

Federal Court



Cour fédérale

**Date: 20110728**

**Docket: IMM-6970-10**

**Citation: 2011 FC 957**

**Ottawa, Ontario, July 28, 2011**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**BONTLEBOTSILE SYLVIA KGAODI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 25 October 2010 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

## **BACKGROUND**

[2] The Applicant is a citizen of the Republic of Botswana. She married in 1995. She alleges that her husband became abusive in February 2002, after the Applicant confronted him with the knowledge that he was having an affair with another woman. He moved out of the matrimonial home in February 2002, but she continued to have conjugal relations with him, both consensual and non-consensual, following his departure.

[3] The Applicant alleges that her husband raped her in May 2006. She reported the incident to the police, who arrested the husband within hours. The following day, the Applicant was called to the police station, where the husband apologized to her in the presence of the police. The officers told the Applicant and her husband to “go and settle the matter at home.”

[4] In December 2007, her husband came to her home, raped the Applicant and beat her. She attended a clinic for medical treatment but did not seek protection from the police.

[5] In June 2008, the Applicant told her husband that she was leaving the relationship. He replied that, if she left him, he would find her and kill her.

[6] On 12 July 2008, the Applicant fled Botswana and travelled immediately to Canada, where she made a refugee claim upon her arrival on 13 July 2008. She alleges a well-founded fear of persecution based on her membership in a particular social group, namely female victims of domestic violence.

[7] The Applicant appeared before the RPD on 22 October 2010. She was represented by counsel, and there was no interpreter present. The RPD found the Applicant to be credible but rejected her claim based on the availability of state protection for her in Botswana. This is the Decision under review.

## **DECISION UNDER REVIEW**

### **Credibility**

[8] The RPD stated that, in rendering its Decision, it considered the guidelines for women refugee applicants fearing gender-related persecution. It found the Applicant to be a credible and straightforward witness. It accepted her oral and written evidence that she had had an abusive relationship with her husband and accepted her report of her experiences in Botswana as accurate. It was also satisfied that the Applicant was a victim of domestic violence and that, if she were to return to Botswana, there is a serious possibility that the husband's abusive conduct would resume. The determinative issue was the availability of adequate state protection for the Applicant in Botswana.

### **Legal Principles**

[9] The RPD recognized the presumption that, except in situations where the state is in complete breakdown, a state is capable of protecting its citizens. This presumption underscores the principle that international protection comes into play only when a refugee claimant has no domestic recourse. A refugee claimant can rebut the presumption of state protection only by

adducing clear and convincing, or reliable and probative, evidence which satisfies the tribunal on a balance of probabilities that the state is unable to protect her.

[10] In a functioning democracy that has the willingness and the apparatus necessary to provide a measure of protection to its citizens, the onus is on the refugee claimant to show that she has sought state protection where it might reasonably be forthcoming and has been denied it. Alternatively, she must provide a compelling explanation for why she should not have been required to exhaust all recourses available domestically before claiming refugee status. This is a heavy burden. A refugee claimant cannot rebut the presumption of state protection simply by asserting her subjective reluctance to approach the authorities. Furthermore, no functioning democratic state is expected to protect all of its citizens all of the time. Less than perfect protection is not a basis for finding that state protection is unavailable.

### **The Documentary Evidence**

[11] The documentary evidence before the RPD indicates that Botswana is a functioning democracy. There are free and fair elections and a relatively independent and impartial judiciary. The government is in effective control of its territory and the security force upholds the laws and the Constitution. The issue before the RPD was whether it was objectively unreasonable to expect the Applicant to seek state protection. The RPD determined, based on the evidence, that it was not.

[12] The documentary evidence establishes that domestic violence, especially against women, remains a serious problem in Botswana. However, the US DOS Report for 2009 indicates that rape

laws were being effectively enforced and that over 1500 cases of rape were reported to the authorities. The RPD found that the police were “clearly responding to the issue.” Furthermore, in August 2008, the government passed the Domestic Violence Act, which creates civil remedies for victims while cases make their way through the criminal courts.

### **State Protection for the Applicant**

[13] The Applicant explained that she had not approached the police after her husband beat her in December 2007 because he had threatened to kill her if she did so and because the police are slow to respond to complaints of domestic violence. The RPD found, however, that the Applicant’s own prior experience contradicts this statement. She testified at the hearing that, in May 2006, she filed a complaint against her husband and, within hours, the police had arrested him, and they detained him overnight.

[14] Consequently, the RPD found it unreasonable for the Applicant to have failed to approach the police following the beating of December 2007. The husband no longer lived with her; therefore, she had the ability and the freedom to seek police protection, which had been forthcoming in the past.

[15] According to the Gender Guidelines, a tribunal should consider an applicant’s social, cultural, religious and economic circumstances when determining whether it was objectively unreasonable for her not to have sought state protection. In the instant case, the RPD recognized that the Applicant is a university-educated person, who had previously sought and obtained police

protection. Therefore, it was unreasonable for her not to have sought state protection. Moreover, according to the documentary evidence, police protection appears to have improved since the Applicant fled from Botswana.

[16] The RPD concluded that, in light of the Applicant's personal circumstances, the documentary evidence and the jurisprudence, the Applicant had not rebutted the presumption of state protection with respect to Botswana. For this reason, her claims under sections 96 and 97 must fail.

## **ISSUES**

[17] The Applicant raises the following issue:

Whether the RPD erred by ignoring relevant evidence, misinterpreting the evidence or making erroneous findings of fact.

## **STATUTORY PROVISIONS**

[18] The following provisions of the Act are applicable in these proceedings:

### **Convention refugee**

**96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

### **Définition de « réfugié »**

**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe

social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

#### **Person in need of protection**

#### **Personne à protéger**

**97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

#### **Person in need of protection**

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

#### **Personne à protéger**

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

## **STANDARD OF REVIEW**

[19] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the



reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[20] Treatment of the evidence and factual findings are within the RPD's areas of expertise and are, therefore, deserving of deference. They are reviewable on a standard of reasonableness. See *Dunsmuir*, above, at paragraphs 51 and 53; and *Ched v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1338 at paragraph 11.

[21] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

## **ARGUMENTS**

### **The Applicant**

#### **The RPD's State Protection Findings Were Flawed**

[22] In the Applicant's view, the RPD found that state protection was available to her for the following three reasons:

- a) In May 2006 when the Applicant complained to the police, they arrested the agent of persecution, detained him overnight and this in the opinion of the Board constitutes evidence of effective state protection;
- b) The U.S. [D]epartment of State report for 2009 declares that rape laws were being effectively enforced and the number of reported rape cases during the year rose to over 1500;
- c) The government has passed the Domestic Violence Act 2008, in August 2008, which creates civil remedies and protections for victims while cases make their way through criminal courts.

The Applicant contends that the RPD based these three conclusions on factual errors or on a partial reading of the evidence.

[23] First, the RPD misconstrued the facts when it stated that the Applicant's husband was arrested by police after he beat and raped her in May 2006. The Applicant's Personal Information Form narrative (PIF) never says that the husband was charged or arrested; he was simply told to go home and deal with the matter there. It is preposterous for the RPD to suggest that this supports a finding that state protection is available to the Applicant.

[24] Second, the RPD failed to address the affidavit of the Applicant's nephew, which states that he reported the matter to the police but was told that they were "not interested" in becoming involved in "family matters."

[25] Third, the RPD's analysis ignores documentary evidence suggesting that state protection is unavailable and relies only on passages that support its conclusions. The RPD had a duty to provide reasons for disregarding material and contradictory evidence. In *Lewis v Canada (Minister of*

*Citizenship and Immigration*), 2009 FC 282, Justice James O'Reilly found that the tribunal made a serious error by failing to consider such evidence. He stated, at paragraph 9:

... the very documents relied on by the Board to find a presence of adequate state protection in St. Vincent also question the sufficiency of that protection. In my view, the Board was obliged to explain why it found that the favourable elements contained in the evidence outweighed the negative parts. In the absence of that assessment, I find that the Board's decision was unreasonable in the sense that it was not a defensible outcome in light of the facts and law ....

[26] The Applicant submits that the RPD considered only the US DOS Report and the report of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Report) and, moreover, employed a “partial and disingenuous reading” of that evidence. The RPD’s conclusions, consequently, are completely unreasonable.

[27] The RPD found that the US DOS Report “declares that rape laws were being effectively enforced and the number of reported rape cases during the year rose to over 1,500. The police are clearly responding to the issue.” However, what the RPD does not mention is the Report’s further comments, which state:

[t]he law prohibits rape but does not recognize spousal rape as a crime.... The law does not specifically prohibit domestic violence against women, and it remained a serious problem. Police did not keep statistics for the specific category of domestic violence, as it is not considered a crime under the penal code. Customary law allows husbands to treat their wives in the same manner as minor children. Under customary law husbands may use corporal punishment to discipline their wives, which was common in rural areas. Greater public awareness resulted in increased reporting of domestic violence and sexual assault.

The Applicant asks how the RPD can find that rape laws are being effectively enforced when the law does not recognize spousal rape or domestic violence as crimes under the penal code and when customary law allows corporal punishment.

[28] The RPD's reading of the CEDAW Report is equally flawed. The RPD states that "the government has passed the Domestic Violence Act 2008, in August, 2008 which creates civil remedies and protections for victims while cases make their way through the criminal courts."

However, the CEDAW Report emphasizes that the Domestic Violence Act, in failing to criminalize domestic violence or spousal rape, leaves a "legislative gap" that must be addressed:

The Committee is concerned about the prevalence of violence against women and girls, including domestic violence, which appears to be tolerated by society.... The Committee calls on the State party to enact legislation on domestic violence, including marital rape, sexual harassment and on all forms of sexual abuse as soon as possible. Such legislation should ensure that violence against women and girls constitutes a criminal offence; that women and girls who are victims of violence have access to immediate means of redress and protection; and that perpetrators are prosecuted and adequately punished.

[29] The Applicant argues that the above-noted quotations, which the RPD disregarded, provide evidence that is relevant to the state protection analysis. Indeed, the RPD's own Request for Information Report indicates that domestic violence in Botswana is widespread but victims can only lodge complaints of common assault. The Court has found that the RPD's own documents are central to the analysis of state protection, and failure to demonstrate that they have been considered is a reviewable error. See *Alexander v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1305.

## **The Respondent**

### **The RPD's State Protection Analysis Was Reasonable**

[30] The Respondent submits that the RPD's state protection analysis was reasonable in light of the documentary evidence and was supported by the Applicant's own accounts.

[31] Contrary to the Applicant's assertions, the RPD acknowledged that the documentary evidence was mixed on the issue of domestic violence. However, recent evidence demonstrated that the government was taking steps to address the issue. Rape laws were being effectively enforced; the reporting of rape had increased; and the Domestic Violence Act had been passed in 2008. It was reasonably open to the RPD to find that, although far from perfect, state protection for victims of domestic violence in Botswana was adequate.

[32] The RPD also considered the measures that the Applicant took in the six years of abuse. She went to the police only once, in May 2006, and they responded by arresting her husband. The Applicant contends that the RPD erred in finding that there was an arrest, but it is clear from the accounts in her Port of Entry declaration, her Port of Entry interview and her testimony at the hearing that the police did arrest her husband. In the hearing she stated: "They arrested him, he was arrested ...."

[33] The Applicant also argues that state protection was not available because the husband was not charged or prosecuted. The Respondent replies that the measure of state protection is adequacy,

not effectiveness. The fact that the husband was eventually released does not demonstrate that state protection was inadequate. No state is expected to provide perfect protection all of the time.

[34] Following the 2007 beating and rape, the Applicant sought medical attention but did not go to the police, claiming that she did not have faith in them. However, her claim that the police were slow to act in domestic violence situations is contradicted by her own testimony that she reported her husband to the police and they arrested him on the same day.

[35] The Applicant also states that the RPD ignored evidence in the US DOS Report that the laws of Botswana do not recognize spousal rape. However, the RPD repeated this precise information during the hearing and followed up by stating that the documentary evidence suggests that police are responding to the problem of violence against women.

[36] The RPD is presumed to have considered all of the evidence, and it is clear that, in the instant case, it did so. The RPD disregarded the evidence in the nephew's affidavit because it dealt with the nephew's (not the Applicant's) interaction with the police, and the nephew is not a similarly-situated person such that his experience would be relevant to the state protection analysis for female victims of domestic violence. In consequence, the RPD was not obliged to refer to it.

## **ANALYSIS**

[37] In my view, the heart of this Decision contains a reviewable error.

[38] The RPD reasons as follows at paragraphs 15 and 16 of the Decision:

Counsel for the claimant pointed out that the documentary evidence establishes that domestic violence, especially against women, remains a serious problem in Botswana. On the other hand the U.S. Department of State report for 2009, dated March 2010, declares that rape laws were being effectively enforced and the number of reported rape cases during the year rose to over 1,500. The police are clearly responding to the issue. Furthermore, the government has passed the Domestic Violence Act 2008, in August, 2008 which creates civil remedies and protections for victims while cases make their way through the criminal courts.

The panel asked the claimant why she had not approached the police following the beating by her husband in December, 2007. She replied that she had not done so because her husband threatened her with death if she involved the police. Furthermore, she testified that the police are slow to respond to complaints of domestic violence. Her own prior experience contradicts this statement, however. The claimant testified that within hours of filing a complaint of rape at the Central Police Station, Gabarone, in May 2006, the police had arrested her husband and detained him overnight. In the circumstances, the panel finds it unreasonable for the claimant to have failed to approach the police following the beating of December 2007 which left her visibly wounded. Her testimony was that the husband visited only once or twice per month following his departure from the matrimonial home in February 2002. This would have given her the ability and freedom to seek protection from the police, which had been forthcoming in the past.

[39] This extract makes it clear that, in deciding that the Applicant had not overcome the presumption of adequate state protection in Botswana, the RPD took into account the documentary evidence and the Applicant's own experience with the police.

[40] The RPD refers to two documents. The U.S. Department of State report for 2009, dated March 2010 makes it clear that, in Botswana, the "law prohibits rape but does not recognize spousal rape as a crime." It also makes it clear that the "law does not specifically prohibit domestic violence against women, and it remained a serious problem":

Police did not keep statistics for the specific category of domestic violence, as it is not considered a crime under the penal code. Customary law allows husbands to treat their wives in the same manner as minor children. Under customary law husbands may use corporal punishment to discipline their wives, which was common in rural areas. Greater public awareness resulted in increased reporting of domestic violence and sexual assault.

[41] The RPD says that this DOS report “declares that rape laws were being effectively enforced and the number of reported rape cases during the year rose to over 1,500. The police are clearly responding to the issue.”

[42] The report does indeed say this, but it has no relevance to the Applicant’s situation. The Applicant has been, and may in future be, assaulted and raped as a spouse. The DOS report tells us that the law in Botswana “does not recognize spousal rape as a crime.” The rise in the number of cases of reported rape, and the police response to those cases, has nothing to do with the Applicant’s situation. If the RPD felt that the Applicant was no longer a spouse and that she could seek protection under the criminal law of Botswana for the crime of rape, then it should have explained how it came to this conclusion.

[43] The RPD also relies upon the *Domestic Violence Act* of August, 2008 “which creates civil remedies and protections for victims while cases make their way through the criminal courts.”

[44] Once again, the RPD fails to explain what relevance this has for the Applicant’s spousal situation, as the 2009 U.S. DOS report makes it clear that spousal rape is not a crime in Botswana and the law “does not specifically prohibit domestic violence against women and it remained a serious problem.”



[45] The RPD's errors in this regard give rise to the very problem referred to by Justice O'Reilly in *Lewis* at paragraph 9:

The Minister argues that the Board is presumed to have considered all the evidence before it, even if the Board does not specifically cite it. I agree. However, here, the very documents relied on by the Board to find a presence of adequate state protection in St. Vincent also questioned the sufficiency of the protection. In my view, the Board was obliged to explain why it found that the favourable elements contained in the evidence outweighed the negative parts. In the absence of that assessment, I find that the Board's decision was unreasonable in the sense that it was not a defensible outcome in light of the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47. (emphasis added)

[46] In the present case, the very documents relied upon by the RPD for its state protection analysis actually contradict the RPD's conclusions based upon them. Either the RPD has mistaken what these documents say or it has decided not to explain why it found that the "favourable elements contained in the evidence outweighed the negative parts." Either way, this is a reviewable error. See *Kaur v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1491 at paragraph 29; and *Hooper v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1359 at paragraph 22.

[47] The RPD's assessment of the Applicant's personal evidence, even if reasonable in itself, cannot redeem an unreasonable mistake about what the documentary evidence reveals. Clearly, the RPD relied heavily upon the documentary evidence for its conclusion that the Applicant had not rebutted the presumption of adequate state protection in Botswana. On this ground alone, the matter

must be referred back for reconsideration. There is no need for the Court to consider the other issues raised by the Applicant.

[48] Counsel agree that there is no question for certification and the Court concurs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

“James Russell”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-6970-10

**STYLE OF CAUSE:** BONTLEBOTSILE SYLVIA KGAODI

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 14, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT** **Russell J.**

**DATED:** July 28, 2011

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