Date: 20080124

Docket: IMM-840-07

Citation: 2008 FC 94

Ottawa, Ontario, January 24, 2008

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

SHANICE NYAWIRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Shanice Nyawira is a seven-year-old citizen of Kenya. She claims refugee protection on the basis of her membership in the particular social group of young girls who face a serious possibility of female genital mutilation (FGM) in Kenya.

[2] The Refugee Protection Division of the Immigration and Refugee Board (Board) dismissed Ms. Nyawira's claim for protection on the basis of two principal findings. First, the Board found

that Ms. Nyawira was never under any threat of FGM. Second, the Board found that Ms. Nyawira had not rebutted the presumption of state protection.

[3] This application for judicial review of that decision is dismissed because: (i) the Board's first finding, being one of fact, was not patently unreasonable; and (ii) the Board's finding with respect to state protection withstands scrutiny on the standard of reasonableness *simpliciter*.

[4] Dealing with the Board's first finding, it is settled law that findings of fact made by the Board with respect to credibility and implausibility are reviewed on the standard of patent unreasonableness. The Board, in its reasons, noted that Ms. Nyawira's mother and designated representative, Ms. Waweru, had made a conscious decision to leave her daughter in Kenya so as to travel to Canada to make a refugee claim. The Board reasoned that, as a failed refugee claimant whose evidence was rejected by the Board, Ms. Waweru was under no pressure to leave Kenya. The Board further reasoned that, if Ms. Waweru truly believed that her daughter was vulnerable to FGM, she would not have left her daughter in Kenya and traveled to Canada.

[5] A finding of fact is patently unreasonable if it is "clearly irrational" or "evidently not in accordance with reason." See: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paragraph 52. In my view, the Board's conclusion on this point cannot be said to be clearly irrational. As such, it was not patently unreasonable.

[6] Turning to the Board's finding that adequate state protection existed, this is a finding of mixed fact and law that is ordinarily reviewable against the standard of reasonableness. See:

Hinzman v. Canada (Minister of Citizenship and Immigration) (2007), 282 D.L.R. (4th) 413 (F.C.A.) at paragraph 38. This standard requires the Court to determine whether, after a somewhat probing examination, the reasons for the decision, when taken as a whole, support the decision. See: *Ryan*, cited above, at paragraph 47. The Court must exercise proper deference and may be forced to accept that the decision is reasonable, even if it is unlikely that the Court would have decided as the tribunal did. See: *Ryan*, cited above, at paragraph 46.

[7] The Board's finding with respect to state protection was as follows:

> Counsel drew my attention to the U.S. Department of State Report on FGM in Kenya and noted that the practice is ongoing today. The thrust of this evidence is that FGM is on the decline and that efforts are being made in various directions to curtail the practice. This is a dated report (2001) and refers to there being "no laws making FGM/FGC illegal in Kenya". In fact, more recent evidence (February 2005) shows that Kenya outlawed FGM among girls under the age of 18. Known as the Children's Act, the law stipulates that any conviction carries a penalty of 12 months imprisonment or a fine of 50,000 shillings (approximately US $670) or both. The Ministry of Health circulated a policy directive making FGM illegal in all health facilities. Information from 2004 indicates that the structures to fully implement the provisions of the Act were not all in place and some sources noted that the Act is not being enforced. The Kenyan government has also implemented a National Plan of Action for the Elimination of FGM in Kenya which aims to increase the number of communities supporting the elimination of FGM. I find that the State is making serious efforts at protecting persons such as the claimant. Although not perfect there is a legislative will to correct the problem and with some effort on her part and assistance from others she can avail herself of the protection offered. The claimant, through her [designated representative], has not rebutted the presumption of State protection. [footnotes omitted, emphasis in original] [1]

[8] As a matter of law, there is a general presumption that a state is able to provide protection to its citizens. There must be clear proof of the state's inability to protect its citizens. Thus, a refugee claimant is generally expected to seek state protection where the agents of persecution are not state

actors. A failure to seek protection is justified only where the evidence supports the conclusion that protection would not reasonably be forthcoming. See: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

[9] In the present case, no evidence was adduced that Ms. Nyawira's mother had ever sought state protection for her daughter. Thus, the Board was required to weigh the risk to Ms. Nyawira against Kenya's willingness and capacity to provide protection.

[10] Elsewhere in its reasons, the Board had concluded that Ms. Nyawira was not ever under any threat of FGM in Kenya. The Board made no error in its discussion of the evidence before it, which included evidence that Kenya had outlawed FGM, made it illegal to perform FGM in all health facilities, and implemented a plan for the elimination of FGM. In my view, after a somewhat probing examination, the Board's reasons, when taken as a whole, support its decision. It follows that the application for judicial review will be dismissed.

[11] Counsel posed no question for certification, and I agree that no question arises on this record.

1. I have noted the Board's unfortunate reference to the exertion of "some effort" on the part of Ms. Nyawira to avail herself of state protection. It is, in my view, absurd to speak of a six or seven year old child exerting any effort to seek state protection. However, I am satisfied that the nub of the Board's conclusion was that with the help of her mother state protection could be accessed. In this connection, the mother had testified that she opposed any mutilation of her daughter and that before leaving Kenya she lived and worked in Nairobi. Nairobi is a large urban centre where Ms. Nyawira would be further away from rural attitudes and any older female relatives who may wish to see her subjected to FGM.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

"Eleanor R. Dawson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-840-07
STYLE OF CAUSE:	SHANICE NYAWIRA, Applicant and THE MINISTER OF CITIZENSHIP AND IMMIGRATION, Respondent
PLACE OF HEARING:	TORONTO, ONTARIO
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