Date: 20091019

Docket: IMM-592-09

Citation: 2009 FC 1059

Ottawa, Ontario, October 19, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

LEILA BROWN TRIMMINGHAM

Applicant

and

THE MINISTER OF CITIZENSHP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Ms. Brown Trimmingham (the "Applicant") seeks judicial review of the decision of Pre-Removal Risk Assessment Officer, N. Sturino (the "Officer"), dated January 29, 2009. In that decision, the Officer determined that the Applicant would not be subject to a risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to her country of nationality, Saint Vincent and the Grenadines.

Background

[2] The Applicant is a citizen of Saint Vincent and the Grenadines. She first came to Canada and claimed refugee protection on April 22, 1987. Her claim was denied and she was removed from Canada on November 7, 1996.

[3] Upon her return to Saint Vincent, she began a relationship with one Oriel Yearwood and on July 28, 1998, the Applicant gave birth to a son, Omar Yearwood.

[4] The relationship with Mr. Yearwood was abusive. The Applicant states that she tried to leave him on many occasions but because Saint Vincent is so small, she could not live safely and without fear that he would find her. The Applicant left Saint Vincent and re-entered Canada on July 22, 2001. Mr. Yearwood followed her to Canada and on one occasion, he abused the Applicant and her son in public, and was convicted of kidnapping the son. Mr. Yearwood was convicted of offences in Canada and was imprisoned for six months. Following his release from prison, he was deported from Canada.

[5] The Applicant states that she has heard from family and friends that Mr. Yearwood has continued his threats against her, including threats to her life.

[6] The Applicant filed her first Pre-Removal Risk Assessment (“PRRA”) application in January 2006. The application was based upon the threats she faced at the hands of Mr. Yearwood in Saint Vincent. While the officer acknowledged the threat, he concluded that state protection

would be reasonably forthcoming in Saint Vincent. A judicial review of that decision was dismissed in cause number IMM-5310-06 on November 16, 2006.

[7] In May 2007, the Applicant filed an application for admission into Canada on humanitarian and compassionate grounds (the "H&C application"), pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). The H&C application was undecided as of the filing of this application for judicial review.

[8] The Applicant filed her second PRRA application in June 2008. The basis for this second application was the threat that she faces at the hands of Mr. Yearwood in Saint Vincent and the fact that the Vincentian Government had confirmed that it could not provide the kind of protection that was required in her situation. In this regard, she provided a letter dated May 21, 2008 from Mr. Phillips, the Consul General of Saint Vincent and the Grenadines to Canada.

[9] In the decision made on January 29, 2009, the Officer found that since the basis for the Applicant's application was the same as that given in her first PRRA application, the Applicant had failed to provide any fresh evidence that would lead him to a decision contrary to the one made by the first officer and the second PRRA application was dismissed.

[10] In her affidavit filed in support of the present application for judicial review, the Applicant states that following the denial of her first PRRA application, she learned that Mr. Yearwood informed her aunt that he still intended to kill her if she returned to Saint Vincent. The Applicant

then approached the representatives of the Government of Saint Vincent and the Grenadines in Canada, for protection from Mr. Yearwood.

[11] The Applicant was advised to report for removal on May 4, 2008 but did not do so. On January 21, 2009, she was arrested. On February 6, 2009, she received another direction to report for removal.

[12] By letter delivered by facsimile on February 10, 2009, Mr. Phillips again expressed concern that the Applicant would not receive the protection in Saint Vincent that she required. He also noted that the Officer had incorrectly referred to the statements made in the May 21, 2008 letter when the Officer said that the Government had indicated protection would be available.

[13] The Applicant was scheduled for removal from Canada on February 13, 2009. She applied for a stay of removal and by Order dated February 12, 2009, a stay was granted by Justice Barnes.

[14] Upon granting the Applicant the stay of removal on February 12, 2009, Justice Barnes noted that there was a serious issue raised, given that the Vincentian Government had expressed doubt as to its ability to offer adequate protection to the Applicant, in spite of the Officer's finding that state protection would be available.

[15] The Applicant argues that the Officer committed a reviewable error by misconstruing the evidence that was before him.

[16] The Minister of Citizenship and Immigration (the "Respondent") submits that the Officer acted reasonably when he characterized the letter from the Consul General as stating that Mr. Phillips believed that state protection would be available for the Applicant in Saint Vincent. In support of his position, the Respondent relies on the decision in *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.) [*Villafranca*], and argues that no government can guarantee the protection of all of its citizens at all times.

Discussion and Disposition

[17] Further to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, decisions of administrative decision-makers are reviewable upon one of two standards, that is the standard of correctness or the standard of reasonableness. Where prior jurisprudence has established the applicable standard of review, that standard can be adopted.

[18] Formerly, decisions with respect to PRRA applications were reviewed upon the standard of patent unreasonableness; see *Rosales v. Canada (Minister of Citizenship and Immigration),* 2008 FC 257 at para. 12. Following the decision in *Dunsmuir*, the standard of patent unreasonableness has been merged with the standard of reasonableness. The present case raises the issue whether the Officer misconstrued the evidence before him in reaching his conclusion on state protection. This is a question of fact, that is with respect to the question of state protection, and accordingly, the applicable standard of review is that of reasonableness.

[19] In his letter of May 21, 2008, Mr. Phillips said the following:

> It is with profoundest concern for the well being of Leila Trimmingham Brown, a Vincentian, that I seek to solicit your kindest humanitarian considerations in facilitating whatever means at your disposal to help secure her safety.
>
> With much discomfort I reviewed documents submitted to me from the file of Leila who is presently under a deportation order by Citizenship & Immigration Canada to her homeland St. Vincent & the Grenadines. I have forwarded Leila's case to the Police authority there because her going home is potentially dangerous, both emotionally and physically, to her and her son.
>
> I believe that the Police in St. Vincent and the Grenadines will treat this matter with utmost seriousness and professionalism, but unfortunately, given their limitations and challenges, a twenty-four hour daily protection, which Leila will apparently need against this kind of perpetrator mentioned in her documents, cannot be guaranteed.

[20] The Officer's notes record that new evidence was submitted with the Applicant's second PRRA submission. The new evidence submitted by the Applicant includes the affidavit of Elizabeth J. Cain. Ms. Cain is the maternal aunt of the Applicant. She deposed that she had seen Oriel Yearwood in Saint Vincent in 2007, that is after the dismissal of the Applicant's initial PRRA application. At paragraphs 7 and 8 of her affidavit she said the following:

> 7. When he saw me in St. Vincent he was not friendly with me and extremely angry with and wishes to seek "revenge" on Leila. He said, "St. Vincent is not like Canada. If she come, I will pop her neck!" He said this time he would "kill her and finish her off. Before the police get here. Because by the time the police come, she already dead." I just walked away real fast because if he got violent with me, there is no one to call for help.
>
> 8. Based on this experience and my personal knowledge of Oriel Yearwood, I know he is serious about his threats because if he could abuse my niece in public, in front of all the school and teachers here in Canada, he will not think twice about killing her in St. Vincent.

[21] The PRRA Officer referred to the affidavit of Elizabeth Cain and the letter dated May 21, 2008 from the Consul General of Saint Vincent and the Grenadines. The Officer discussed this evidence as follows:

> The applicant has submitted an affidavit from Elizabeth J. Cain dated 05 June 2008. While I note that it contains information of threats to the applicant which postdates the decision of the original PRRA decision, I find that this is not evidence of a new risk development as the previous officer considered this threat of risk.
>
> The applicant submitted a letter from the Consulate General of Saint Vincent and the Grenadines in Toronto dated 21 May 2008. This letter expresses the concern of the government of St. Vincent and indicates that the author believes that state protection will be available. This rebuts counsel's contention that state protection is not available for the applicant.

[22] The Officer apparently discounted this evidence. Ms. Cain stated her belief that the Applicant would be at risk from Mr. Yearwood if she returned to Saint Vincent. While Ms. Cain's opinion may be influenced by the familial relationship, the letter from Mr. Phillips, an envoy of the Government of Saint Vincent and the Grenadines is a different matter. He provided a statement on behalf of that Government as to the lack of protection for the Applicant in her country of nationality. That statement was ignored by the Officer or deliberately misunderstood.

[23] The Officer found that the Applicant had failed to rebut the presumption of state protection. He relied on Mr. Phillips' letter in that regard. In my opinion, that finding is unreasonable since the letter from the Consul General is evidence that would rebut the presumption of state protection. I am satisfied that the Officer misunderstood the letter of May 21, 2008 and that is a reviewable error

[24] In *Villafranca*, Mr. Justice Hugessen stated, at para. 6, that:

> The burden of showing that one is not able to avail oneself of the protection of one's own state is not easily satisfied. The test is an objective one and involves the claimant showing either that he is physically prevented from seeking his government's aid…or that the government itself is in some way prevented from giving it. (emphasis added).

[25] Contrary to the Officer's reasons, the letter of Mr. Phillips was clear and convincing evidence that the Vincentian Government is "in some way prevented" from giving the necessary protection. In this letter the Vincentian Government itself stated that, as a result of its "limitations and challenges," it is incapable of providing the necessary protection to ensure the Applicant's safety. In my opinion, it was not reasonable for the Officer to find that state protection will be available on the basis of this letter.

[26] Further, Mr. Justice Hugessen at para. 7 proceeded to say that:

> No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation.

[27] However, the Applicant has not merely shown that the Vincentian Government has not always been effective at protecting the victims of domestic violence. There is clear evidence of her own state's inability to protect her. This aspect of *Villafranca* is not applicable in this case because the Applicant has shown that the Vincentian Government cannot protect her.

[28] In the result, the application for judicial review is allowed and the matter is remitted to a different officer to be re-determined in accordance with the law. There is no question for certification arising.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed and the matter remitted to a different officer to be re-determined in accordance with the law. There is no question for certification arising.

"E. Heneghan"
Judge

SOLICITORS OF RECORD

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