Date: 20040630

Docket: IMM-4908-03

Citation: 2004 FC 944

OTTAWA, ONTARIO, THIS 30TH DAY OF JUNE, 2004

PRESENT: THE HONOURABLE MADAM JUSTICE SNIDER

BETWEEN:

MARLENE SIRIAS CARRILLO

Applicant

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

SNIDER J.

[1] The Applicant, Marlene Sirias Carrillo (the _Applicant_), is a 31 year old citizen of Costa Rica who claims to be a Convention refugee by reason of a well-founded fear of persecution because of her membership in a particular social group, namely, lesbians. She also claims protection as a person who faces a risk to life or a risk of cruel and unusual treatment or punishment in Costa Rica. Her claim stems from alleged persecution by certain members of the police force.

[2] The Refugee Protection Board (the _Board_), in its decision dated May 15, 2003, determined that the Applicant was not a Convention refugee and not a person in need of protection as contemplated by the provisions of the *Immigration and Refugee Protection Act* S.C. 2001, c. 27, ("*IRPA*") . The Board concluded that the Applicant had not rebutted the presumption of Costa Rican state protection. The Board noted that the Applicant had not complained to the police or to the Ombudsman's office. In addition, while recognizing that lesbians still face problems in Costa Rica, the Board found that there was documentary evidence of the role of the Ombudsman's office and the courts in protecting the rights of gays and lesbians.

[3] The Applicant seeks judicial review of this decision.

Issues

[4] The issues in this application are as follows:

1. Did the Board err in requiring the Applicant to seek state protection when the agents of persecution were from the state agents?

2. Did the Board ignore evidence in determining that there is adequate state protection available to the Applicant in Costa Rica?

Analysis

Issue #1: *Did the Board err in requiring the Applicant to seek state protection when the agents of persecution were from the state agents*?

[1] In *Canada* (*Attorney General*) v. *Ward*, [1993] 2 S.C.R. 689 at 724, the Supreme Court of Canada held that, to successfully claim Convention refugee status, a refugee claimant must provide clear and convincing evidence of the absence of state protection. Evidence that a claimant might lead to rebut this presumption can relate to past personal incidents, such as seeking protection, or even experiences of similarly situated individuals (*Ward*, *supra*).

[2] In the case at bar, the Applicant submits that there is no obligation at law for her to demonstrate to the Board that she sought state protection, given that the agents of persecution were state agents. I disagree.

[3] In *Ward*, *supra* at 724, the Supreme Court of Canada held that, when state protection _might reasonably have been forthcoming_, the Board is entitled to draw an adverse inference based on a claimant's failure to approach state authorities for assistance:

Like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection _might reasonably have been forthcoming_, will the claimant's failure to approach the state protection defeat his claim. Put another way, the claimant will not meet the definition of _Convention refugee_ where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state.

[4] In my view, whether it is objectively unreasonable for the claimant not to have sought the protection of home authorities invites the Board to weigh the evidence before it and make a finding of fact. For example, although the agent of persecution might be a stage agent, the facts of the case might suggest that purely local or rogue elements are at work and that the state in question is democratic and offers protection to victims similarly situated to the claimant. It might, therefore, be objectively reasonable to expect a claimant to seek protection. In other instances, the identity of the state agent and documentary evidence of country conditions might mean that state protection would not be reasonably forthcoming and, therefore, the claimant is not expected to have sought protection. Given that the Board's

analysis of Costa Rica's political and judicial institutions was not patently unreasonable, meaning it was supported by the evidence before the Board, the imposition of an obligation to seek protection based on this evidence does not constitute a reviewable error, in my opinion.

Issue #2: *Did the Board ignore evidence in determining that there is adequate state protection available to the Applicant in Costa Rica*?

[5] The Applicant submits that:

· the Board ignored evidence in finding both that there are legal remedies open to the Applicant and that the Ombudsman's office may also provide protection to a person in the Applicant's situation.

· the documentary evidence shows that the court system is prejudiced against gays and lesbians, and that the court cases in which gays have been successful centre around people who are HIV positive being able to access treatment from the state.

· the Ombudsman cannot provide adequate state protection, as his decisions are recommendations and not binding.

[5] In respect of the first two points made by the Applicant, a careful review of the record before the Board shows evidence of the growing effectiveness of the courts and the Ombudsman's office in protecting the rights of gays and lesbians. It was a valid exercise of the Board, in this case, to prefer that documentary evidence. Based on that evidence, it was open to the Board to conclude that there are effective legal remedies open to the Applicant. It is true, as the Applicant submits, that the court system in Costa Rica is not perfect and there is still homophobia. However, the Board did not ignore this fact, but simply found that, despite this, there is adequate state protection. It was open to the Board to come to this conclusion.

[6] I agree with the Applicant that the Ombudsman's office does not have the authority to enforce its recommendations. However, this does not lead inevitably to a conclusion that the Ombudsman is ineffective. The documentary evidence describes the Ombudsman's office as "an effective mechanism for lodging and recording complaints of police misconduct" that "investigates complaints and, where appropriate, initiates suits against officials" (United States, 2000, Country Reports on Human Rights Practices (Bureau of Democracy, Human Rights and Labour U.S. Department of State, February 2001)). This effectiveness, coupled with a democratic state that respects the rule of law and courts that have shown an ability to deal with situations involving individual rights, forms a sufficient basis upon which the Board could conclude, as it did, that the Applicant had not rebutted the presumption of state protection.

[7] Thus, I conclude that the decision of the Board was open to it on the record and that the Board did not err.

Conclusion

[8] In conclusion, I am satisfied that this application should be dismissed.

[9] The Applicant proposed two questions for certification:

1. Whether the fact that a state has put in place institutions that purport to protect the rights of its citizens is sufficient or must the effectiveness of the institutions be demonstrated.

2. Whether the Board must specifically address the mind set of the authorities who are in charge of the institutions that purport to protect the rights of citizens.

[10] I am not satisfied that these questions ought to be certified. The answer to the first is clearly "yes"; there is no need to certify it. In the circumstances of this case, there was significant evidence on the record of the effectiveness of the institutions in question (the Ombudsman's office and the courts). The second question is not one upon which this application turns.

ORDER

THIS COURT ORDERS THAT:

1. The application is dismissed;

2. No question of general importance is certified.

Judith A. Snider

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-4908-03

STYLE OF CAUSE: MARLENE SIRIAS CARRILLO v.

MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 23, 2004

REASONS FOR ORDER

AND ORDER: The Honourable Justice Snider

DATED: June 30, 2004

APPEARANCES:

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