

Federal Court



Cour fédérale

Date: 20110613

Docket: IMM-3449-10

Citation: 2011 FC 676

Ottawa, Ontario, June 13, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

**ANA EMILIA ZOEGA RODRIGUES BEXIGA
(a.k.a. ANA EMILIA ZOEGA
RODRIGUES BEXI)**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated May 26, 2010, wherein the

applicant was determined not to be a Convention refugee or person in need of protection under sections 96 and 97 of the Act.

[2] The applicant requests that the decision of the Board be set aside and the claim remitted for redetermination by a different member of the Board.

Background

[3] Ana Emilia Zoega Rodrigues Bexiga (the applicant) was born on August 16, 1963 and is a citizen of Brazil.

[4] The applicant married in February 1986 and she and her husband were practicing Catholics. In 2005, the applicant converted to Islam.

[5] In March 2005, the applicant's husband became angry with her over the decision to convert to Islam. The applicant left to stay with her mother but returned to live with her husband after he apologized.

[6] Subsequently, the applicant's husband became violent with her on a regular basis. During one incident, the applicant's neighbours called the police. The applicant's husband was held for a few hours but released without being charged.

[7] The applicant left Brazil and stayed in the United States and Mexico for several months, but returned to Brazil in March 2006 hoping that the situation had improved.

[8] Her husband continued to be violent and the applicant separated from him in June 2006. In December 2007, the applicant's husband surprised her walking in the street; he choked her and threatened to kill her.

[9] At no point did the applicant approach the police for assistance.

[10] The applicant left Brazil for Canada in January 2008 and claimed refugee protection.

Board's Decision

[11] The Board found that the determinative issue was state protection.

[12] The Board reviewed the legal principles of state protection, noting the presumption and the onus on the applicant to provide clear and convincing evidence of the state's inability to protect her.

[13] The Board reviewed the current country conditions in Brazil. It acknowledged that violence against women is a serious problem. However, the Board found that Brazil is making serious efforts to combat violence against women. The measures noted by the Board included: a hotline for female victims, domestic and family violence courts in 22 of 26 states, police stations focused only on crimes against women and legislation named the Maria de Penha Law enacted August 2006 which increases punishment for domestic violence and requires health workers to contact police in cases of domestic violence. The Board acknowledged that in the police stations focused on crimes against

women, the quality of services varied and is limited in isolated locations. The Board found that the Maria de Penha Law is making a difference.

[14] The Board found that the applicant had never approached the police and it noted her explanation was that she did not believe the police would help her because she saw cases in the media of women going to the police and not receiving help. The Board noted the applicant's testimony that her sister approached the police for help and did not receive it. The applicant also testified that going to the police would further anger her husband.

[15] Ultimately, the Board found that the applicant had not rebutted the presumption of state protection. The Board found the applicant had not taken all reasonable steps in the circumstances to access protection from the authorities in Brazil. The Board found that the applicant's documentary evidence and testimony did not establish the unwillingness or inability of the police to provide adequate protection to victims of domestic violence.

Issues

[16] The issues are as follows:

1. What is the appropriate standard of review?
2. Did the Board err in finding that there was adequate state protection?
3. Did the Board fail to apply the Gender Guidelines?

Applicant's Written Submissions

[17] The applicant submits that the Board erred in its state protection analysis. The Board was required to assess the quality of the state's efforts to provide protection as efforts alone are not determinative of protection. The Board must determine whether those efforts do result in protection and assess the adequacy of the protection. The effectiveness of protection measures remains a relevant consideration.

[18] There was evidence before the Board that impunity and a lack of resources affected the ability of the state to provide protection. The Board made no reference to any measures taken to address these deficiencies in the criminal justice system. The Board also did not provide reasons for dismissing this evidence which contradicted its findings. It further failed to provide evidence for the finding that problems with implementation and enforcement of domestic violence laws are not generalized. This constitutes inadequate reasons.

[19] The applicant submits that she provided information of similarly situated individuals which was discounted by the Board as evidence of a lack of state protection. This was an error as the evidence of her sister's experience demonstrated that making a complaint against an abusive partner will not result in protection.

[20] Finally, the applicant argues that the Board failed to take note of the applicant's ex-husband's influential connections in Brazil which will affect the ability for her to personally access state protection.

[21] The applicant submits that the Board did not apply the Board's *Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (the Gender Guidelines) in a sensitive manner. This is evidenced in the Board's failure to understand why it was difficult for the applicant to report the abuse and threats by her husband to the police.

Respondent's Written Submissions

[22] The respondent submits that the Board applied the correct principles regarding state protection. The Board noted the presumption of state protection and that the applicant must approach the state for protection where state protection might reasonably be forthcoming; a failure to do so will usually be fatal to a claim.

[23] The Board further properly considered the documentary evidence. The Board gave concrete examples of the efforts that the Brazilian government is making to combat the problem of domestic violence. The evidence the Board considered demonstrated that these efforts have found positive results. The Board noted that problems with the domestic violence laws exist, but found that they are not generalized and Brazil is addressing the deficiencies in the administration of criminal justice.

[24] The applicant improperly submits that the test for state protection is effectiveness. Rather, the Board need only assess whether there is adequate state protection available for the applicant, which the Board did.

[25] The applicant failed to seek help from local authorities and she did not provide clear and convincing evidence that Brazil was unable or unwilling to protect her.

[26] The respondent submits that the Board also properly considered and applied the Gender Guidelines. There was no need for the Board to do more than refer to the Gender Guidelines in this case as the applicant had not raised any particular vulnerabilities which would make her unable to approach the state for protection.

Analysis and Decision

[27] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[28] It is firmly established that assessments of the adequacy of state protection raise questions of mixed fact and law and are reviewable against a standard of reasonableness (see *Hinzman, Re*, 2007 FCA 171 at paragraph 38).

[29] In reviewing the Board's decision using a standard of reasonableness, the Court should not intervene unless the Board has come to a conclusion that is not transparent, justifiable and

intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47).

[30] **Issue 2**

Did the Board err in finding that there was adequate state protection?

The onus is on a refugee claimant to rebut the presumption of state protection, not on the Board to provide evidence of adequate state protection (see *Ward v Canada (Minister of Employment and Immigration)*, [1993] 2 SCR 689, [1993] SCJ No 74 (QL) at paragraph 51).

[31] As the applicant did not approach the police for assistance following any of the incidents of abuse and threats from her ex-husband, she had to provide clear and convincing evidence that Brazil was unable or unwilling to protect her.

[32] The applicant submits that she did provide this evidence, but that the Board did not assess the adequacy of state protection in Brazil or whether the state's efforts to combat domestic violence result in real protection. I disagree.

[33] The Board reviewed the applicant's testimony of similarly situated individuals. It was open to the Board to conclude that the applicant's subjective assertion that the police would do nothing based on cases she had seen in the media was not sufficient to overcome the presumption of state protection (see *Victoria v Canada (Minister of Citizenship and Immigration)*, 2009 FC 388 at paragraphs 17 to 19).

[34] Further, the Board acknowledged the applicant's testimony that her sister had approached the police regarding threats. It was reasonable for the Board to weigh this evidence and not find it persuasive due to lack of detail about the event. Board members have considerable discretion in deciding how much weight should be afforded to the evidence (see *Velychko v Canada (Minister of Citizenship and Immigration)*, 2010 FC 264 at paragraph 26). It is not the position of this Court to reweigh the evidence.

[35] Finally, the Board assessed the documentary evidence on protection for victims of domestic violence in Brazil and reviewed concrete examples of forms of protection available to victims of domestic violence. These included police stations focused on only crimes against women as well as government created and funded special courts for domestic violence which include public defenders positions and free legal assistance.

[36] Based on the above, it was reasonable for the Board to find that the applicant had not presented clear and convincing evidence of Brazil's inability or unwillingness to provide protection.

[37] The Board's conclusion that the applicant had not convinced it that there would not be adequate state protection was transparent, intelligible and justified and within the range of acceptable outcomes as per the standard of reasonableness in *Dunsmuir* above, at paragraph 47.

[38] **Issue 3**

Did the Board fail to apply the Gender Guidelines?

The Gender Guidelines directly address the issue of domestic violence and state protection. Only if the applicant can demonstrate that it was objectively unreasonable for her to approach the state for protection, will the fact that she did not do so not defeat her claim. The decision maker should consider “social, cultural, religious, and economic context in which the claimant finds herself.” The Board specifically noted this fact. However, the applicant did not raise specific social, cultural or religious factors which would affect her ability to approach the police. She indicated that she did not approach the police because she did not believe they would assist her.

[39] I do not find that the Board failed to consider and apply the Gender Guidelines.

[40] Given the above analysis, I would therefore dismiss the judicial review.

[41] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[42] **IT IS ORDERED that** the application for judicial review is dismissed.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions*Immigration and Refugee Protection Act, SC 2001, c 27*

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-3449-10

STYLE OF CAUSE: ANA EMILIA ZOEGA RODRIGUES BEXIGA
(a.k.a. ANA EMILIA ZOEGA RODRIGUES BEXI)

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 8, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: June 13, 2011

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