marcus' father has any influence over the decisions of the police to investigate crimes. Although Marcus'

> father was involved in an illegal betting operation that required weekly payments to a corrupt police officer, there was no persuasive evidence present to indicate that the police would not investigate Thabata's allegations if they were rePortod to them or that Marcus' father had the influence to convince the police to charge Thabatha with a crime instead of Marcus."

[10] The case law is clear: implausibility findings must only be made in the clearest of cases (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 (TD)). In this case, the Board's conclusion in regards to Marcus' father went beyond what the evidence supported. Furthermore, in concluding that Marcus' father's influence on the police was limited, the Board failed to adequately consider the Principal Applicant's reasons for not seeking state protection.

[11] Hence, the Board's decision in regards to the sufficiency of state protection is flawed in two aspects. Firstly, it failed to adequately assess the *Gender Guidelines* in order to fully address the reasons for which state protection was not sought, and secondly, it made an unreasonable plausibility finding, thus depriving the Applicants of a full and proper assessment of the reasons for which state protection was not sought. As such, the decision falls outside the range of acceptable outcomes defensible in fact and in law. The proper remedy is to send the matter for redetermination before a newly constituted panel of the Board.

[12] No question for certification was put forth by the parties, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that:

- The application for judicial review is granted. The matter is to be sent for redetermination before a newly constituted panel of the Board. No question is certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3669-10
STYLE OF CAUSE:	THABATA PORTO GOMES SOUSA KAUE GOMES SOUSA DE OLIVEIRA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 17, 2011
REASONS FOR JUDGMENT:	NOËL S. J.
DATED:	January 20, 2011

APPEARANCES:

Laura Setzer	FOR THE APPLICANT
Helene Robertson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Laura Setzer Barrister and Solicitor Ottawa, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canda Ottawa, Ontario	FOR THE RESPONDENT