Federal Court  Cour fédérale

Date: 20100503

Docket: IMM-4645-09

Citation: 2010 FC 487

Ottawa, Ontario, May 3, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

UDINE PAULA WARNER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Udine Paula Warner is a victim of her past. All she knows about domestic life is violence and sexual abuse. She grew up in St. Vincent where her father constantly battered her mother. Although a young child, she recalls that her mother went to the police, who did nothing.

[2] She married in St. Vincent and found herself in the same situation. She went to the police who said that they could nothing for her.

[3] She fled to Trinidad and Tobago, where she is also a citizen, and again fell into the same dreadful pattern. This time she did not complain to the police.

[4] However, she came to Canada and sought refugee status. Thereafter, she found herself once again in a disastrous, violent relationship. Again she did not call the police. However the hospital where she was treated did so. Criminal charges were laid.

[5] The deciding member of the Refugee Protection Division of the Immigration and Refugee Board found her to be a credible witness and the victim of domestic violence in St. Vincent and the Grenadines, in Trinidad and Tobago, and in Canada. However, after carrying out an analysis of state protection he found that adequate state protection was available to her in both St. Vincent and the Grenadines and in Trinidad and Tobago, and so dismissed her application. This is a judicial review of that decision.

[6] The Minister has gone out of his way to emphasize that it is not contested that Ms. Warner had and has a subjective belief, honestly held, that no state protection was, or in the future would be, available to her in either country. However the question is, objectively speaking, whether the member’s decision was reasonable.

[7] The analysis of state protection in St. Vincent and the Grenadines was based on the same tired template this Court has seen time and time again. The analysis goes like this. St. Vincent is a democracy. The burden is upon the applicant to rebut the presumption that state protection is available. That burden becomes heavier the more democratic the state. A number of cases were mentioned in which applications for judicial review of decisions based on this type of analysis were dismissed. However no mention was made whatsoever of the many cases which came to the opposite conclusion, cases which are set out in *Alexander v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1305. I think the time has come where it is insufficient to simply say that St. Vincent and the Grenadines is a democracy. It is a democracy where domestic violence runs rife.

[8] The burden of proof which lies upon a claimant was aptly described by Mr. Justice O'Reilly in *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 320, [2008] 1 F.C.R. 3 at para. 13:

> The burden of proof lies on claimants to show that they meet the definition of a refugee. To do so, they must prove that they actually fear persecution and that their fear is "well-founded". To establish a well-founded fear, refugee claimants must show that there is a "reasonable chance", a "serious possibility" or "more than a mere possibility" that they will be persecuted if returned to their country of nationality (*Adjei* v. *Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680, F.C.J. No. 67 (C.A.) (QL)). (By contrast, a person who claims to be in danger of being tortured, killed or subjected to cruel and unusual treatment must establish his or her claim on the balance of probabilities: *Li* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] F.C.J. No. 1 (C.A.) (QL)). In respect of particular underlying facts, the claimant shoulders a burden of proof on the balance of probabilities (*Adjei*, above, at para. 5).

[9] He emphasized that the term “clear and convincing confirmation”, which comes from the decision of Mr. Justice La Forest speaking for the Supreme Court of Canada in the leading case of *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 20 Imm. L.R. (2d) 85, is descriptive of the nature of the evidence required, not the burden of proof.

[10] Although Mr. Justice O’Reilly was reversed by the Federal Court of Appeal, 2008 FCA 94, [2008] 4 F.C.R. 636, 69 Imm. L.R. (3d) 309, Mr. Justice Létourneau agreed, at para. 26 thereof, that Mr. Justice La Forest, in *Ward*, was referring to the quality of the evidence necessary to rebut the presumption, not to a higher standard of proof:

> Indeed, in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, at paragraph 57, our colleague Sexton J.A. used a somewhat similar expression when he wrote that “a claimant coming from a democratic country will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status” (emphasis added). I think our colleague, as was La Forest J. in the *Ward* case, referred to the quality of the evidence that needs to be adduced to convince the trier of fact of the inadequate state protection. In other words, it is more difficult in some cases than others to rebut the presumption. But this in no way alters the standard of proof. In this respect, I fully agree with the finding of the judge that La Forest J. in *Ward* was referring to the quality of the evidence necessary to rebut the presumption and not to a higher standard of proof.

[11] A claim for refugee status arises out of, and has to be considered within the context of a particular fact pattern. Ward was seeking refuge from a paramilitary terrorist organization. Ms. Warner is seeking refuge from a member of her own household. Her past makes it difficult for her to break away from the circle of violence and abuse, subjectively speaking. Her experiences in Canada give testimony to that fact.

[12] However it is not necessary to reach a final conclusion with respect to the reasonableness of the analysis by the RPD with respect to St. Vincent and the Grenadines in this particular case, as I am of the view that the separate analysis done with respect to the availability of state protection in Trinidad and Tobago was within the range of acceptable reasonable outcomes as enunciated by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47.

[13] Since Ms. Warner did not seek state protection in Trinidad and Tobago, the burden falls upon her to establish, objectively speaking, that any efforts would have been fruitless. The Member took account of inconsistencies among several sources within the documentary evidence, noted that violence against women is a serious problem in Trinidad and Tobago, but nevertheless, for reasons he clearly set forth, was of the view that state protection was adequate. Indeed, there appears to be a better structure in place in Trinidad and Tobago when compared to St. Vincent and the Grenadines in that there are women's shelters, hotlines and community crisis centres.

[14] This case is somewhat similar to *Lynch v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 374, another domestic abuse case from Trinidad and Tobago. What Mr. Justice Phelan said in that case, at para. 10, applies equally to the case before me:

> The Board did consider both the objective evidence of state protection and the personalized situation of whether that protection was reasonably available to the Applicant. The Board's reasons were adequate – the Applicant could understand how the Board reached its conclusions. The Applicant's real challenge is to the Board's conclusions; not the adequacy of the reasons.

[15] There may be humanitarian and compassionate considerations which would persuade the Minister to allow Ms. Warner to remain in Canada. However, that issue is not before me, and so I must dismiss the application.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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