

Date: 20080620

Docket: IMM-5246-07

Citation: 2008 FC 770

Ottawa, Ontario, June 20, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

**DARIO CRADMORE MATTHEWS
(BY HIS LITIGATION GUARDIAN,
CONSTANCE NAKATSU)**

Applicant
and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of Refugee Protection Division of the Immigration and Refugee Board (the Board), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), dated November 22, 2007, in which the Board found that the applicant, Dario Cradmore Matthews, is not a Convention refugee or a person in need of protection.

[2] The application for judicial review shall be allowed for the following reasons.

FACTUAL BACKGROUND

[3] The applicant is a citizen of St. Vincent. He is seven years old and was born on August 25, 2000. His interests are represented by a designated representative, Constance Nakatsu. The applicant's claim was disjoined from that of his mother and her partner, whose claims have failed. While in Canada, the applicant's mother was charged with assault in respect of her partner, and the applicant is under the care of Children's Aid Society, living with foster parents.

[4] The applicant's claim was based on abuse he suffered at the hands of his father, who would beat him when his mother was not present. He fears that his father would abuse or kill him if he returned to St. Vincent. He fears also to be beaten by his extended family except his aunts (Tribunal's Record, page 198).

[5] The applicant consistently indicated to the designated representative that he had been beaten 13 times by his father, using his hands and other objects. The designated representative indicated that, to the best of her knowledge, the applicant had not needed medical attention following the beatings.

[6] The applicant's grandmother and aunts continue to live in St. Vincent.

DECISION UNDER REVIEW

[7] The Board determined that the applicant is neither a Convention refugee nor a person in need of protection because of the availability of state protection in St. Vincent. The following reasons were given in support of the decision:

- a) The Board noted that it took into consideration the Guidelines on Child Refugee Claimants in reaching its decision.
- b) The Board reviewed the principles of state protection, and the burden an applicant must meet to demonstrate that protection of his home state is not forthcoming.
- c) The Board reviewed the documentary evidence. Notably, it discussed evidence which was contrary to its ultimate conclusion; the evidence indicated that there was no government program available for abused children who cannot remain in their household, or who require an alternative living arrangement to that of the family home. The absence of legislation specifically addressing the needs of abused children was noted.
- d) The situation of the applicant's mother was examined by the Board. The Board noted that though the applicant's mother was charged with assault, no persuasive evidence was presented to indicate that she was abusive toward the claimant, or an unfit mother. The Board found no persuasive evidence that the applicant would not remain in the custody of his mother upon return to St. Vincent.
- e) The Board determined that the applicant's mother could seek protection from the state on his behalf. It reviewed the documentary evidence dealing with the protection of children who remained under the care of a parent, and the legislation in place,

namely the Domestic Violence Act. The Board concluded that it was not unreasonable for the applicant, with the help of his mother, to approach the state of St. Vincent for protection; he failed to rebut the presumption of state protection with clear and convincing evidence.

ANALYSIS

Standard of Review

[8] Whether the Board erred in its assessment of state protection is reviewable on a standard of reasonableness (*Chaves v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 232, 2005 FC 193; *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraphs 55, 57, 62, and 64). For a decision to be reasonable there must be justification, transparency and intelligibility within the decision making process. The decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, above at paragraph 47).

[9] The applicant first argues that the Board erred in its assessment of availability of care for the applicant in St. Vincent. Specifically, the applicant argues that the Board erred in finding that he was not a child in need of alternative living arrangements to the family home, and that his mother could approach the state for protection on his behalf. The applicant submits that there was no evidence as to the outcome of the custody issue and that this assumption by the Board was based on pure speculation, unsupported by the evidence.

[10] Second, the applicant argues that the Board erred in its assessment of the documentary evidence regarding the availability of state protection in St. Vincent. The applicant submits that the Board selectively referred to portions of the evidence that favour the conclusion that state protection is available. The applicant argues that the Board did not provide reasons for preferring the evidence that it did.

[11] I will deal only with the first argument because I think it is determinative in this case. The Board wrote at page 9 of the Tribunal's Record:

... The claimant was in the custody of his mother for the last few years prior to coming to Canada and seldom saw his father. There is no persuasive evidence before the panel that the claimant will not continue to remain in the custody of his mother upon return to St. Vincent, and that if the claimant were to be the target of harm from his father, his mother, as his primary care giver, would protect him or if necessary seek out state protection for him. ...

[12] This assumption is not supported by the evidence. First, the transcript from the hearing (Tribunal Record, page 200) shows that in the event of a return to St. Vincent, the applicant would live with his maternal grandmother. The applicant, through his designated representative (Tribunal Record, page 198), said that he was beaten by "everybody" except his aunts. I am therefore not convinced that the applicant would be protected.

[13] Second, at the time of the Board's decision, the applicant's mother had lost legal custody of her child. There is no evidence whatsoever in the file when she will regain custody. I therefore find speculative the Board's assumption that the applicant will continue to remain in the custody of his

mother upon return to St. Vincent. The conclusion to dismiss the applicant's claim cannot stand on this reviewable error.

[14] No questions for certification were proposed and none arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is allowed. The matter is remitted to a differently constituted panel for redetermination. No question is certified.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-5246-07

STYLE OF CAUSE: **DARIO CRADMORE MATTHEWS
(BY HIS LITIGATION GUARDIAN,
CONSTANCE NAKATSU)
and
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 18, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** Beaudry J.

DATED: June 20, 2008

APPEARANCES:

D. Clifford Luyt FOR APPLICANT

Gordon Lee FOR RESPONDENT

SOLICITORS OF RECORD:

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