Federal Court Cour fédérale

**Date: 20110224**

**Docket: IMM-3823-10**

**Citation: 2011 FC 225**

**Toronto, Ontario, February 24, 2011**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**ESTANIEL DESIR**
**DESTROY DESIR**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] In this application for judicial review of a decision by the Refugee Protection Division ("RPD") of the Immigration and Refugee Board, counsel for the applicants, Mr. Sina Ogunleye, signed and filed a Memorandum of Argument alleging the arrest, beating and torture of the principal applicant by the Nigerian police. In the further memorandum of argument which Mr. Ogunleye signed and filed with the Court, the identical allegations are made against the St. Lucia police. As acknowledged by Mr. Ogunleye at the hearing of this application, these allegations bear no

resemblance to the facts of the case considered by the Board. The effect was to mislead the Court as to the grounds for granting leave on this application.

[2] The principal applicant claimed protection from his ex-wife and her family in St. Lucia. After their separation, he was subjected to various forms of harassment by the ex-wife and her family. The Board refused his claim on the grounds that there was no nexus between the claim and the Convention grounds under s.96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA") and, with respect to the claim for protection under s.97, that the applicant had failed to rebut the presumption of state protection.

[3] In the scant written arguments filed by Mr. Ogunleye on behalf of the applicants it is stated that the "Board relied heavily on inferences drawn by it from the applicant's emotional effects during his oral testimony at the hearing and based its adverse credibility finding on it". There is no support for this statement in the record before me.

[4] On the hearing of this application, Mr. Ogunleye submitted that the sole issue was whether the Board had erred in finding that there was no nexus between the applicants' claim and any Convention refugee ground. He argued that the Board erred in failing to find that the principal applicant belonged to an identifiable social group, that being males abused by their former female spouses. The respondent objected to this argument being put forward at the hearing as it had not been advanced in the applicants' Notice of Application or Memoranda of Argument. I agree with the respondent that there is nothing in the materials filed by the applicants in these proceedings that would give the opposing party reasonable notice that this issue would be raised and will not address it.

[5] I have considered whether the Board erred in finding that there was no nexus to a Convention ground. Notwithstanding that it was not addressed in the applicants' Memoranda of Argument, I have also considered whether the Board erred in its finding that the applicants had failed to rebut the presumption of state protection.

[6] In considering these issues I have applied the standard of reasonableness which has been found to apply to similar refugee determinations by the Board: *Gilbert v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1186 at para. 18; *Kaleja v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 252 at paragraph 19; *Sagharichi v. Canada (Minister of Employment and Immigration)* (1993), 182 N.R. 398 (F.C.A.) at para. 3. The Court is concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47.

*Did the Board err in finding there was no nexus to a Convention ground?*

[7] Proving refugee status requires evidence of a clear link between a refugee claimant and one of the five enumerated grounds in the Convention refugee definition: *Kang v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1128 at para. 9; *Starcevic v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1370 at paras. 10 and 12. Being a victim of crime or of a

personal vendetta, as in this case, cannot generally establish a link between fear of persecution and Convention reasons: *Kang*, above, at para. 10.

[8] As in *Kang*, where the applicant based her refugee claim on a death threat from her uncle, or in *Starcevic*, where the applicant's alleged fear was at the hands of his ex-wife's husband, in the case at bar, the principal applicant claims to have been the target of various criminal acts by his ex-wife and her family. Although unfortunate occurrences, they do not form the basis for making a refugee claim as outlined by s.96 of the IRPA. As such, the Board correctly concluded that in the applicants' situation, there was no nexus to a Convention ground.

*Did the Board err in finding that the applicants had failed to rebut the presumption of state protection?*

[9] It is presumed that the state is in a position to provide adequate protection to its citizens: *Canada (Attorney General v. Ward)*, [1993] 2 S.C.R. 689 at para. 50. The burden of rebutting this presumption rests with the individual seeking protection in Canada: *Flores Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 F.C.R. 636 at paras. 17-19. This burden is directly proportional to the level of democracy in the state in question: *Kadenko v. Canada (Minister of Citizenship and Immigration)* (1996) (FCA), 143 D.LR. ($4^{th}$) 532, 206 N.R. 272 at para. 5. If it is argued that state protection is not able to provide such protection, clear and convincing evidence of its inability to do so must be provided: *Ward*, above, at para. 50.

[10] In this case, the Board considered the documentary evidence relating to state protection in St. Lucia noting that there are reports which suggest the rise in crime rates and police corruption. At the same time, it found that St. Lucia has a functioning, independent judicial system and has been making efforts to bolster its criminal law system, including training the police force. St. Lucia was also noted to be a parliamentary democracy with free and fair elections.

[11] Here, the principal applicant's evidence demonstrated a certain level of state protection. After he was attacked by his ex-wife's brother and cousin, he went to the police station to report the incident. The police left immediately to investigate. Although the police did not find the assailants, the Board reasonably concluded that the police were engaged.

[12] Part of the Board's finding that the principal applicant had not rebutted the presumption of state protection was based on the fact that no copies of police reports were filed with his application. When asked about this at the hearing, the principal applicant explained that he gave money to a lawyer in St. Lucia so that he could be sent the necessary reports. He said he sent the money via Western Union. There is a Western Union receipt on record but, as rightly noted by the Board, it does not confirm why the money was sent or that the individual to whom it was sent is a lawyer. The Board reasonably concluded that there were other means of ensuring he had the necessary documentation to support his claim. It was open to the Board to draw an adverse inference from the principal applicant's failure to produce police reports.

[13] I am satisfied that the Board's findings are reasonable and that this decision falls within the range of acceptable and defensible outcomes in respect of the facts and the law. The application is dismissed. No serious questions of general importance were proposed and none will be certified.

[14] In closing, I wish to note that apart from the egregious factual errors referred to at the outset, the quality of the representation that the applicants received in this matter fell short of what the Court or a client should expect from a member of the Law Society of Upper Canada. Mr. Ogunleye's attempt to justify the inadequacy of the record filed with the Court on the ground that he was filing many applications for leave at the time this one was prepared is unacceptable. This was not a case where counsel unfamiliar with the history of the matter inadvertently made a minor error. Mr. Ogunleye was counsel for the applicants at the RPD hearing. He had a responsibility to his clients and to the Court to ensure that the memoranda of fact and law he filed were accurate.

**JUDGMENT**

**THIS COURT'S JUDGMENT** is that the application for judicial review is dismissed.

There are no certified questions.

"Richard G. Mosley"
Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3823-10 |
| **STYLE OF CAUSE:** | ESTANIEL DESIR AND DESTROY DESIR v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | February 23, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | Mosley J. |
| **DATED:** | February 24, 2011 |

**APPEARANCES:**

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| Sina Ogunleye | FOR THE APPLICANTS |
| Mahan Keramati | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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