

Federal Court



Cour fédérale

Date: 20121019

Docket: IMM-2176-12

Citation: 2012 FC 1225

Ottawa, Ontario, October 19, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

**FRANCINE NATALIE ST. JOAN CLARKE,
A.K.A. FRANCENE NATALI CLARKE**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a citizen of Jamaica, who fled that country in 2007 due to abuse she suffered at the hands of her former common-law spouse. The Refugee Protection Division of the Immigration and Refugee Board [the RPD or the Board] rejected her refugee claim on February 12, 2012, finding that she was not a Convention refugee or person in need of protection because she had not rebutted the presumption that adequate state protection was available to her in Jamaica. In this application for judicial review, the applicant argues that the Board's determination was

unreasonable and should be set aside because much of the evidence before the Board indicated that state protection is not available to women who are victims of domestic abuse in Jamaica.

[2] Apart from certain newspaper articles filed by the applicant with the Board, the relevant objective evidence before it on state protection was comprised of three documents: a report from the United States Department of State, entitled “Jamaica, Country Reports on Human Rights Practices for 2010, dated April 8, 2011 [the US DOS Report], the United Kingdom’s July 2010 Home Office report entitled “Operational Guidance Note: Jamaica” [the UK Operational Guidance Note] and the National Documentation Package prepared by the Research Directorate of the Immigration and Refugee Board of Canada, dated April 27, 2011 [the National Documentation Package]. As the Board noted in its decision, this documentation provides a mixed picture as to the efficacy of enforcement of Jamaican laws aimed at preventing spousal abuse. On the one hand, the UK Operational Guidance Note indicates that such laws are effectively enforced, while the other two reports indicate otherwise.

[3] The salient sections in each provide as follows:

US DOS Report

Social and cultural norms perpetuated violence against women, including spousal violence [...] The law prohibits domestic violence and provides remedies including restraining orders and other noncustodial sentencing [...] however] [p]olice were generally reluctant to become involved in domestic issues, which led to cases not being pursued vigorously when reported.

(Certified Tribunal Record [CTR] at p 78)

UK Operational Guidance Note

[...] there is a general sufficiency of protection available to victims of domestic violence through enforcement of legislative provisions and availability of governmental and non-governmental shelters, advice, and legal aid and counseling. [...] Domestic violence is widespread in Jamaica but there is in general sufficient protection and internal relocation is also an option where in the particular circumstances of the applicant it is not considered unduly harsh for them to relocate. The grant of asylum or Humanitarian Protection is unlikely therefore to be appropriate and unless there are specific reasons why sufficient protection would not be available to the individual applicant and why it would be unduly harsh to expect them to relocate internally, such claims may be certified as clearly unfounded.

(CTR at p 93)

National Documentation Package

According to the Woman Inc. Representative, domestic violence legislation is "comprehensive but enforcement and reporting are the real issues" (1 Dec. 2009). Similarly, Freedom House reports that women's groups, government bodies and NGOs "have noted that while much of the legal structure is in place to help reduce violence and discrimination against women, enforcement remains lacking" (2009). In the opinion of the Woman Inc. Representative, state protection is "not available" to victims of domestic violence due to "massive resource constraints" on the part of the government (1 Dec. 2009). Furthermore, the Woman Inc. Representative stated that "[u]nless the victim is a witness who qualifies for protection under the witness protection program, there is no other form of 'state protection'" (1 Dec. 2009). Corroborating information on whether the witness protection program is the only form of protection provided by the government could not be found among the sources consulted by the Research Directorate.

(CTR at p 99)

[4] In addition to the objective country documentation, the applicant also provided evidence of her own experiences with the Jamaican police. She claimed that two serious incidents occurred with

her former spouse. The first occurred in 2006, when he beat her up. She claims that she reported the matter to the police, who came and took a verbal report but said they could not do anything as it was a domestic matter.

[5] The second incident occurred in February 2007, when the applicant claims that her former spouse “gave her a severe beating” and threatened to shoot her. As corroborating evidence, the applicant provided an affidavit from a secretary at her former workplace that confirms the secretary was aware the applicant was in an abusive relationship and indicates that the applicant came to the secretary’s home with bruises from an attack one evening in February of 2007. The secretary also states that she witnessed the applicant’s former spouse threaten to kill the applicant.

[6] The applicant also filed a copy of a police report that was made following the February 2007 attack, which confirms her claim to have been attacked and indicates that the attack left “visible bruises to her neck, forearm, thigh and abdomen”. The report documents that the applicant told the police that the attack went on for 15-20 minutes and that when she broke free her ex-spouse threatened to shoot her. The police report further indicates that they went to the residence the next day, searched the apartment and questioned the applicant’s former spouse but did not find a firearm. The report goes on to detail that the former spouse indicated that he and the applicant had been arguing, that “he got out of control and he [would] not let it happen again” and that the police gave him a warning (Applicant’s Record at p 52).

The parties' positions

[7] The applicant argues that the Board's state protection finding was not reasonable as the UK Operational Guidance Note cites no empirical evidence for its conclusion regarding the "general sufficiency of protection" available to victims of domestic violence in Jamaica and notes that there is ample authority for the proposition that mere presence of laws preventing abuse is insufficient to ground a finding of adequate state protection if the evidence demonstrates that those laws are not enforced, relying in this regard on *Gilvaja v Canada (Minister of Citizenship and Immigration)*, 2009 FC 598 and *Beharry et al v Canada (Minister of Citizenship and Immigration)*, 2011 FC 111. The applicant further argues that the Board's determination as to the adequacy of state protection hinged in part on its determination that the police responded to the applicant's complaints, and that this finding is unreasonable, given their failure to do anything in 2006 and their failure to lay charges in 2007, when there was evidence of abuse. The applicant argues, relying on the decision of the Supreme Court of Canada in *Ward v Canada (Minister of Employment and Immigration)*, [1993] 2 SCR 689, 103 DLR (4th) 1, that the best evidence regarding the availability of state protection is evidence of a refugee claimant's own experiences, and that in the applicant's case these indicate that the police were unwilling to enforce the law. The applicant finally notes that the possibility of assistance being provided by non-governmental organizations is irrelevant to the issue of the availability of state protection as there is no burden on an applicant to seek redress from an organization other than the police (citing *Molnar v Canada (Minister of Citizenship and Immigration)*, [2003] FC 339).

[8] The respondent, for its part, argues that the Board's determination was reasonable because the evidence of the efficacy of state protection was mixed and accordingly its finding that the

applicant had not rebutted the presumption of state protection is reasonable. As for the finding that the police responded to the applicant's complaint, the respondent argues that the verbal warning was a response and therefore that this finding is likewise reasonable. The respondent finally argues that the applicant is seeking to have this Court reweigh the evidence, which is inappropriate and notes that the US DOS Report and the National Documentation Package also lack empirical foundation for their conclusions and therefore all three reports were appropriately afforded equal weight by the Board.

Analysis

[9] The standard of review applicable to the Board's finding regarding the adequacy of state protection for the applicant in Jamaica is reasonableness, the matter being one of fact or mixed fact and law (*Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 38 [*Hinzman*]).

[10] It is firmly established that there is a presumption that a democracy is capable of adequately protecting its citizens and accordingly, the burden is on refugee claimants (when put on notice that state protection is in issue) to establish that such protection is not adequate (*Kadenko v Canada (Solicitor General)* (1996), 143 DLR (4th) 532 at p 534; *Hinzman* at paras 45-46). This burden has been described as a heavy one (*Hinzman* at para 46).

[11] As a finding of fact, the RPD's state protection determination will only be unreasonable if it is palpably erroneous and is shown to have been based upon factual findings that were made in a perverse or capricious manner or without regard to the evidence before the Board (*Canada*

(Citizenship and Immigration) v Khosa, 2009 SCC 12 at para 45, [2009] 1 SCR 339; *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at paras 24-40).

[12] This cannot be said of the Board's state protection finding in this case. Dealing first with the applicant's evidence regarding her own experiences, what transpired five or six years ago is not necessarily indicative of the treatment she would now experience if she returned to Jamaica and was once again threatened by her ex-spouse. Thus, contrary to what the applicant asserts, the Board's treatment of the applicant's evidence regarding her experiences is not unreasonable. (I note parenthetically that there is no evidence of any ongoing threats having been made by her former spouse after she left Jamaica in 2007.)

[13] Turning next to the Board's treatment of the objective evidence, it is clear from the Board's decision that it did consider all the evidence before it regarding the efficacy of state protection as it cited it all three reports and noted that the objective evidence was mixed. The Board therefore did not erroneously base its finding merely on the presence of laws or on the presence of possible assistance from organizations other than the police as the applicant asserts. Rather, the Board premised its finding on the statements in the UK Operational Guidance Note, which indicated that enforcement of the laws against spousal abuse was adequate (and which also noted the various governmental and non-governmental sources of assistance for abuse victims in Jamaica). The RPD's conclusion that the applicant had not rebutted the presumption of state protection is supported by the documentary evidence and is therefore reasonable.

[14] In making the determination that the Board's decision on state protection in this case was reasonable, I recognise that this Court has decided several times that findings of adequate state protection, in the context of spousal abuse in Jamaica, are not reasonable (see e.g. *Mitchell v Canada (Minister of Citizenship and Immigration)*, 2006 FC 133; *Robinson v Canada (Minister of Citizenship and Immigration)*, 2006 FC 402; *Simpson v Canada (Minister of Citizenship and Immigration)*, 2006 FC 970; *Wisdom-Hall v Canada (Minister of Citizenship and Immigration)*, 2008 FC 685). All these cases, however, are distinguishable as in them, unlike the situation here, there was no report before the RPD similar to the UK Operational Guidance Note. Thus, in those cases, the objective country documentation was not mixed and instead indicated that the police did not adequately enforce the laws against domestic violence in Jamaica. As the evidence in this case is different, presumably because the situation has evolved, the findings in those cases are not applicable in the present case.

[15] Therefore, for these reasons, this application for judicial review will be dismissed as the Board's determination was reasonable. No question for certification under section 74 of the IRPA was presented and none arises in this case as it is entirely fact specific.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;
2. No question of general importance is certified; and
3. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-2176-12

STYLE OF CAUSE: *Francine Natalie St. Joan Clarke (a.k.a. Francene Natali Clarke) v The Minister of Citizenship and Immigration*

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 16, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** GLEASON J.

DATED: October 19, 2012

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