Federal Court  Cour fédérale

Date: 20101213

Docket: IMM-2259-10

Citation: 2010 FC 1279

BETWEEN:

SONJA JENEFER DA SOUZA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

LEMIEUX J.

[1] On Tuesday, December 7th, 2010, I granted Ms. Da Souza's judicial review application from the March 19th, 2010 decision of a PRRA Officer who rejected her application for protection based on his finding:

> "that adequate state protection would be available for the applicant if required. It is my finding that the authorities would be reasonably forthcoming with serious efforts to protect the applicant, if she were to return to St. Vincent and approach the state for protection".

[2] The availability of adequate state protection is the only issue in this proceeding.

[3] Sonja Jenefer Da Souza, a citizen of St. Vincent and the Grenadines (St. Vincent), fled that country based on her fear of her ex-partner Brian Charles who abused her throughout their on and off relationship which began in the late 1980's. She came to Canada making a refugee claim which was dismissed on July 8, 2009. The Refugee Protection Division (RPD) has expressed some credibility concerns about her evidence in support of her allegations of abuse. She submitted new evidence to the PRRA Officer who was satisfied, as a matter of fact, she had been abused by Brian Charles in St. Vincent.

[4] The PRRA Officer indicated in his reasons, based on the evidence before him, because Ms. Da Souza had been away from St. Vincent for almost nine years, there was insufficient evidence to indicate her ex-partner is still interested in harming her. He accepted the evidence that Brian Charles in 2009 had inquired of Ms. Da Souza's whereabouts from the applicant's cousin who was visiting the Island. He was not satisfied this showed he was interested in targeting her.

[5] Be that as it may, the PRRA Officer later on in his decision wrote:

> After a careful analysis of the evidence before me, it is my finding that even if Brian Charles is still interested in targeting the applicant upon return to Saint Vincent and the Grenadines, based on the objective evidence, I find that adequate protection would be available for the applicant if required.
>
> [My emphasis]

[6] It has been said often by judges of this Court that a determination of state protection often turns on the specific fact circumstances which call for case by case assessment.

[7] The crux of the PRRA Officer's state protection analysis turns on the fact Ms. Da Souza never sought the protection of the State by filing a complaint with the police in St. Vincent.

[8] The PRRA Officer had before him a letter from Alex Phillips, Sergeant of Police in St. Vincent. That letter is dated December 22nd, 2009. I quote it in it's entirety:

> To whom it may concern,
>
> I am writing on behalf of Sonja Da Souza formerly of Overland, St. Vincent. She is also called Sonia. I am with the knowledge that she is currently residing in Canada.
>
> I have known her for about fifteen years. As a police officer, I would have settled several disputes between Sonja and her common-law husband, Brian Charles. However, Sonja has never made any official report at any police station to my knowledge. She always settled the matter. The matters that I dealt with are matters where Brian would physically abuse her. I would have spoken to them on these occasions and sometimes advised her to report the matter to the police but she always make it up before she does so. Sad to say in our country, we only arrest for these offences if the person who is abused report the matter, or if the police was present when such an assault took place.
>
> Since Sonja went to Canada, during her absence the house she owned was destroyed by fire so therefore she has no home now in St. Vincent. She would have to depend on family to live with, should she return to St. Vincent.
>
> I must add that she is a hard working person and a mother of eight children of which she is the bread winner (the one who provides for them).
>
> [My emphasis]

[9] After referring to this letter and accepting the fact that Ms. Da Souza had been abused by her ex-husband/boyfriend, the PRRA Officer wrote:

> […] I also note that she did not make any effort to avail herself of the state protection available in St. Vincent. Based on the evidence before me, the applicant was familiar with Alex Phillips, who is with

> the police force and hence, it would be reasonable for the applicant to have attempted, with his assistance, to seek protection from the authorities if required. I find that it is unreasonable for the applicant not to have made a greater effort to seek police protection or the protection of any state authority in the circumstances of this case. The applicant is required to show that she has exhausted all avenues of protection. In this case, the applicant did not take sufficient reasonable steps to rebut the presumption of state protection.
>
> [My emphasis]

[10] As is well known, the leading case in matters of refugee law in Canada is the Supreme Court of Canada's decision in *Canada (Attorney General) v Ward*, [1993] 2 S.C.R. 689. Justice La Forest writing for the Court.

[11] From *Ward*, I take the following propositions from his reasons:

> **45** It is clear that the lynch-pin of the analysis [for determining fear of persecution] is the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded, and thereby the objective reasonableness of his or her unwillingness to seek the protection of his or her state of nationality.
>
> […]
>
> Having established that the claimant has a fear, the Board is, in my view, entitled to presume that persecution will be likely, and the fear well-founded, if there is an absence of state protection. The presumption goes to the heart of the inquiry, which is whether there is a likelihood of persecution. But I see nothing wrong with this, if the Board is satisfied that there is a legitimate fear, and an established inability of the state to assuage those fears through effective protection. […]
>
> **47** More generally, what exactly must a claimant do to establish fear of persecution? As has been alluded to above, the test is bipartite: (1) the claimant must subjectively fear persecution; and (2) this fear must be well-founded in an objective sense. […]
>
> [My emphasis]

[12] After stating the issue in the case before him Justice La Forest then posed the following question and answered it.

> **48** Does the plaintiff first have to seek the protection of the state, when he is claiming under the "unwilling" branch in cases of state inability to protect? The Immigration Appeal Board has found that, where there is no proof of state complicity, the mere appearance of state ineffectiveness will not suffice to ground a claim. As Professor Hathaway, supra, puts it, at p. 130:
>
> > Obviously, there cannot be said to be a failure of state protection where a government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming:
> >
> > > A refugee may establish a well-founded fear of persecution when the official authorities are not persecuting him if they refuse or are unable to offer him adequate protection from his persecutors ... however, he must show that he sought their protection when he is convinced, as he is in the case at bar, that the official authorities -- when accessible -- had no involvement -- direct or indirect, official or unofficial -- in the persecution against him. (José Maria da Silva Moreira, Immigration Appeal Board Decision T86-10370, April 8, 1987, at 4, per V. Fatsis.)
>
> [My emphasis]

[13] Justice La Forest qualified Professor's Hathaway's views:

> **48** […] This was not true in all cases. Most states would be willing to attempt to protect when an objective assessment established that they are not able to do this effectively.
>
> [My emphasis]

[14] He added:

> […] Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness. [My emphasis]

[15] He formulated this aspect of the test for fear of persecution as follows:

> **49** […] Only situations in which state protection "might reasonably have been forthcoming", will the claimant's failure to approach the state for protection defeat his claim. Put another way, the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state. [My emphasis]

[16] Justice La Forest then said:

> **50** The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection.
>
> [My emphasis]

[17] He answered it this way:

> **50 […]** On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state [page725] protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in Zalzali, it should be assumed that the state is capable of protecting a claimant.
>
> [My emphasis]

[18] It is clear from *Ward*, above, that the fact a claimant did not approach the state for protection will not automatically defeat a claim. An objective assessment must be undertaken to establish if the state is able to protect effectively. In other words, the test is whether effective state protection may be reasonably forthcoming. What has to be determined, in each case is whether it was objectively unreasonable for the claimant not to have sought the protection. If it was not objectively unreasonable for Ms. Da Souza not to have sought state protection, she need not have approached the police in St. Vincent. The answer to this question is a matter of the evidence produced on the point.

[19] The fundamental error the PRRA Officer made in this case is that he did not engage in any analysis to answer that question. The PRRA Officer acknowledges violence against women remains a serious problem in St.Vincent. He did not confront the contrary evidence found in the two Country reports concerning St. Vincent he relied on. He ignored other relevant documentation. More particularly, he ignored the numerous decisions of this Court which have determined no state protection was available to women subject to domestic violence in St. Vincent in the particular circumstances of the facts in those cases. I rely on my colleague Justice Sean Harrington decision in *Alexander v Canada (The Minister of Citizenship and Immigration)*, 2009 FC 1305 and the cases he cites at paragraph 7 of his reasons.

[20] It is for these reasons that the judicial review application by Ms. Da Sousa was allowed.

"François Lemieux"

Judge

Ottawa, Ontario
December 13, 2010

FEDERAL COURT

SOLICITORS OF RECORD

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