Date: 20080422

Docket: IMM-2071-07

Citation: 2008 FC 522

Ottawa, Ontario, April 22, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

NINA NAUMETS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Naumets is a Ukrainian citizen who claimed refugee status based on her fear of continued abuse at the hands of her common law spouse. She began cohabiting with him in 1995, and claims that he began abusing her in 2000.

[2] She alleges that she informed police of the abuse, but claims that she was told that they did not consider family disputes serious. After an attack which left her hospitalized in July 2004, she left him and went to live with her daughter. Another attack occurred near her daughter's house in

October, 2004. She claims that a complaint to the police was not acted upon. She fled to Canada on October 24, 2004 on a one month visitor's visa.

[3] Ms. Naumets filed for refugee protection on October 26, 2005. After a hearing on March 19, 2007, her claim was rejected on April 30, 2007. This proceeding is for judicial review of that decision.

[4] The Refugee Protection Division (RPD) found that she did not have a well-founded fear of persecution for the purposes of sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). The Panel member based his decision in part on an adverse inference drawn from the delay between the applicant's arrival in Canada and her application for protection. He also found her allegation that her common law partner was still pursuing her not to be persuasive, as her only evidence for this claim were letters from friends and relatives, whom he found to be 'not uninterested parties'.

[5] In the alternative, the RPD found that Ms. Naumets had failed to rebut the presumption that the Ukraine was capable of protecting its nationals. He noted that the Ukraine is a democratic country which is not in a state of collapse, and pointed to various statutory and community-based initiatives to tackle the admittedly serious problem of domestic abuse.

Issues

[6] The issues are whether the RPD erred in his assessment of the availability of state protection for battered women in the Ukraine and whether he made any other reviewable errors.

Standard of Review

[7] In the interim between the hearing in this case and this decision, the Supreme Court released its decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. 9 which significantly altered the framework of standards against which reviewing courts should assess administrative decisions. While the Court moved from three to two standards of review, thereby collapsing the two reasonableness standards into one, the majority also noted that a full analysis of which standard to apply did not need to be undertaken in every case.

[8] With regard to decisions of the RPD, this Court had established a general consensus that findings of fact were reviewable on a patently unreasonable standard; questions of mixed fact and law attracted the reasonableness *simpliciter* standard; and, pure errors of law were reviewed on the correctness standard: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46.

[9] *Dunsmuir* did not address the question of the application of paragraph 18.1(4)(d) of the *Federal Courts Act* as it did not arise in that case. That paragraph provides that the Federal Court may provide relief if findings of fact were made in a perverse or capricious manner, or without regard to the material before the tribunal. That had previously been equated with the patently unreasonable standard: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] S.C.J. No.39 at paragraph 38.

[10] However, findings of fact made with respect to state protection must be assessed against the test set out in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74, *i.e.*,

do the facts constitute “clear and convincing confirmation of a state’s inability to protect” so as to rebut the presumption.

[11] In light of the prior jurisprudence to the effect that this assessment constitutes a mixed question of fact and law for which the standard of review should be reasonableness I did not think it necessary to invite further submissions from the parties on the question: see *Chaves v. Canada (Minister of Citizenship and Immigration)* 2005 FC 193, [2005] F.C.J. No. 232. I would have decided this matter on the reasonableness standard prior to *Dunsmuir*.

[12] As was stated by Chief Justice John Richard of the Federal Court of Appeal in *Canada (Attorney General) v. Grover*, 2008 FCA 97, [2008] F.C.J. No. 401 at paragraph 6, a decision released following *Dunsmuir*,

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable and in particular whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and the law…

State Protection

[13] Ms. Naumets first alleges that the RPD erred in its assessment of the state protection offered to battered women in the Ukraine. She asserts that the reliance of the RPD on the existence of ‘women societies’, or non-governmental organizations which assist battered women, was erroneous as it is irrelevant to the question of state protection. The respondent notes that the RPD also discussed legislative initiatives undertaken by the Ukrainian government to address spousal abuse.

[14] State protection is a finding which lies at the heart of refugee law, for where a person's own state is capable and willing to diligently pursue his or her persecutors, that person cannot be said to need the protection of another state. The protection afforded by the state need not be perfect to be reasonably considered adequate: *Zalzali v. Canada (Minister of Employment and Immigration)*, (1991), 126 N.R. 126, [1991] F.C.J. No. 341.

[15] A decision on rebuttal of the presumption of state protection was released by the Federal Court of Appeal between the hearing of this case and delivery of these reasons. In *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] F.C.J. No. 399, the Court reiterated that the burden of proving the ineffectiveness of state protection lies with the claimant. The evidentiary standard of 'clear and convincing' was also required, not mere reliability. In the context of that case, the failure of the claimant to complain to Mexican authorities about alleged corruption of a police officer was fatal to her claim of a lack of state protection in the face of 'substantial, meaningful and often successful efforts' by the Mexican government to address corruption (at paragraph 35).

[16] The assessment of the availability of state protection is not a simple task. While the presumption of protection is one which must be rebutted by the claimant with 'clear and convincing evidence', it has also been recognized by this Court that claims may succeed where the authorities are unable or unwilling to act against the persecutors. The difficulty of assessing the nature and quantity of evidence required to rebut the presumption has long been recognized: see *Smirnov v. Canada (Secretary of State) (T.D.)*, [1995] 1 F.C. 780, [1994] F.C.J. No. 1922.

[17] Where the claimant is a member of a particularly vulnerable population whose complaints have historically been neglected by the state, such as battered women in many areas of the world, it is incumbent on the RPD to assess the state's willingness and ability to protect a member of that population, not merely citizens in general: *Tomori v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1039, [2006] F.C.J. No. 1299.

[18] In this case, the RPD directly and appropriately considered the legislative efforts of the Ukrainian government to stamp out spousal abuse. But the presence of laws 'on the books' is not sufficient for a finding of state protection. There must be some realistic possibility that the protection will be afforded to the claimant, as noted by Justice Gibson in *Elcock v. Canada (Minister of Citizenship and Immigration)*, (1999), 175 F.T.R. 116, [1999] F.C.J. No. 1438 at paragraph 15:

> 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.

[19] I agree with the applicant that the existence of efforts on the part of civil society cannot be considered as part of the assessment of state protection. This is for the reason that measures taken by NGOs are generally undertaken to plug holes in the fabric of the state. They highlight problems, rather than serving as indicia of government-based solutions: *Garcia v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 78, [2007] F.C.J. No. 118 at paragraph 15. The Panel member's error in emphasizing this evidence is not fatal, in my view, as the conclusion that state protection for victims of domestic violence in the Ukraine is adequate was a reasonable finding on all of the evidence.

[20] In my view, the Panel member gave adequate consideration to the evidence detailing the efforts of the Government of the Ukraine to offer protection to abused spouses. The RPD noted the statutory attempts to address the problem of battered women in the Ukraine, which include mandatory registration of perpetrators of domestic violence and reviews of complaints of spousal abuse by a range of government agencies.

[21] The applicant asserts that there was clear and convincing evidence on the record that the efforts of the Ukrainian authorities in dealing with the issue of domestic violence were not substantial or effective. While perfection is not required, she submits, there must be some indication that protection will, in fact, be provided. While I agree with the legal principle as stated, I must note that the evidence to which she directed me is a statement of Police Chief Vasylovych of the city of Berdychiv in the western Ukraine from no later than February, 2002. Given that most of the legislative initiatives discussed by the RPD Panel member postdate that evidence, I cannot find his failure to directly address it to be a fatal error.

[22] The applicant also charges that the RPD erred in dismissing the claimant's evidence that her common law spouse continued to search for her on the basis that letters from her sister and a friend were not from uninterested parties: *Coitinho v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1037, [2004] F.C.J. No. 1269. I agree that this was an error. While the RPD is to be shown deference in its weighing of the evidence in coming to factual and factual-legal determinations, this does not permit it to simply give little weight to evidence which comes from those who know the applicant, even her family.

[23] Especially in a case such as this, where there is objective documentary evidence of past persecution, it was unreasonable of the RPD to give little weight to the letters from the applicant's friends, in essence to find them false, simply because they were not uninterested parties. However, this error does not overcome the finding that the decision of the RPD on the issue of state protection was reasonable and is thus not fatal to the decision as a whole.

[24] For the foregoing reasons I would dismiss the application. No questions of general importance were proposed and none will be certified.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that this application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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