

Date: 20050510

Docket: IMM-2009-04

Citation: 2005 FC 660

Ottawa, Ontario, this 10th day of May, 2005

Present: The Honourable Justice James Russell

BETWEEN:

BETSABE DEL CARMEN BALMACEDA TORRES

ant

Applic

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

ent

Respond

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review under s. 72(1) of the *Immigration and Refugee Protection Act, S.C. 2001, c.27* of a decision of the Refugee Protection Division of the Immigration Refugee Board ("Board") dated February, 9, 2004 ("Decision"), wherein the Board determined that the Applicant was not a Convention refugee or a person in need of protection. The Applicant asks that the Board's decision be set aside pursuant to s. 18.1 of the *Federal Court Act, R.S.C. 1985, c. F-7*, and that the claim be referred back to the Board for redetermination.

BACKGROUND

[2] The Applicant is a 20-year-old citizen of Nicaragua. She claims a well-founded fear of persecution in her country based on her membership in a particular social group, namely women subject to domestic abuse. She claims to have been physically and psychologically abused by her father. The Applicant alleges that her life would be in danger and that she would be subject to cruel and unusual treatment should she return to Nicaragua.

[3] The Applicant submits that she has been physically abused by her father since the age of 6. Her father, an alcoholic, has always been violent toward every member of her family. Her mother, also a victim of abuse, was powerless to help her children. One of her sisters moved out of the family house to live with her fiancé in another neighbourhood of the city in order to escape her father's violent behaviour.

[4] The Applicant asserts that she was only allowed out of the family house to attend school or church. The Catholic group to which she belonged decided to plan a trip to Canada to attend the World Youth Day. The group carried on different activities to collect money and held a draw of all the people who participated. The Applicant won the draw and was awarded a trip to Toronto to attend World Youth Day. She says that her father, despite the fact that he was a terrible person, let her travel because he is also religious.

[5] The Applicant mentions that she knew before leaving Nicaragua that she would not be returning. She explains that it was a very difficult decision for her to make because she was really attached to her mother and her siblings.

[6] She arrived in Canada in July 2002, not knowing that she could make a refugee claim based on the abuse of her father. It was only after World Youth Day that she spoke with her aunt, living in Canada, about her problems with her father and learned about the possibility of such a claim. In August 2002, the Applicant decided to make an inland claim.

[7] She alleges that her father called her great-uncle and her aunt the day after she was supposed to return home. They told her that she was not going to return because of the abuse she had been subjected to. She says that her father was furious and that he would certainly harm her if she was to return to her country. She indicates that, being a violent and obsessive man, he would find her even if she was to go somewhere else in Nicaragua.

[8] The Board concluded that the Applicant was not a Convention Refugee or a person in need of protection. It found that she had not rebutted the presumption of state protection. Even though it admitted that state protection was not perfect, the Board believed, based on the documentary evidence, that state protection would be available to the Applicant if she were to return to Nicaragua.

ISSUES

[9] The Applicant raises the following issue:

Did the Board err in law in that it misconstrued the test for an absence of state protection as a requirement for refugee protection in the case of persecution by non-state actors?

ANALYSIS

[10] The jurisprudence of this Court is that a refugee claimant must provide "clear and convincing" evidence of a state's inability to afford protection. Absent a complete breakdown of state apparatus, it is presumed that a state is capable of protecting a claimant and, when the state in question is a democratic state, the claimant must do more than simply show that she went to see some members of the police force and that her efforts were unsuccessful. The more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to her. See *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; *Canada (Minister of Citizenship and Immigration) v. Smith*, [1999] 1 F.C..

[11] In *Canada (Minister of Employment and Immigration) v. Villafranca*, [1992] F.C.J. No. 1189, the Federal Court of Appeal emphasized that "No government that makes any claim to democratic values or protection of human rights can guarantee the protection of its citizens at all times. Thus, it is not enough for a claimant to merely show that the government has not always been effective at protecting persons in the particular situation."

[12] In the present case, the Applicant was able to demonstrate a subjective fear of returning to Nicaragua, but the Board felt she had not overcome the presumption of adequate state protection.

[13] The Applicant's complaint about the Board's analysis is that it fails to make the distinction addressed by Mr. Justice Gibson in *Penelova v. Canada (Solicitor General)*, [1994] F.C.J. No. 1722, and *D'Mello v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 72. The Applicant's fear did not rest upon a lack of legislative and procedural framework in Nicaragua to protect women subject to abuse, but rested upon the lack of police support for such women and the difficulty, given the lack of such support, in effectively taking advantage and having recourse to the existing legislative and procedural framework of state protection in Nicaragua.

[14] The Applicant's credibility was not questioned and her evidence was clear that the police and the various support groups could provide no effective protection against her father.

[15] The issue of effectiveness is only addressed by the Board in relation to police protection and prosecution, and the evidence there was that it was ineffective: "while police sometimes intervened to prevent domestic violence, they rarely

prosecuted perpetrators because victims refused to press charges" and "those cases that actually reached the courts usually resulted in not guilty verdicts due to judicial inexperience with, and lack of legal training related to, proper judicial handling of such violence."

[16] When I review the decision as a whole, it is not clear to me if, or where, the Board addressed the Applicant's expressed fear of the lack of police support and the difficulty of her taking advantage and having recourse to the existing legislative and procedural framework, of state protection in Nicaragua. It looks to me as though the Board never really engaged with the Applicant's concern that the police and other support groups could not provide effective protection. I believe her evidence was clear and convincing that they could not protect her against her father in the past and would not be able to do so in the future. The Board should have turned its mind to this issue and addressed it directly in its reasons.

[17] I do not say, of course, that the decision would necessarily have been different if it had, but its failure to do so was a reviewable error and it would be unsafe to let the decision stand. The Board failed to effectively analyse, not merely whether a legislative and procedural framework for protection existed, but also whether the state, through the police and otherwise, was willing to effectively implement any such framework. As Mr. Justice Gibson said in *Elcock v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1438 at para. 15, the "Ability of a state to protect must be seen to comprehend not only the existence of an effective legislative and procedural framework, but the capacity and the will to effectively implement that framework."

ORDER

THIS COURT ORDERS THAT:

1. The Application is allowed and the matter is returned for reconsideration by a differently constituted Board.
2. There is no question for certification.

"James Russell"

JFC

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-2009-04

STYLE OF CAUSE: BETSABE DEL CARMEN BALMACEDA **TORRES**

-and-

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: THURSDAY, FEBRUARY 10, 2005

REASONS FOR ORDER: RUSSELL J.

DATED: May 10, 2005

APPEARANCES: Mr. Clifford Luyt

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FEDERAL COURT/COUR FÉDÉRALE

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