Federal Court  Cour fédérale

Date: 20190513

Docket: IMM-4212-18

Citation: 2019 FC 661

Ottawa, Ontario, May 13, 2019

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ENAS ODEESH
VIDONIA TERESITA DANIEL

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] The principal Applicant, Enas Odeesh, and her minor daughter, Vidonia Teresita Daniel, are citizens of Australia. They arrived in Canada in early April 2012 and claimed refugee protection in late June 2012. The Refugee Protection Division [RPD] of the Immigration and Refugee Board rejected their claims in a decision dated August 3, 2018, because they failed to rebut the presumption of the availability of state protection in Australia for victims of domestic and child abuse.

[2] The Applicants have now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the RPD's decision. They ask the Court to set aside the decision and return the matter for redetermination by another member of the RPD.

I. Background

[3] Ms. Odeesh testified before the RPD that she consented to an arranged marriage to an Australian, Daniel Waleed Shlimun, because, at the time of the proposal she was living in Syria with her Iraqi Christian family as a UNHCR refugee. After they were married, her husband sponsored her, and she landed in Australia in August 2007.

[4] For the first year of their marriage, Ms. Odeesh's husband treated her well but then he began to drink, smoke, and gamble, and threaten her by pushing and hitting her. Because her husband would not let her leave the apartment, she was unable to attend school or learn English.

[5] Ms. Odeesh says her husband had an extra-marital relationship with another woman in January 2009 and he left her in mid-September 2010. She lived on social assistance since her husband did not provide any support. Even after their separation, he would come to Ms. Odeesh's apartment without notice and was very abusive to her and her daughter. Eventually, her husband obtained a divorce order in July 2012.

[6] Because Ms. Odeesh had family in Canada and no supports in Australia, she decided to come to Canada. She and her daughter arrived in Canada on April 8, 2012. Since their arrival in Canada, her ex-husband has not initiated any contact with them.

[7] During the RPD hearing, the Applicants' representative argued that if Ms. Odeesh is sent back to Australia, she will have to rely on social assistance because she does not have any other means of support in Australia (whereas in Canada the Applicants have a large family); and the Australian social services will look for Mr. Shlimun to provide support for his daughter, thus notifying him of the Applicants' presence in Australia.

II. The RPD's Decision

[8] The RPD noted at the outset of its reasons that it had carefully considered the *Guideline on Women Refugee Claimants Fearing Gender-Related Persecution* in assessing the merits of the claims. It also noted that Ms. Odeesh responded to all questions directly and clearly and was a credible and trustworthy witness on the issue of domestic abuse.

[9] The RPD further noted Ms. Odeesh's testimony that the physical altercations she experienced did not require any medical attention and she never contacted the police due to fear of reprisals, and that she came to Canada where her parents and siblings reside in search of protection. The RPD remarked that Ms. Odeesh's daughter does not have a relationship with her father and her ex-husband has not initiated any contact with them since their arrival in Canada. The RPD also remarked that no medical evidence, police reports, affidavits from family

members and friends, or psychological assessments had been provided in support of the Applicants' claims.

[10] After noting that both Ms. Odeesh and her daughter psychologically fear returning to Australia and believe their lives would be in danger upon return, the RPD stated that there is a presumption that, except in situations where the state is in complete breakdown, a state is capable of protecting its citizens. According to the RPD, to rebut the presumption of state protection, a claimant must provide clear and convincing evidence of the state's inability to protect its citizens.

[11] The RPD then looked to objective resources to assess the legitimacy of a claim based on being victims of domestic and child abuse in Australia. In particular, the RPD referenced and quoted extensively from the United States Department of State's *Australia 2017 Human Rights Report*.

[12] The RPD noted that this report states Australia is a "constitutional democracy with a freely elected federal parliamentary government… and that the civilian authorities maintained effective control over the security forces". After examining portions of the report pertaining to victims of domestic and child abuse, the RPD concluded:

> [16] The objective evidence before the panel is clear that effective state protection and community support funded by the Government of Australia is available for victims of domestic and child abuse. The panel has allocated more weight to the documentary evidence from reliable and reputable sources to the *viva voce* evidence of the claimant. The documentary evidence does not have a vested interest in the outcome of this claim. Accordingly, the claimants have failed to rebut the presumption of

> the availability of state protection for victims of domestic and child abuse. Furthermore, the principal claimant's *viva voce* evidence clearly established that her ex-husband has had no contact with them and has shown no interest in her or her daughter since their arrival in Canada in April 2012. There is no credible evidence to establish that the ex-husband would pursue the claimants if they were to return to their country of nationality today, namely Australia.

[13] The RPD thus found that the Applicants were neither Convention refugees nor persons in need of protection.

III. The Parties' Submissions

A. *The Applicants*

[14] The Applicants assert that the RPD ignored information in the National Documentation Package [NDP] for Australia which contradicts its finding of state protection for individuals facing domestic abuse. Even if an applicant does not approach the state for protection, the Applicants say the presumption of state protection can be rebutted on the evidence before the RPD and, in this case, it was reasonable for Ms. Odeesh not to seek state protection.

[15] In the Applicants' view, the RPD provided inadequate reasons about state protection and this renders the decision unintelligible and unreasonable. According to the Applicants, although the RPD found Ms. Odeesh to be credible and did not question that she was a victim of domestic violence who could not contact the police due to her fear of reprisal, it was not reasonable for the RPD to fault her for not providing additional supportive documentation. This, the Applicants say, undermines the presumption of truthfulness.

B. *The Respondent*

[16] The Respondent says the document found at pages 48 to 50 of the Applicant's record cannot be considered by the Court since it was not before the RPD. According to the Respondent, it is well-settled law that evidence not before the decision-maker cannot be admitted barring limited exceptions which the Applicants do not meet.

[17] The Respondent notes that Ms. Odeesh's ex-husband has not shown any interest in the Applicants since April 2012 and there was no credible evidence establishing that he would pursue them if they return to Australia. In the Respondent's view, the RPD's finding that the Applicants do not have a well-founded fear of persecution was reasonable, and the fact the RPD remarked that no supporting documentation had been submitted was just that, a remark.

[18] According to the Respondent, the Applicants did not meet their burden of proving that Australia was unable to protect them, and they did not introduce evidence of inadequate state protection. The Respondent says the RPD was allowed to prefer the documentation found in the NDP over Ms. Odeesh's testimony and it did not ignore key evidence concerning domestic abuse. In the Respondent's view, the objective evidence shows there is community support funded by the Australian government available to domestic abuse victims. A reasonable finding of state protection is, the Respondent further says, sufficient to dispose of an application for judicial review.

IV. Analysis

[19] The main issue raised by this application for judicial review is whether the RPD's analysis of state protection was reasonable.

[20] The Respondent is correct about the document at pages 48 to 50 of the Applicants' record. The Court has not considered the information in this document in rendering its judgment.

A. *Standard of Review*

[21] The RPD's assessment of the evidentiary record with respect to state protection involves questions of mixed fact and law and, consequently, is subject to review against the standard of reasonableness (*Kina v Canada (Citizenship and Immigration)*, 2014 FC 284 at para 24).

[22] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "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 at para 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

B. *Was the RPD's Decision Reasonable?*

[23] The test as to whether a state is unable to protect its citizens is well-established (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at paras 52 to 59). It is bipartite: (1) a claimant must subjectively fear persecution; and (2) this fear must be well founded in an objective sense. A claimant must provide clear and convincing evidence of a state's inability to protect absent an admission by the state of its inability to protect its nationals. Except in situations of a complete breakdown of the state apparatus, it is assumed that a state can protect its nationals.

[24] The main question in cases of state protection is whether the evidence before the decision-maker shows that state protection at an operational level will be available to a refugee claimant. In other words, "looking at the evidence as a whole, including the evidence relating to the state's capacity to protect its citizens, has the claimant shown that he or she likely faces a reasonable chance of persecution in the country of origin?" (*Moczo v Canada (Citizenship and Immigration)*, 2013 FC 734 at para 10). Put another way, does the evidence relating to a state's resources available to a refugee claimant indicate that the claimant would probably not encounter persecution if they returned to their country of origin?

[25] The Federal Court of Appeal determined in *The Minister of Citizenship and Immigration v Flores Carrillo*, 2008 FCA 94 at para 38, that:

> … A refugee who claims that the state protection is inadequate or non-existent bears the evidentiary burden of adducing evidence to that effect and the legal burden of persuading the trier of fact that his or her claim in this respect is founded. The standard of proof applicable is the balance of probabilities and there is no requirement of a higher degree of probability than what that

> standard usually requires. As for the quality of the evidence required to rebut the presumption of state protection, the presumption is rebutted by clear and convincing evidence that the state protection is inadequate or non-existent.

[26] The level of democracy in a refugee claimant's country of origin may be such that the claimant must show that, absent exceptional circumstances, all possible protections were exhausted. For example, in *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 [*Hinzman*], the Federal Court of Appeal observed that:

> [57] *Kadenko* and *Satiacum* together teach that in the case of a developed democracy, the claimant is faced with the burden of proving that he exhausted all the possible protections available to him and will be exempted from his obligation to seek state protection only in the event of exceptional circumstances: [citations omitted] … a claimant coming from a democratic country will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status. ... the United States is a democracy that has adopted a comprehensive scheme to ensure those who object to military service are dealt with fairly, … the appellants have adduced insufficient support to satisfy this high threshold.

[27] In this case, it is not in dispute that the presumption of state protection applies to Australia which, as the RPD noted, is a constitutional democracy with a freely elected federal parliamentary government and civilian authorities maintain effective control over the security forces. To rebut this presumption, Ms. Odeesh had to demonstrate that she exhausted reasonable avenues to obtain state protection or that it would have been objectively unreasonable for her to do so (*Hinzman* at para 46). In other words, a subjective reluctance to engage that protection does not rebut the presumption of state protection (*Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at para 33).

[28] The jurisprudence requires that Ms. Odeesh's subjective perception be considered in light of the general country conditions. As the Court in *Aurelien v Canada (Citizenship and Immigration)*, 2013 FC 707, stated:

> [9] An applicant need not seek state protection if the evidence indicates it would not reasonably have been forthcoming. The Officer must consider whether seeking protection was a reasonable option for the applicant, in her circumstances. When the relevant circumstances include domestic abuse, the Supreme Court of Canada has outlined specific considerations that must be taken into account, including the psychological effects that abuse has on a victim. The issue as framed in *R v Lavallee*, [1990] 1 SCR 852, is what the applicant "reasonably perceived, given her situation and her experience." The test is thus subjective and objective.

[29] In this case, Ms. Odeesh testified she was never sure when her husband would come by, only spoke basic English, and did not think that calling 911 would help because the police would come and then go and, therefore, could not protect her at all times. She did not test state protection, but she did need to reasonably avail herself of it. She did not, with clear and convincing evidence, demonstrate that in her particular circumstances she would not be protected. In these circumstances, it was reasonable for the RPD to conclude that the Applicants had failed to rebut the presumption of the availability of state protection in Australia for victims of domestic and child abuse.

[30] This case is unlike *Pearson v Canada (Citizenship and Immigration)*, 2011 FC 981, where the Court set aside the decision under review because the immigration officer failed to consider whether, despite a general presence of adequate state protection, the applicant had been unable to obtain protection in her circumstances. The Court stated:

> [37] There are, generally speaking, adequate protections in Australia for women who are victims of domestic abuse. However,

> the evidence in the present case suggests to me that, in the Applicant's special circumstances—namely, her former spouse's extreme behaviour and his utter disregard for the law—the available state protections have consistently failed her in the long term. Persistent police and legal intervention, while well-meaning, has not been successful in containing this man and in protecting the Applicant from him. The only real protection from his behaviour is geography.
>
> [38] The police in Australia consistently responded to the Applicant's requests for help on the 30-40 occasions when she called them. However, the state protection provided was effective only in the short-term because the Applicant's former spouse has refused to abide by state-imposed sanctions such as restraining orders. State protection need not be perfect to be adequate [citation omitted], but in assessing risk and hardship in this case, the Officer has neglected to take into account the realities of the situation and whether, notwithstanding Australia's state protection apparatus, the Applicant's situation is so unusual that she is facing a high degree of risk notwithstanding the efforts of the state to protect her. In other words, the reasons stop short at adequate state protection for women and fail to consider the Applicant's actual circumstances and the real risk she faces given the determination of her former spouse to harm her notwithstanding the best efforts of the state.

[31] State protection and its availability must be assessed on a case by case basis (*Perez Mendoza v Canada (Citizenship and Immigration)*, 2010 FC 119 at para 33(3); *Murati v Canada (Citizenship and Immigration)*, 2010 FC 1324 at para 39; and *Taho v Canada (Citizenship and Immigration)*, 2015 FC 718 at para 44).

[32] In this case, it was reasonable for the RPD, based on the evidence before it, to find there was no reliable or persuasive evidence to indicate that the Applicants would be shut out from protection measures in Australia intended for victims of domestic abuse.

V. Conclusion

[33] The RPD had evidence before it which supported its conclusion that state protection was available and the Applicants had not rebutted the presumption with their own evidence.

[34] The RPD's reasons for rejecting the Applicants' claims for refugee protection are intelligible, transparent, and justifiable, and its decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law. The Applicants' application for judicial review is, therefore, dismissed.

[35] Neither party proposed a serious question of general importance to be certified under paragraph 74(d) of the *IRPA*; so, no such question is certified.

JUDGMENT in IMM-4212-18

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed, and no serious question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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