Federal Court  Cour fédérale

Date: 20111129

Docket: IMM-1579-11

Citation: 2011 FC 1378

Ottawa, Ontario, November 29, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

SHELIA LEWIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Shelia Lewis (the applicant) brings this application for judicial review of the decision of member Joel Bousfield (the member) of the Refugee Protection Division, Immigration and Refugee Board (the Board). In that decision, dated January 28, 2011, the Board determines that the applicant is neither a convention refugee section 96 nor a person in need of protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [*IRPA*].

[2] For the reasons that follow, this application for judicial review is dismissed.

II. Facts

[3] The applicant was born on January 19, 1950, in Mustique, St. Vincent. She fled her home country and arrived in Canada on July 13, 2005. In 2010, the applicant applied for refugee protection.

[4] The applicant fears returning to St. Vincent where her abusive ex-common law spouse, Ed Johnson, remains. In her Personal Information Form [PIF], she states that during their relationship, Johnson would punch and slap her in front of her children and threaten to kill her if she did not follow instructions. The applicant also mentions that she could not stand up for her rights without being beaten. At the hearing before the Board, the applicant stated that Johnson continues to inquire from her relatives when she will be returning to that country as he wishes to hurt her.

[5] The last time the applicant attempted to contact the police for help was in 2003, about two years before she fled for Canada. At the hearing, the applicant stated that she could contact the police for protection in St. Vincent, but that in the past, when she had done so, the police would simply attempt to pacify the situation. After the police intervention, the abuse would continue.

III. Legislation

[6] Sections 96, 97, 108(1)(*e*) and 108(4) of the *IRPA* provide as follows:

> Convention refugee
>
> 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,
>
> > (*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
> >
> > (*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.
>
> Person in need of protection
>
> **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
>
> > (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture;
> > or
> >
> > (*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
> >
> > > (i) the person is unable or, because of that risk, unwilling to avail themself 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.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Cessation of Refugee Protection

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

…

(*e*) the reasons for which the person sought refugee protection have ceased to exist.

…

(4) Paragraph (1)(*e*) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

IV. Issues and standard of review

A. Issues

1. Did the Board err in determining that there is adequate state protection available to the applicant?

2. Did the Board err by considering the delay in claiming without a section 108(4) exemption?

B. Standard of review

[7] Questions of state protection involve determinations of fact and mixed fact and law. They concern the relative weight assigned to evidence, the interpretation and assessment of such evidence, and whether the Board had proper regard to all of the evidence presented in reaching a decision (*Hippolyte v Canada (Minister of Citizenship and Immigration)*, 2011 FC 82).

[8] Similarly, questions related to the application of section 108(1)*(e)* and 108(4) are determinations of mixed fact and law (*S. A. v Canada (Minister of Citizenship and Immigration)*, 2010 FC 344 at para 22).

[9] Issues of fact and issues of mixed fact and law are reviewable on the standard of reasonableness (*Dunsmuir v New-Brunswick*, 2008 SCC 9; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12).

V. Parties' submissions

A. Applicant's submissions

[10] The applicant raises several arguments under the Guideline 4: *Women Refugee Claimants fearing Gender-Related Persecution* (hereinafter the Gender Guidelines), as they relate to the state protection analysis. She also takes issue with several findings in the decision.

[11] Finally, the applicant argues that the Board failed to consider the requirements under section 108(4) of the *IRPA*.

[12] The applicant relies on *Rose v Canada (Minister of Citizenship and Immigration)*, 2004 FC 537 [*Rose*], and quotes paragraph 5:

> The Board made no credibility findings relative to the Applicant. In the absence of negative credibility findings, it is arguable that the Board accepted that the past treatment endured by the Applicant was "appalling and atrocious". Accordingly, the Board erred in failing to consider whether there were "compelling reasons" arising out of that past treatment in St. Vincent, such that the Applicant would be entitled to the exception in section 108(4).
> [Emphasis added by the applicant]

[13] The applicant submits that the Board failed to examine the applicant's situation as a whole, and other mitigating circumstances which can explain the applicant's delay in making a refugee claim (*Myle v Canada (Minister of Citizenship and Immigration)*, 2006 FC 871).

[14] The applicant alleges that the Board erred by stating that she cannot rebut the presumption of state protection by asserting a subjective reluctance to seek protection, or a doubt that it will be effective without proximately testing it (see decision at para 13). This she argues is inconsistent with a quote made later in the same paragraph: "… I would add in that regard that the claimant testified that the police did make efforts on the occasions that she complained in the past."

[15] The applicant submits that the Board accepted her testimony that, on several occasions in the past, she sought police protection but her subjective fear of her agent of persecution still existed

and the measures taken by police were not effective to stop the abuse. The applicant relies on *Franklyn v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1249 [*Franklin*] to show that the threshold for demonstrating the incapacity of the state to protect its citizens should be lower. The applicant contends that her past negative experience with the police and their failure to provide effective state protection are such that she meets that lower threshold.

[16] The applicant claims that the Board used an incorrect legal test for state protection by failing to address the issue of availability of adequate state protection for the claimant in St. Vincent. The applicant quotes *Woods v Canada (Minister of Citizenship and Immigration)*, 2008 FC 446 at para 45-46 [*Woods*]:

> I agree with the Board that St. Vincent does not need to provide perfect protection, but, in my view, the Board provides no evidentiary or jurisprudential explanation as to why, in this case, the fact of some limited action by the police means that the presumption of adequacy remains intact even when the evidence is clear and convincing that such action has not deterred the predator and the Applicants will face exactly the same abuse from the same man if they are returned. [Emphasis added by applicant]

[17] The applicant states that St. Vincent was either unwilling or unable to provide adequate protection. The Board accepted that she had made several complaints to the police but her efforts were all futile and the abuse continued. The Gender Guidelines state that a decision maker should consider the applicant's evidence that the home country was unwilling or unable to provide protection from gender-related persecution (Gender Guidelines, at heading "C. Evidentiary Matters", paragraph 2).

[18] Based on *Cuffy v Canada (Minister of Citizenship and Immigration* (1996), 121 FTR 81 [*Cuffy*] and *Kraitman v Canada (Secretary of State)*, (1994), 81 FTR 64 at para 71-72 (TD) [*Kraitman*] as cited in *Cuffy*), the applicant argues that the state chose not to offer her protection, which is equivalent to saying it is unable to provide protection.

[19] The applicant also relies on *N. K.* v *Canada (Solicitor General)* (1995), 107 FTR 25 at para 38 (TD) (as cited in *Cuffy*) to argue that, due to previous police inaction, the applicant may be reluctant to seek state protection in the future, thus putting her life at further risk for persecution. This, she claims, shows that the Board was in error in stating that "… it is not objectively unreasonable for me to find that the claimant is now capable of complaining to the Saint Vincent police and would be capable of complaining to them if she were to return there…" (see decision at para 14).

[20] The applicant argues that the Board failed to fully address the negative aspects of the country reports for St. Vincent and only referenced them in a cursory statement that the reports are mixed. Here the Board only provided a pro-forma analysis and failed to provide an in-depth objective analysis of the country conditions as required in *Alexander v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1305 at para 5 [*Alexander*]. The applicant also relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, for the proposition that the more important the information that is not analysed, the more willing a Court may be to conclude that a finding was made without regard to the evidence.

[21] The applicant submits that the Board erred with regards to the burden of proof it placed on her regarding state protection and the documentary evidence she adduced. The Board listed several positive measures implemented by the government of St. Vincent but failed to explore whether these developments would be effective in relation to that applicant as required by the "Gender Guidelines". The Gender Guidelines (at heading "C. Evidentiary Matters", paragraph 3) require the Board to inquire from the perspective of the applicant whether changes in the home country will be meaningful in abating her particular fear. For that proposition, the applicant relies on *Codogan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 739 at para 32 [*Codogan*].

[22] Pursuant to section 108(1)(*e*) of the *IRPA*, the Board has no discretion to grant an applicant protection if it finds that the reasons for needing protection no longer exist. The respondent argues that the onus is on the applicant to demonstrate that there are "compelling reasons" for not seeking state protection. In this case, it was open to the Board to conclude that the applicant did not provide compelling reasons as to why she should be exempt.

B. Respondent's submissions

[23] With respect to state protection, the respondent argues that the Board correctly applied the law since the applicant failed to adduce sufficient evidence to clearly establish that the State cannot protect her. The member acknowledged in his reasons the incidents claimed by the applicant. But according to the respondent, the applicant failed to provide clear and convincing evidence of the failure of the St.Vincent police to protect her. According to the respondent, the member did not

commit a reviewable error since he came to the only reasonable conclusion based on the few elements that were before him.

[24] At the hearing the respndent's counsel pointed out for the benefit of the Court that the cases cited by the applicant were distinguishable from the case at bar. The majority of cases cited by the applicant in support of her position that the state of St Vincent cannot protect the applicant were cases of domestic violence that occurred in St.Vincent. The respondent underlined that in several of these cases, namely *Franklin, Woods, Cuffy, Codogan* and *Alexander*, cited above; *Samuel v Canada (Minister of Citizenship and Immigration)*, 2008 FC 762; *Young v Canada (Minister of Citizenship and Immigration)*, 2008 FC 637 and *Richardson v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1009, the facts were quite different from the present case and were therefore not applicable.

[25] On the issue of the application of the Gender Guidelines, the respondent claims that the member acknowledged their applicability in the case and did apply them correctly. Respondent rejects applicant's allegation that the member failed to apply the Guidelines in this instance, pointing out that a failure to provide sufficient evidence will not be remedied by the Guidelines.

[26] Finally, with respect to the application of section 108 (1)(*e*) of *IRPA*, respondent points out that, in this instance, the Board did not err since there is no compelling ground.

[27] The Respondent further argues that the applicant misconstrued the Board's consideration on the length of time the applicant was removed from her situation in St. Vincent. The Board was not

suggesting that the applicant had delayed seeking refugee protection, but rather that she had not established that the risk of domestic abuse, as alleged, was still present. The respondent concludes that this was a reasonable finding given that the applicant failed to present convincing evidence of a current threat of domestic abuse.

VI. Analysis

1. Did the Board err in determining that there is adequate state protection available to the applicant?

[28] The applicant alleges that the Board contradicted itself at paragraph 13 of the decision. The Court does not agree. The Board states that the applicant has not tested state protection in St Vincent recently, and that, when she did in the past, the police did make an effort to protect her. There is no contradiction in such a finding.

[29] The fundamental disagreement between the parties in this application is whether the applicant received attention from the police when she complained in the past, and whether there was evidence to support her claim that the state, through its police force, can effectively protect her. The applicant argues, in her memorandum, that she did seek police protection but found it inadequate. Hence, her position that St. Vincent was unable or unwilling to protect her.

[30] The Board found the applicant credible with respect to the domestic abuse she suffered at the hands of Mr. Johnson, her former common law spouse, but disagreed with her that the state of St. Vincent could not protect her adequately.

[31] The Board actually based its decision on its finding that the applicant had sought protection in the past and the police had intervened. The transcript of the hearing in this case reveal that, it is clear from the applicant's answers, that she stated she could seek protection from the police if she were to return to St. Vincent. However, it is unclear, from the applicant's answers, what the police did when they intervened in the past (see pages 93-94 of the Tribunal Record).

> **Member**: … And what about the police in St. Vincent, do you think you could get protection from them?
> **Claimant**: I could. I could.
> **Member**: Alright. Did you ever complain to the police in St. Vincent about your former common-law?
> **Claimant**: Yes, I did
> **Member**: And what happened?
> **Claimant**: Nothing happened.
> **Member**: Okay well did they do anything for you?
> **Claimant**: They tried to pacify it, as anyone else will but it still continue.
> **Member**: Okay. So they did intervene is what you are saying?
> **Claimant**: Yeah.

[32] This evidence establishes that the police had intervened multiple times during and before 2003 when the applicant had approached them, but the interventions had not been effective to stop the abuse.

[33] The respondent argues several times that the applicant did not present compelling evidence that the police interventions were inadequate. Absent any evidence, they argue, the cases of *Woods, Franklyn, Cuffy, Kraitman* and *N. K.*, cited above, are not relevant. All of those cases, the

respondent argues, rely on clear evidence presented by an applicant that the police were ineffective. *Woods*, cited above, also relies on a finding that the abuse would continue from the same perpetrator upon the applicant's return.

[34] The applicant relies on the Board's acceptance that the applicant was abused by Johnson and the lack of a negative credibility finding. Without any negative credibility findings, the applicant indirectly argues that all of her assertions should have been accepted by the Board.

[35] The Court agrees with the respondent that the Board's analysis of the availability of state protection was reasonable in this case. Although the applicant clearly had problems properly and clearly expressing herself at the hearing, in her PIF and in her affidavit, the evidence to rebut the presumption of state protection was not before the Board.

[36] The Board made no findings that any submissions by the applicant were not credible. The Board accepted that she had been abused, but the evidence was not clear as to how adequate the protection of the police had been when the applicant had contacted them. Based on the quotation above from the hearing, it is not unreasonable for the Board to conclude that the applicant's answers suggest that the police did attempt to help her when contacted.

[37] The Court agrees with the respondent that, absent a complete breakdown of state apparatus, a state is presumed to be capable of protecting its citizens. This presumption must be rebutted with "clear and convincing confirmation of a state's inability to protect" (*Canada (Attorney General) v*

Ward, [1993] 2 SCR 689 at para 50 [*Ward*]). *Ward* also outlined how a claimant can rebut the presumption:

> …For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens…

[38] The Court finds that the lack of evidence presented is the applicant's main hurdle in this case. *Franklyn* is distinguishable because, in that case, there was clear evidence available to the Board that the police had refused to protect the applicant who was being abused due to her sexuality. Likewise, *Woods*, cited above, is distinguishable due to the clear evidence that was before the Board that St. Vincent had been unable to protect the applicants from stalking and repeated attacks. The respondent also correctly distinguished *Cuffy*, *Kraitman* and *N. K.*, cited above, based on the lack of clear evidence in this case that the police were ineffective in providing assistance to the applicant.

[39] With respect to the Gender Guidelines, the Court finds that the applicant also failed to present compelling arguments that the Gender Guidelines were not followed or observed in this decision. The applicant argues that the Board did not analyse whether positive developments would have an impact on the specific circumstances of the applicant. However, all of the quoted material in the decision from the country documentation is directly related to domestic violence, so the Board clearly considered that the information would be applicable to the applicant's situation.

[40] The respondent does not cite cases where claimants are “similarly situated” to the present applicant, except for the case of *Peter v Canada (Minister of Citizenship and Immigration)*, 2011 FC 778, a recent decision by Justice O’Keefe that found a state protection analysis of St. Vincent to be reasonable. However, the other cases mentioned are not analogous to the present case.

[41] In summary, the applicant has not shown that the Board’s consideration of state protection in St. Vincent was unreasonable. The key factor is that clear evidence was not before the Board to rebut the presumption of state protection, or to suggest that the presumption should not exist due to past inaction as in *Franklyn* and *Woods*, cited above.

2. Did the Board err by considering the delay in claiming without a section 108(4) exemption?

[42] Both the applicant and respondent misread the meaning of section 108(1)(*e*) and section 108(4). The respondent seems to suggest that the Board had considered the application of section 108(1)(*e*) and then found that the applicant had not provided compelling reasons under section 108(4). As there is no mention in the decision of the applicability of this section, the Court finds that this is pure speculation by the respondent.

[43] *Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635 at para 5 is the leading case. It states that section 108(1)(*e*) will only apply when the decision maker has made a determination that the person has had a valid claim for refugee protection due to persecution. The decision maker must then find that the cause of that persecution no longer exists. At this point, the

decision maker can consider section 108(4) and "… whether the nature of the claimant's experiences in the former country were so appalling that he or she should not be expected to return and put himself or herself under the protection of that state".

[44] *Rose*, cited above, at para 3 is distinguishable because in that case, the decision maker very clearly found that "[t]here has been a change in the attitudes of the politicians about domestic violence in St. Vincent and efforts are continuing to control this widespread problem".

[45] In the present case, the Board did not make a finding that it was relying on changes in the country conditions or that the applicant's abuser, Ed Johnson, no longer posed a threat nor did it find that the applicant had a valid claim for refugee protection. It is clear to this Court that section 108 (1)(*e*) is not applicable.

[46] The Board did not make its determination with section 108(1)(*e*) in mind, nor did it make a decision that could fit the test for section 108(1)(*e*). Therefore, the applicant was not eligible for an exemption from its application under section 108(4).

[47] The applicant also presented arguments related to the delay in claiming refugee status, but the Board did not make this determination either explicitly or implicitly. Therefore, these arguments are not pertinent.

VII. Conclusion

[48] The Board did not err in determining that the applicant has adequate state protection available to her in St. Vincent and is therefore not a convention refugee nor a person in need of protection. The Board's conclusion on state protection was reasonable. This application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. this application for judicial review is dismissed; and

2. there is no question of general importance to certify.

"André F.J. Scott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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