**Date: 20080312**

**Docket: A-225-07**

**Citation: 2008 FCA 94**

**CORAM:** **LÉTOURNEAU J.A.**
**NADON J.A.**
**SHARLOW J.A.**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Appellant**

**and**

**MARIA DEL ROSARIO FLORES CARRILLO**

**Respondent**

Heard at Toronto, Ontario, on March 10, 2008.

Judgment delivered at Toronto, Ontario, on March 12, 2008.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NADON J.A.
SHARLOW J.A.

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## REASONS FOR JUDGMENT

**LÉTOURNEAU J.A.**

[1] We are being asked to answer the following questions certified pursuant to paragraph 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, ch. 27 (Act):

> What is meant by the presumption of state protection (as mentioned in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689)? Does it impose a particular standard of proof on refugee claims [sic] to rebut it, or does it merely impose an obligation to present reliable evidence of a lack of state protection? If it imposes a particular standard of proof, what is it?

[2] In a decision rendered on March 26, 2007, O'Reilly J. of the Federal Court of Canada (judge) allowed the respondent's application for judicial review and ordered a new hearing by the Immigration and Refugee Board – Refugee Protection Division (Board). The Minister of Citizenship and Immigration (Minister) appeals that decision. For the reasons which follow, I believe the appeal should be granted.

**The facts**

[3] I need not relate the facts in detail. It is sufficient at this stage to say that the respondent, Ms. Flores Carrillo, is a citizen of Mexico who sought refugee protection in Canada in 2004. She stated that her common-law spouse began abusing her in 2001. She complained to the police in January 2004, after a severe beating and after she had hid at a friend's house. However, her spouse found out where she was hiding. She explained that to find her, he had help from his brother, a federal judicial police officer. Because she was of the view that she could not get state protection in Mexico, she fled that country on October 20, 2004. She arrived in Canada the same day and made a claim for refugee protection upon arrival.

**The decision of the Board**

[4] The Board dismissed the respondent's claim. It was of the view that the respondent was not a Convention refugee or a person in need of protection. It came to that conclusion for two reasons.

[5] First, the Board did not find the respondent "to be a credible and trustworthy witness with respect to her efforts to seek state protection": see the reasons for decision, appeal book, at page 41. This finding of the Board came as a result of the inconsistencies within the body of the respondent's evidence.

[6] Second, the Board concluded that even if it had found the respondent to be credible, she had failed to rebut "the presumption of state protection with "clear and convincing" evidence within the "preponderance of probability category" as stated in *Xue*". The Board referred in fact to the following statement of Rothstein J. of the Federal Court Trial Division (as he then was) in the case of *Xue v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1728, at paragraph 12.

> [12] Having regard to the approach expressed by Dickson C.J.C. in *Oakes*, i.e. that in some circumstances a higher degree of probability is required, and the requirement in *Ward* that evidence of a state's inability to protect must be clear and convincing, I do not think that it can be said that the Board erred in its appreciation of the standard of proof in this case. If the Board approached the matter by requiring that it be convinced beyond any doubt (absolutely), or even beyond any reasonable doubt (the criminal standard), it would have erred. However, the Board's words must be read in the context of the passage in *Ward* to which it was referring. Although, of course, the Board does not make reference to *Oakes* or *Bater*, and while it would have been more precise for the Board to say that it must be convinced within the preponderance of probability category, it seems clear that what the Board was doing was imposing on the applicant, for purposes of rebutting the presumption of state protection, the burden of a higher degree of probability commensurate with the clear and convincing requirement of *Ward*. In doing so, I cannot say that the Board erred.
>
> [Emphasis added]

[7] Indeed, the Board noted that the respondent "only reported the abuse on one occasion and never made a complaint about the involvement of the abuser's brother, a federal judicial police

officer". The Board considered that fact in the context of the information on the record relating to the availability of state protection and found that the respondent's evidence was not sufficient to meet the onus of providing clear and convincing proof that state protection would not be available to her: see the reasons for the Board's decision, appeal book, at page 49.

[8] In addition, the Board ruled that the "fact that a state does not provide perfect protection is not, in itself, a basis for determining that the state is unwilling or unable to offer reasonable protection in the circumstances: *ibidem*, at pages 49 and 50.

**The decision of the Federal Court**

[9] According to the judge, the Board imposed too high a standard of proof with respect to the issue of whether there was state protection available in Mexico. This, he said, amounted to an error of law.

[10] In addition, the judge concluded that the presumption of state protection is a legal presumption which can be rebutted when a claimant adduces reliable evidence of the particular state's inability to offer protection: see paragraphs 16, 17 and 30 of his reasons for judgment.

[11] Furthermore, the learned judge ruled that the case of *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 did not establish a special standard of proof in relation to state protection: *ibidem*, at paragraphs 19 and 24. In his view, La Forest J. in *Ward* simply describes "the kind of

evidence that would be capable of satisfying the objective branch of the definition of a refugee" when he required that there be a clear and convincing confirmation of a state's inability to protect: *ibidem*, at paragraph 24. This requirement does not refer to a standard of proof greater than a balance of probabilities: *ibidem* at paragraphs 22, 23 and 24.

**The submissions of the parties**

[12] The appellant raises two grounds of appeal. The judge erred in concluding that the presumption of adequate state protection is a legal presumption. Rather he submits that it is a factual presumption rebuttable by means of "clear and convincing evidence". Therefore, it was also an error for the judge to rule that the respondent needed only to adduce reliable evidence of the state's inability to protect her in order to rebut the presumption.

[13] Counsel for the respondent supports the judge on all his findings although he agreed that, in relation to the presumption of state protection, what matters for his client is that the presumption is one that is rebuttable, not whether it is a legal or a factual presumption. I do not think there is any doubt that the presumption is rebuttable.

**Analysis of the decision**

[14] It is unfortunate that the judge did not address the primary finding of the Board regarding the lack of credibility of the respondent. Had he done that, it might not have been necessary for him

to address the alternative and secondary ground on which the Board rested its decision. The litigation would have ended there and scarce judicial resources would have been spared.

[15] In the end, as a result, we are seized with an appeal the focus of which is on a subsidiary ground for dismissing the respondent's claim when the main reason for dismissing it, i.e. the lack of credibility, has been totally evacuated from the debate before us and ignored by the parties. In view of the substantial deference required to be given to credibility findings, the judge should have dealt with this issue first.

**Burden of proof, standard of proof and quality of the evidence**

[16] Burden of proof, standard of proof and quality of the evidence necessary to meet the standard of proof are three different factual realities and legal concepts which should not be confused. Unfortunately, as counsel for the respondent pointed out, the words are often used interchangeably, resulting in confusion of the three concepts and realities.

a) The burden of proof

[17] The respondent claims that the state of Mexico could not or failed to provide her with state protection against her husband's physical abuse. As a result of her claim, the respondent bears both an evidentiary and a legal burden.

[18] Indeed, in order to rebut the presumption of state protection, she must first introduce evidence of inadequate state protection (for the sake of convenience, I will use “inadequate state protection” as including lack of such protection). This is the evidentiary burden.

[19] In addition, she must convince the trier of fact that the evidence adduced establishes that the state protection is inadequate. This is the legal burden of persuasion.

b) The standard of proof

[20] A claimant must assume his or her legal burden on a balance of probabilities. I agree with the judge that the *Ward* case does not require a higher probability than what is normally required on the balance of probabilities standard to meet the legal burden.

[21] I also agree with the judge that, to the extent that relying on the *Xue* case, *supra*, meant a higher degree of probabilities than what is normally required by the standard, this is an error of law.

[22] It is true that, in the case of *R. v. Oakes*, [1986] 1 S.C.R. 103, Chief Justice Dickson introduced a requirement that there be a heightened standard of proof, that is to say a higher probability than the usual standard. At paragraphs 67 and 68, he wrote:

> [67] Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase “demonstrably justified” in s. 1 of the Charter supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, The Law of Evidence in

> Civil Cases (Toronto: 1974), at p. 385. As Lord Denning explained in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), at p. 459:
>
> > The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.
> > …
>
> [68] Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion".

[23] However, as Chief Justice Dickson himself acknowledged, his statement was made in the context of a Charter challenge to a fundamental constitutional right and a section 1 argument that the limit to such right is demonstrably justified in a free and democratic society. The Chief Justice was addressing a state intrusion on, or a curtailment of, a citizen's constitutionally guaranteed right. In view of the issue at stake, it is not surprising that the Supreme Court of Canada would require a higher standard of proof, short of proof beyond reasonable doubt, to ensure a better protection of constitutionally guaranteed rights against state infringement.

[24] Here, however, we are dealing with a different question. We are, so to speak, in a different ballpark. It is often a bewildered and resourceless refugee trying to rebut a presumption of state protection by establishing that the protection is inadequate. Nothing requires a departure from the usual balance of probabilities standard applicable to rebuttals of presumptions in administrative or civil matters.

[25] I think that La Forest J. properly stressed in paragraph 51 of the *Ward* case, *supra*, that the "presumption serves to reinforce the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the claimant". The presumption indicates that the responsibility towards a refugee first lies with the state of which the refugee is a citizen. It is in that sense that La Forest J., in my respectful view, said that "this presumption increases the burden on the claimant": *ibidem*. His reference to the burden on the claimant was not a reference to the burden of proof in the legal sense, but rather to the difficult task of rebutting a presumption that the claimant's state is able to provide adequate protection.

[26] 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.

[27] This brings me to the substance of the third concept, i.e. the quality or nature of the evidence. It is on this issue that I disagree with the position taken by the judge.

c) The nature or quality of the evidence required to rebut the presumption

[28] Although the judge discussed the "clear and convincing evidence" requirement to rebut the presumption of state protection, in the end he substituted a lower threshold. At paragraph 30 of his reasons for judgment, he wrote:

> In my view, the presumption of state protection falls away once the claimant has provided reliable evidence of a lack of state protection.

Evidence of the substitution also appears in the questions that he certified.

[29] I agree with counsel for the appellant that this is an error of law. It is not disputed that this error is reviewable on a standard of correctness.

[30] In my respectful view, it is not sufficient that the evidence adduced be reliable. It must have probative value. For example, irrelevant evidence may be reliable, but it would be without probative value. The evidence must not only be reliable and probative, it must also have sufficient probative value to meet the applicable standard of proof. The evidence will have sufficient probative value if it convinces the trier of fact that the state protection is inadequate. In other words, a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate.

**Application of these principles to the present case**

[31] The Board acknowledged the prevalence of domestic abuse in Mexico. It then reviewed the various steps taken by the authorities to address the issue: see the Board's reasons at pages 43 to 49 of the appeal book.

[32] It proceeded to review the law governing the presumption of state protection. It stated that local failures to provide effective policing do not amount to a lack of state protection. Relying upon the findings of this Court in *Kadenko v. Canada (Solicitor General)* (1996), 143 D.L.R. (4th) 532, leave to appeal to the Supreme Court of Canada refused on May 8, 1997, it stated that "the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her": *ibidem*. It found that Mexico is a fledgling democracy governed by the rule of law: *ibidem*, at pages 43-44.

[33] The Board found that the respondent had failed to make determined efforts to seek protection. She reported to police only once during more than four years of alleged abuse: *ibidem*, at page 45.

[34] In addition, the Board concluded based on the evidence before it that the respondent did not make additional effort to seek protection from the authorities when the local police officers allegedly did not provide the protection she was seeking: *ibidem*. She could have sought redress through National or State Human Rights Commissions, the Secretariat of Public Administration, the

Program Against Impunity, the General Comptroller's Assistance Directorate and the complaints procedure at the office of the Federal Attorney General: *ibidem*, at page 49.

[35] Finally, the Board noted the respondent's omission to make a complaint about the involvement of the abuser's brother, who allegedly is a federal judicial police officer, when the evidence indicates that substantial, meaningful and often successful efforts have been made at the federal level to combat crime and corruption: *ibidem*, at pages 46 and 49.

[36] Considering the principles relating to the burden of proof, the standard of proof and the quality of the evidence needed to meet that standard defined as a balance of probabilities against the factual context, I cannot say that it is an error or unreasonable for the Board to have concluded that the respondent has failed to establish that the state protection is inadequate.

**Conclusion**

[37] For these reasons, I would allow the appeal, set aside the decision of the Federal Court and restore the decision of the Board.

[38] I would answer the certified questions as follows:

> A refugee who claims that the state protection is inadequate or non-existent bears the evidentiary burden of adducing evidence to that effect and the legal burden of persuading the trier of fact that his or her claim in this respect is founded. The standard of proof applicable is the balance of probabilities and there is no requirement of a higher degree of probability than what that standard usually requires. As for the quality of the evidence required to rebut the presumption of state protection, the presumption is rebutted by clear and convincing evidence that the state protection is inadequate or non-existent.

"Gilles Létourneau"

J.A.

"I agree
M. Nadon J.A."

"I agree
K. Sharlow J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-225-07 |
| **(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE O'REILLY OF THE FEDERAL COURT, DATED APRIL 25, 2007, IN FEDERAL COURT FILE NO. IMM-822-06.)** | |
| **STYLE OF CAUSE:** | THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. MARIA DEL ROSARIO FLORES CARRILLO |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | March 10, 2008 |
| **REASONS FOR JUDGMENT BY:** | LÉTOURNEAU J.A. |
| **CONCURRED IN BY:** | NADON J.A.<br>SHARLOW J.A. |
| **DATED:** | March 12, 2008 |

**APPEARANCES:**

| | |
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