Federal Court  Cour fédérale

Date: 20130906

Docket: IMM-9876-12

Citation: 2013 FC 938

Ottawa, Ontario, September 6, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

LEIDY DIANA MANRIQUE FLORES
SALOME ILLARY GARCIA MANRIQUE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*] of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [the Board], made on September 4, 2012, which determined that they were not Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the *Act*;

[2] The applicant, Ms Flores, arrived in Canada from Peru with her young daughter on September 20, 2011 and sought refugee protection alleging persecution by her common law husband. The daughter's claim is derived from that of her mother, Ms Flores.

[3] The Board found that Ms Flores had failed to rebut the presumption of state protection with clear and convincing evidence. The Board was not persuaded that Peru would not be reasonably forthcoming with adequate state protection if Ms Flores returned to Peru and sought such protection.

[4] For the reasons that follow, the application is allowed.

Background

[5] Ms Flores began her relationship with Michael in 2003 when she was 15 years old. He began to physically and sexually abuse her after she first became pregnant in 2005. As a result, she suffered a miscarriage and spent three days in hospital. Despite this incident, she continued the relationship and the pattern of abuse continued. Her daughter was born in April 2007.

[6] Ms Flores testified that on at least eight occasions she sought to report the repeated assaults to the police, but the police would not take a report and advised her to go home and solve her domestic problems. Ms Flores also testified that the police did take reports regarding four assaults, including the 2005 assault which resulted in her miscarriage, although Michael was never arrested or charged with any offence. Ms Flores' evidence was that she lived in fear of Michael and that he repeatedly threatened to kill her and her family if she left him.

[7] The Board acknowledged and referred to some of the serious incidents of assault. On September 18, 2008, Michael punched, kicked, and raped Ms Flores. The following day, she sought medical assistance and reported the assault to the police. The police told her to go home.

[8] On May 14, 2011, upon her return home from visiting her mother, Michael accused Ms Flores of being with someone else, and then beat and raped her. She reported the incident to a special police unit and completed a medical and psychiatric examination. The police issued a summons to Michael, which he ignored without consequences.

[9] On June 1, 2011, Ms Flores returned home from the market and discovered Michael sexually touching their daughter. She intervened and was then beaten and choked by Michael. Michael's mother arrived shortly after the assault and then took Ms Flores and her daughter to the hospital. She remained in the hospital for two days. Although Ms Flores made a statement to the police, she did not have a police report.

[10] Ms Flores then disclosed the abuse to her parents, who lived in the city some distance away. Her parents assisted her to first go to Lima and then to leave Peru. She travelled to Canada via Mexico and the United States of America.

The Decision

[11] The Board found that Ms Flores' testimony was, for the most part, consistent with her written evidence and other documents in support of her claim. However, the Board noted several credibility concerns, most of which had not been put to Ms Flores during the hearing. The Board

noted that it could not draw any negative inferences from the concerns not put to the applicant, but it is difficult to conclude that the Board did not do so given its reference to these issues in its state protection analysis.

[12] The Board found Ms Flores' testimony about the June 1, 2011 assault to be inconsistent because she did not have a police report. The Board noted there was no corroborating evidence to support that the incident occurred. However, the Board acknowledged that a medical report was provided which indicated that she had spent two days in the hospital and which described the injuries suffered. I note that the medical report referred to injuries consistent with strangulation and other contusions and bruising. The Board found it unreasonable that she could provide other police reports but not a report for this incident.

[13] The Board seems to acknowledge, later on in its decision, that Ms Flores did report the June 1, 2011 incident to the police, as it went on to find that she should have waited to see what protection would be forthcoming following that report rather than leaving the country. It appears that the Board accepted that the incident occurred and that the police took a report to support its findings that there was adequate state protection, but not to support Ms Flores' evidence of her efforts to seek protection.

[14] The Board also found it implausible that the applicant did not have contact with her parents and other relatives while she was living with Michael, given that both she and her parents had access to e-mail as of November 2011 (which I note was after the applicant left Peru). The Board implies that she could have contacted her parents for help sooner.

[15] Leaving aside the lack of evidence about whether Ms Flores had access to e-mail at the time she was living with Michael, I do not find it implausible that a victim of repeated abuse by her common law husband would not disclose the abuse to family members or to others. It is not unusual for such victims to not disclose their abuse for many reasons, including shame, self blame and their hope that the situation will improve.

[16] The Board also expressed concerns about Ms Flores' hasty departure from Peru following the June assault, the date of issue of her identification documents, and her explanation about how she obtained Michael's authorization to take their daughter out of the country. The Board noted that these concerns were not raised with Ms Flores at the hearing.

[17] Despite the Board's concerns about credibility, the Board accepted that Ms Flores was in a common law relationship with Michael and that he was abusive.

[18] The Board examined extensive country condition documentation and found that Peru is a democratic country with a functioning political and judicial system which is able to provide "a measure of protection" to its citizens and that the presumption of state protection is strong.

[19] The Board considered evidence about support services available to victims of domestic violence. While the Board recognized that domestic violence is a serious issue in Peru due to ineffective punishment, lack of policing resources, and police indifference, it nevertheless found that the situation is improving due to specialized governmental services, internal investigations into

police ineptitude, and legal reforms, although there was no research on how these reforms were being implemented. Overall, the Board found that Peru has undertaken significant efforts to provide better protection for its citizens, including measures to address violence against women and children.

[20] The Board also noted Ms Flores' history in seeking help from the police.

[21] At para 36, the Board found:

> "I accept that the claimant has had an abusive relationship with Michael and that she did report this abuse to police. While at times they advised her to return home and deal with her domestic situation, the evidence is clear that the police did ultimately take her reports of abuse seriously, when the claimant made complaints while at the hospital and when she attended the police station."

[22] At para 37, the Board concluded:

> "Having reviewed the claimant's circumstances, I am unable to find that the police response particularly in May and June 2011, does not provide clear and convincing evidence that state protection is inadequate."

[23] And at para 51, the Board noted, in response to Ms Flores' testimony that it would be pointless to continue to wait for the police to follow up, or to report to the police or to higher authorities in Lima because "the police do nothing" to help:

> "[…] although the claimant indicated in response to questions by counsel that she had previously attended the police on at least eight occasions when they did not help her, based on the supportive documentation, that is medical reports and police reports, I find that in the circumstances particular to this claimant that the police did respond to complaints made to them".

Standard of Review

[24] The standard of reasonableness applies to the Board's findings of fact and to its state protection analysis given that such an analysis is a question of mixed law and fact (*Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] FCJ No 399 at para 36 [*Carillo*]; *Morales Lozada v Canada (Minister of Citizenship and Immigration)*, 2008 FC 397, [2008] FCJ No 492 at para 17; *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] FCJ No 584 at para 38; *Lopez Villicana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1205, [2009] FCJ No 1499 at para 38).

[25] Where the standard of reasonableness applies, as in this case, the role of the Court is to determine whether the Board's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47). There may be several reasonable outcomes and "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59). While the Court will not re-weigh the evidence or substitute any decision it would have made, it will quash a decision which does not reflect this standard and remit the matter back to the Board for re-determination.

The Issues

[26] Although the Board had some concerns about the applicant's credibility, the determinative issue was state protection.

[27] The applicant submits that the Board's state protection analysis was flawed: the Board conducted a selective analysis of the evidence regarding the ability of Peru to protect its citizens which focused on the efforts being made by Peru rather than the adequacy of state protection; the Board ignored relevant evidence which supported the applicant's submissions that state protection was not adequate, including the applicant's own evidence of her experience; and, the Board erred in assessing the reasonableness of the applicant's efforts to seek state protection in concluding that she had not rebutted the presumption of state protection with clear and convincing evidence.

[28] The respondent submits that the Board is presumed to have considered all of the evidence and is not required to mention every single piece of evidence adduced. The respondent further submits that the Board acknowledged the criticisms and challenges regarding protection for victims of domestic violence in Peru and based its findings on the objective evidence. The respondent submits that, in any event, the applicant did not do enough to seek assistance from the authorities in Peru and that the Board's finding that she failed to rebut the presumption of adequate state protection was reasonable.

[29] In my view, although the Board correctly articulated the key principles governing state protection, it failed to apply those principles to the evidence before it and to the circumstances of the applicant and her efforts to seek state protection.

State Protection

[30] As the respondent notes, the applicant cannot resort to refugee protection without first exhausting the resources of her own country. However, this proposition must be put into context.

[31] In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 18, 103 DLR (4th) 1 [*Ward*], the Supreme Court of Canada set out the rationale underlying the international refugee protection regime which is meant to be relied upon when the protection one expects from the state in which the person is a national is unavailable, and even then, only in certain situations. Refugee protection is considered to be surrogate or substitute protection in the event of a failure of national protection. Persecuted individuals are required to first approach their home state for protection before the responsibility of other states becomes engaged.

[32] The presumption that a state is capable of protecting its citizens is only rebutted by clear and convincing evidence that state protection is inadequate or non-existent and the applicant bears the onus of providing such evidence (*Carillo* at paras 18-19, *Ward* at paras 50-52).

[33] State protection should be adequate; perfection is not the standard. As noted by Justice Crampton, as he then was, in *Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400, [2010] FCJ No 458 at para 52, following a review of the jurisprudence regarding the appropriate test for state protection:

> […] the law is now well-settled that the appropriate test for assessing state protection is whether a country is able and willing to provide adequate protection. In short, a claimant for protection under sections 96 or 97 of the IRPA must establish, with clear and convincing evidence, and on a balance of probabilities, the inability or unwillingness of the state to provide adequate protection. This

> burden of proof remains the same regardless of the country being assessed, although the evidentiary burden required to rebut the presumption of adequate state protection will increase with the level of democracy of the state in question. (*Carrillo*, above, at paras. 25 and 26.)

[34] State protection must also be effective to a certain degree; mere willingness to protect is insufficient (*J B v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 at para 47, 97 Imm LR (3d) 243). Efforts to provide effective state protection must result in adequate state protection at the operational level (*Henguva v Canada (Minister of Citizenship and Immigration)*, 2013 FC 483, [2013] FCJ No 510 at para 18).

[35] In *E Y M V v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364, [2011] FCJ No 1663, Justice Mosley noted the need for the Board to analyze the operational effectiveness of the state's efforts, at para 16:

> While the state's efforts are indeed relevant to an assessment of state protection, they are neither determinative nor sufficient (*Jaroslav v Canada (Minister of Citizenship and Immigration)*, 2011 FC 634, [2011] FCJ No 816 at para 75). Any efforts must have "actually translated into adequate state protection" at the operational level (*Beharry v Canada (Minister of Citizenship and Immigration)*, 2011 FC 111 at para 9.

[36] An applicant need not seek state protection if to do so would expose her to a risk to her life (*Ward*, at para 48). The onus on an applicant to seek state protection is commensurate with the state's ability and willingness to provide protection. As noted by Justice Rennie in *Sow v Canada* (*Minister of Citizenship and Immigration*), 2011 FC 646, [2011] FCJ No 824 at para 10:

> This principle, however, does not stand in isolation. It is tempered by the fact that the presumption varies with the nature of the democracy in a country. Indeed, the burden of proof on the claimant is proportional to the level of democracy in the state in question, or the

> state's position on the "democracy spectrum": *Kadenko v Canada (Minister of Citizenship and Immigration)* [1996] FCJ No 1376 at para 5; *Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359 at para 30; *Capitaine v Canada (Citizenship and Immigration)* 2008 FC 98 at paras 20-22.

[37] In this case, while the Board extensively reviewed the country condition documents and noted some of the criticisms of Peru's ability to offer protection to victims of domestic violence, it did not conduct a real analysis of the operational adequacy of Peru's state protection efforts.

[38] The Board referred to a range of initiatives and efforts underway in Peru to address domestic violence. However, the existence of other agencies and resources is not a substitute for police protection. This Court has held that where an applicant is at risk of violence, it is the police that are presumed to be primarily responsible to provide protection and to enforce the law. While other resources may exist to assist victims of violence, these do not provide adequate state protection for individuals in the circumstances of the applicant (*Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326, [2012] FCJ 1444 at para 15; *Aurelien v Canada (Minister of Citizenship and Immigration)*, 2013 FC 707, [2013] FCJ No 752 at para 16 [*Aurelien*]). This principle was articulated by Justice Tremblay-Lamer in *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, [2008] FCJ No 625 at para 25:

> 25 I am of the view that these alternate institutions do not constitute avenues of protection *per se*; unless there is evidence to the contrary, the police force is the only institution mandated with the protection of a nation's citizens and in possession of enforcement powers commensurate with this mandate. For example, the documentary evidence explicitly states that the National Human Rights Commission has no legal power of enforcement ("Mexico: Situation of Witness to Crime and Corruption, Women Victims of Violence and Victims of Discrimination Based on Sexual Orientation").

> See also: *Risak v Canada (Minister of Employment and Immigration)*, [1994] FCJ no 1581, 25 Imm LR (2d) 267 at para 11.

[39] Bearing these principles in mind, it was not reasonable for the Board to conclude that state protection for domestic violence victims in Peru, like the applicant, was adequate at the operational level. The Board noted the laws on the books, but then acknowledged that the police were indifferent, that few victims reported due to delays in processing or expense, that punishments, if any, were light along with other such criticisms. This evidence does not support the Board's finding.

[40] The analysis of the adequacy of state protection and an applicant's efforts to rebut the presumption of state protection must also take into account the particular context and the circumstances of the applicant. In this case, the applicant was a young woman who had been abused by her common law partner for over six years, with limited education, living in a rural area without family or other relatives close by. The Board's expectation that she would wait for the police to follow up on her report of the June 2011 assault, pursue higher authorities in major cities (which she explained were eight hours travel distance away), or seek out other agencies for assistance, suggests that the Board failed to consider her circumstances – a young woman in a longstanding abusive relationship, in a rural area, with a young child and a history of police indifference and inaction.

[41] Although the Board indicated that it considered the Chairperson's *Gender Guidelines* [the "Guidelines"] in its analysis, the Guidelines are not sufficient on their own to provide the necessary context. In *Codogan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 739, [2006] FCJ No 1032, Justice Teitelbaum highlighted the need to consider the circumstances of an applicant along with the other evidence (including the application of the Guidelines) and found at para 32:

> In my view, the RPD could not simply refer to the documentary evidence and determine that state protection would be available to the applicant. This approach fails to consider the particular circumstances of the individual. In my opinion, the RPD should have examined the Applicant's situation, and, with the assistance of the documentary evidence, determined whether state protection could be available for the Applicant's situation of having an abusive ex-boyfriend still seeking her. The panel's failure to consider the Applicant's context in my view amounts to a reviewable error.

[42] Similarly, in *Aurelien*, Justice Rennie noted at para 9:

> [9] An applicant need not seek state protection if the evidence indicates it would not reasonably have been forthcoming. The Officer must consider whether seeking protection was a reasonable option for the applicant, in her circumstances. When the relevant circumstances include domestic abuse, the Supreme Court of Canada has outlined specific considerations that must be taken into account, including the psychological effects that abuse has on a victim. The issue as framed in *R v Lavallee*, [1990] 1 SCR 852, is what the applicant "reasonably perceived, given her situation and her experience." The test is thus subjective and objective.

[43] The Board focused its inquiry on governmental efforts to address domestic violence rather than on whether those admirable efforts had resulted in effective state protection at the operational level. The Board remarked that "the authorities in Peru are making serious efforts to curb violence against women." The Board also noted that various government agencies "have been working to eliminate all forms of family violence in Peru."

[44] Although the Board stated that it considered the country condition documents and noted some criticisms of the efforts underway, including that domestic violence remains a significant problem, that there is no effective punishment, that processing of complaints is very slow, that few women file police reports due to a fear of retaliation or due to the expense of doing so, and that

police remain indifferent to domestic abuse "despite the law that mandates otherwise", the Board relied on the efforts of agencies other than the police, including hot lines and services provided by non-governmental organisations.

[45] The Board also relied on the fact that the police took at least two reports (and the applicant's evidence was that the police took four reports) and equated that with an adequate police response. While arrests and convictions are not always possible and are not the measure of adequate state protection, something more than a police report, which is not acted upon, is needed.

[46] Where the evidence before the Board establishes that the serious efforts of the state have not resulted in operational adequacy and that serious challenges remain, which in the present case is reflected by the applicant's own experiences, the presumption of adequate state protection cannot prevail only because a country is a democracy and is making such serious efforts.

Conclusion

[47] The Board concluded that the applicant did not rebut the presumption of state protection because she did not do more to avail herself of the protection offered by Peru, but instead sought the surrogate protection of Canada. The documentary evidence indicates that the police are "indifferent" to such violence and the applicant's own evidence supports that the police were, indeed, indifferent to her reports. The repeated reaction of the police to the applicant's reports of sexual and other assaults was to go home and solve her problems and on the few occasions when the police did take a report, the police did not charge or arrest Michael nor did they enforce the two summons that were issued. Given the applicant's experience and the objective evidence, the Board's finding that there

was adequate state protection and that the applicant failed to make reasonable efforts to seek state protection is not supported by the evidence and is, therefore, not reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. No question is certified.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9876-12
STYLE OF CAUSE:	LEIDY DIANA MANRIQUE FLORES ET AL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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