Date: 200509013

Docket: IMM-1361-05

Citation: 2005 FC 1249

Ottawa, Ontario, September 13, 2005

Present: The Honourable Mr. Justice de Montigny

BETWEEN:

LYDIAPETULA FRANKLYN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

[1] The Applicant is a citizen of Saint-Vincent and the Grenadines. She was born in New Prospect, Saint-Vincent on February 27, 1969; she has two children from different fathers. She claimed a well-founded fear of persecution, and also alleged to be a "person in need of protection" based upon a risk to her life or of cruel and unusual treatment or punishment, based upon her lesbianism.

Facts

[2] Mrs. Franklyn met her boyfriend in August 1996. She told him about her previous relationship with women, which she apparently discovered "because of the many disappointments I've had with men". Her boyfriend expressed a willingness to "work this out together".

[3] Her problems with her boyfriend began in February 1998, when she was caught with her former girlfriend by a third party who reported it to the boyfriend. The latter yelled and slapped her around, but this was followed by reconciliation a few days later.

[4] In May of the same year, her boyfriend accused her again of being with another woman. The Applicant was beaten, threatened to death and blacked-out. She went to the police to report it, but the police officer laughed at her and dismissed her. She explains this inaction by the fact that her boyfriend has an uncle in the police. Eventually, she forgave her boyfriend for a second time.

[5] The Applicant alleges that she suffered ridicule in the community because of her sexual orientation and further physical abuse and threats from her boyfriend. At school, her children were being harassed because of her sexual orientation.

[6] In January 2001, learning that she was pregnant, her boyfriend severely beat her and caused a miscarriage. While he was beating her, her mother called the police but no one responded.

[7] She then left her boyfriend, and resisted any further attempt of reconciliation. As a result, he threatened her and said he would kill her. Thereafter, she tried to find work on the Grenadines islands, but was unsuccessful.

[8] On February 10, 2001, she decided to leave the country and arrived in Canada on a visitor visa. She met a man and got married. He promised to sponsor her, which he never did. They divorced on April 26, 2004. Her former husband delivered her passport to Citizenship and Immigration Canada, who invited her for an interview to return her passport. She then claimed refugee protection, based on the risk she alleges from her former boyfriend as well as the risk because of her sexual orientation.

DECISION UNDER REVIEW

[9] At the outset, the Refugee Protection Division of the Immigration and Refugee Board (the "Board") pointed out that the Applicant's testimony was spontaneous, consistent with supporting documentation and free of exaggeration. The Board went so far as saying that the claimant has, "on a balance of probabilities, credibly established her allegations with regard to her risk of persecution based upon her gender and ensuing domestic violence".

[10] However, the Board found that state protection and an Internal Flight Alternative ("IFA") were determinative in this claim. With respect to state protection, the Board found that the Applicant's experience when she filed a complaint at the police station in May 1998 is not indicative of the status of state protection in the country.

[11] The Board acknowledged that the documentation indicates problems with the issue of domestic violence. However, since there are constitutionally guaranteed rights and privileges which are well respected, the Board concluded that the burden of proof with regard to the absence of state protection has not been met. The Board also noted the legislative steps taken to address this problem and the existence of the Marian House, an agency providing counseling and therapy to victims of domestic violence. Despite the current inadequacy of protection with regard to victims of spousal abuse, the Board concluded that the standard of proof for the existence of State protection is met in Saint Vincent and the Grenadines and that, "while more progress needs to be made for a clearly and identified problem, the claimant has failed to credibly refute the existence of State protection".

[12] Further, the Board found the existence of an IFA. On the basis of the Applicant's search for a new job in another location, the RPD inferred that, "had she been able to find a new job in another location, she would have seen herself as able to live successfully apart from and un-harassed by Errol". The Grenadines being separated from the main island by some 20 kilometres of open water and being accessible only by boat or airplane, the Board was of the view that, on a balance of probabilities, there is no serious possibility of the claimant being persecuted in any part of the Grenadines. The Board added that she did not present credible evidence "that her former boyfriend would go to the extent of island hopping by plane and by boat to seek her out..."

[13] Finally, the Board concluded that country documentation does not indicate that she would be at risk particularly because of her lesbian sexuality, and that any location in the Grenadines would provide a viable IFA.

ISSUES

[14] The issues are as follows:

1) Did the Board err when concluding that the Applicant could benefit of state protection?

2) Did the Board err when concluding that the Applicant could benefit of an Internal Flight Alternative?

ANALYSIS

[15] The first question to be resolved is the proper standard of review. This Court appears to be divided on the proper standard of review to be applied to the determination of state protection. While some recent judgments have used the reasonableness *simpliciter* standard (*Racz v. Canada (M.C.I.)*, [2004] F.C.J. No. 1562 (QL); *Canada (M.C.I.) v. Smith,* [1999] 1 F.C. 310, others have determined that the appropriate standard was the patently unreasonable one (*Espinoza v. Canada (M.C.I.)*, [2005] F.C.J. No. 431(QL); *Obi v. Canada (M.C.I.)*, [2005] F.C.J. No. 400 (QL)).

[16] This issue was recently canvassed by my colleague Justice Tremblay-Lamer in *Chaves v. Canada (M.C.I.)*, [2005] F.C.J. No. 232 (QL). After a thorough pragmatic and functional analysis, she concluded that the appropriate standard of review was the reasonableness *simpliciter* standard, essentially because it is a mixed question of law and fact. As she indicated, deciding whether a particular claimant has rebutted the presumption of state protection involves the application of a legal standard [i.e. "clear and convincing confirmation of a state's inability to protect": see *Canada (A.G.) v. Ward*, [1993] 2 S.C.R. 689, at para. 50, [1993] S.C.J. No. 74 (QL) to a set of facts.

[17] In my opinion, that decision correctly sets out the appropriate standard of review. As a result, the decision of the Board will be set aside only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere.

[18] On the issue of the existence of an IFA, there is no such debate. The standard of review has consistently been held to be patent unreasonableness. This is evidenced by two recent decisions from this Court, *Khan v. Canada (M.C.I.)*, [2005] F.C.J. No. 47 (QL) and *Canada (M.C.I.) v. Mohideen*, [2005] F.C.J. No. 596 (QL).

[19] Returning to the issue of state protection, it is worth remembering what a claimant has to establish to demonstrate a fear of persecution. The test it twofold: 1) the claimant must subjectively fear prosecution; and 2) this fear must be well-founded in an objective sense. When it has been established that the fear is legitimate and that the state is unable to assuage those fears through effective protection, there will be a presumption that the fear is well-founded.

[20] As to how, in a practical sense, a claimant is to make proof of a state's inability to protect, Justice LaForest in *Ward*, (supra, pp. 724-725) has outlined the principle applicable:

The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. 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.

[21] In the present case, the Board came to the conclusion that the Applicant had not met her burden of establishing that the State was not capable to protect her. Relying on *Canada(M.C.I.) v. Kadenko et al*., (1996) 143 D.L.R. (4th) 532 (F.C.A.) and on *Canada(M.E.I.) v. Villafranca* (1992), 18 Imm. L.R.(2d) 130 (F.C.A.), [1992] F.C.J. No. 1189 (QL), the Board placed much emphasis on the fact that St-Vincent and the Grenadines was a democratic state with the full panoply of constitutionally guaranteed rights, and that serious efforts were being made to curb domestic violence, both legislatively and on the ground. But with all due respect, this is not enough to demonstrate that the State has the ability to protect women in the situation of the Applicant.

[22] Mrs. Franklyn testified that she went to the police station to report an assault, but that the police officer laughed at her, said that it was a lover's quarrel, and that she deserved it if she had lesbian tendencies. A few months later, while her ex-boyfriend was beating her, her mother called the police but nobody responded. She also testified that her ex boyfriend has an uncle who is a sergeant on the police force.

[23] Should have she tried to go to another police officer or to another police station, to bring her case to a higher authority or to seek out other avenues of redress? As the Federal Court of Appeal stated in *N.K v. Canada (M.C.I.),* [1996] F.C.J. No. 1376 (QL), the refusal of certain police officers to take action cannot in itself be assimilated to the incapacity of the state to protect its citizens when there are political and judicial institutions capable of doing so. But when, as in this case, past experiences turned out to be ineffective and the country documentation is clearly to the effect that domestic violence is met with insensitivity and inaction by the police, it seems to me that the threshold to establish the incapacity of the state to protect its citizens should be lower.

[24] This is indeed the decision recently reached by my colleague Justice O'Keefe in *P.K.R. v. Canada (M.C.I.)*, [2004] F.C. 1460, F.C.J. 1767 (QL). In a very similar set of circumstances, he found that the Board made a reviewable error by failing to consider fully the documentary evidence (the same country report on Human Rights Practices from the U.S. State Department as in this case), as well as the fact that the attacker was friends with the police and a cousin of the Deputy Prime Minister. It is true, as pointed out by the Respondent, that the Country Report quoted in that case (which covered the years from 1995 to 1999) explicitly stated that "The Government has failed to take steps to determine the seriousness of the problem", a sentence that is not found in the Country Report in relation to the year 2002 considered by the Board in the present case. But I do not find this omission to be of much significance in the assessment of the situation. As I said previously, the mere fact that the government took steps to eradicate the problem of domestic violence does not mean that the fate of battered women has improved.

[25] In the circumstances of this case, I do not think that it was objectively reasonable to expect the applicant to have further sought the protection from the police after having been rebuffed or ignored previously. Considering the poor record of St-Vincent and the Grenadines with respect to the protection of assaulted women, it is not difficult to conceive of the enormous difficulties a woman with unorthodox sexual practices is likely to encounter in complaining about the physical abuses she has been subjected to. For these reasons, and applying the reasonableness *simpliciter* standard of review, I believe the Board was not sensitive enough to her predicaments and asked for too much in terms of a proof that the state was incapable to protect her: see, by analogy, *N.K. v. Canada(Solicitor General)* (1995), 107 F.T.R. 25 (F.C.), [1995] F.C.J. No. 889 (QL).

[26] With respect to an IFA, it is well established that "the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists" (*Rasaratnam v. Canada (M.E.I.)*, [1992] 1 F.C. 706, at p. 710, [1991] F.C.J. No. 1256 (QL). In the present case, the Board inferred from the fact that the Applicant searched for a new job in a new location (either in the Grenadines or in the neighbor countries of Saint Martin and Grenada), that she would have seen herself as able to live successfully apart from and un-harassed by her ex-boyfriend had she been able to find such a job.

[27] I think that the Board erred in making that assumption. Not only was this assumption disputed by the Applicant herself in her testimony before the Board (Transcript, p. 38), but it defies logic to believe that an island separated only by a few kilometres of open water from Saint Vincent and easily accessible by ferry or plane could provide a safe heaven to the Applicant. The Board should have known that these islands are sparsely populated and geographically very small, and that it would be relatively easy to find somebody for whoever is bent on doing so. This information was readily accessible to the Board, as part of the Regional Country File that forms part of the record. The Applicant did not need to adduce evidence in this regard.

[28] That being the case, I am therefore of the view that the Board made a reviewable error in concluding that there was no serious possibility of the Applicant being persecuted in any part of the Grenadines.

[29] Finally, the Applicant proposed a question for certification, pertaining to the extent an abused woman must go in complaining about an offence before it can be said that the presumption of state protection has been rebutted. This question has been vigorously opposed by the Respondent, and rightly so in my opinion.

[30] The jurisprudence of this Court establishes that in order to obtain certification, pursuant to section 74(d) of the *Immigration and Refugee Protection Act*, certain criteria must be met. The proposed question must: 1) transcend the interests of the immediate parties to the litigation; 2) seek to clarify an undecided legal point of general importance; and 3) be determinative of the appeal.

[31] Not only is the question proposed by the Applicant essentially factual, but the presumption of state protection and the requirements to rebut it have been considered in a number of previous cases. The determination of this application for judicial review turns on a proper construction of well known principles, and not on any prospective new set of judicial pronouncements.

[32] For all the above reasons, this application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination. No serious question of general importance is certified.

"Yves de Montigny"

JUDGE

FEDERAL COURT

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: IMM-1361-05

STYLE OF CAUSE: LYDIA PETULA FRANKLYN

v.

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: MONTREAL, QUEBEC

DATE OF HEARING: AUGUST 31st, 2005

REASONS FOR ORDER: THE HONOURABLE MR. JUSTICE de MONTIGNY

DATED: SEPTEMBER 13, 2005

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