Federal Court | Cour fédérale

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SUBJECT / OBJET :

Court File No. / N° du dossier de la Cour: IMM-1409-13

Between / entre: JUSTIN v. MCI

Enclosed is a true copy of the Order / Judgment / Reasons of: // Vous trouverez ci-joint une copie conforme de l'ordonnance / jugement / motifs de: Kane J. dated / daté du Apr. 30/14

COMMENTS / REMARQUES :

IR allowed.

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Federal Court  Cour fédérale

Date: 20140430

Docket: IMM-1409-13

Ottawa, Ontario, April 30, 2014

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

SAMANTHA JUSTIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT

UPON CONSIDERING this Application for Judicial Review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "*Act*"], of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board") made on November 23, 2012, which found that the applicant was not a Convention refugee nor a person in need of protection under sections 96 or 97 of the *Act*..

AND UPON considering the written and oral submissions of counsel for the applicant and for the respondent and the Certified Tribunal Record;

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed for the reasons that follow.

The applicant, Samantha Justin, is a young woman from St Lucia. She fears persecution and harm from her ex-common-law spouse, Alexander Joseph. She met Mr Joseph when she was 19 years of age and he was 43. They lived together for six years. In 2008, their relationship began to deteriorate and in March 2010 she decided to leave him. Mr Joseph turned violent and assaulted her and her siblings with a machete. He continued to beat and threaten her. The applicant reported her situation to the police many times, but no action was taken because Mr Joseph had told the police that the applicant had mental health issues, like her mother, whose severe mental illness was known in the community. By December 2010, Mr Joseph had found another girlfriend. However, in May 2011, he sought to reconcile with the applicant. She refused and he raped her twice with a knife to her throat. In July 2011, she fled to Canada and made a claim for protection in September 2011.

The Board found that the determinative and only issue was state protection. It found St Lucia to be a functioning democracy that is presumed to be capable of protecting its citizens, notwithstanding its present social, political, economic and cultural problems. The Board found that the applicant had not rebutted the presumption of state protection with clear and convincing evidence.

The Board considered the documentary evidence and found that St Lucia adequately and effectively protects victims of domestic violence and abuse. The Board acknowledged that violence against women remains a serious problem, that the police may be slow in responding in some cases, that the court system is overburdened, and that the situation is complicated by the

reluctance of victims to report their abuse, which in turn leads to police apathy. However, it also noted the legal and social reforms and the serious efforts being made to address gender violence.

The Board found that the applicant did not avail herself of state protection mechanisms; she was required to seek state protection, notwithstanding any reluctance, and when the local police officers did not respond, she should have asked a higher-ranking officer for help or availed herself of other assistance, such as a women's shelter or the court.

The applicant argued that the Board erred in its state protection analysis by: ignoring or selectively relying on the documentary evidence; failing to consider the applicant's circumstances; and, applying the wrong test.

The overall issue is whether the Board's decision, which is based solely on its state protection finding, is reasonable; that is, does the decision meet the requirements of "justification, transparency and intelligibility" and does it fall within the "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 [*Dunsmuir*]).

I find that the decision does not meet the *Dunsmuir* standard.

The Board's state protection analysis is flawed. The Board selectively relied on parts of the documentary evidence to support its conclusion that there was adequate and effective state protection for the applicant. In addition, the Board failed to consider the applicant's circumstances in assessing if her efforts to seek state protection were reasonable. Although the Board cited many of the relevant principles with respect to state protection, several of those

principles are not at all applicable in this case. The Board also failed to consider other principles which would be applicable.

As noted by the applicant, the Board did not doubt her credibility. As such, the Board presumably accepted, as it did acknowledge, that her mother suffers from severe mental illness, which is well known in their community in St Lucia. Her evidence was also that the police were aware of her mother's mental illness which undermined her ability to access state protection.

The applicant also noted the documentary evidence which portrays a bleaker picture of state protection for victims of domestic violence in St Lucia than that acknowledged by the Board, namely that state protection mechanisms and support services are either not viable or adequate for victims of domestic violence.

The Board noted that domestic violence remains a problem because the police response might be slow and the court system is overburdened. However, relying on the documentary evidence, it found that state protection is adequate and effective. As noted by the applicant, the same documentary evidence referred to by the Board included other information which contradicted this conclusion.

In *Hooper v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1359 at para 22, 68 Imm LR (3d) 106, Justice De Montigny addressed an argument similar to that made by the applicant and noted:

> [22] The respondent argued that the Board did turn its mind to the existence of contradictory evidence, as evidence by its statement that the "documentary evidence is mixed" in the matter relating to domestic violence. But this is not enough, for a number of reasons. First of all, the contradictory evidence was contained in the very same document that the Board relied upon, and it came

> from a credible source, a non-governmental organization that provides direct service to abused women. If the Board saw fit to refer to Marion House in its endeavour to establish that women are not left to themselves when assaulted by a violent partner, it should also have paid attention to the assessment of the situation by that same organization.

Similarly in *Lewis v Canada (Minister of Citizenship and Immigration)*, 2009 FC 282 at paras 9-10, [2009] FCJ No 347, Justice O'Reilly noted:

> 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 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: *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47.
>
> 10 I note that Justices Yves de Montigny and John O'Keefe came to similar conclusions about the Board's treatment of evidence relating to state protection in *St. Vincent in Hooper v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1359, [2007] F.C.J. No. 1744 (QL) and *King v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 774, [2005] F.C.J. No. 979 (QL), respectively.

The Board considered and cited several of the relevant principles regarding state protection but did not conduct a full analysis. It failed to consider the applicant's own circumstances and whether the various initiatives for domestic violence victims would protect her from abuse by Mr Joseph. The uncontested evidence was that the applicant repeatedly sought the help of the police but her reports were dismissed because the police thought her story was fabricated, because Mr Joseph had told the police that she was mentally ill like her mother.

It is well settled that there is a presumption that a state is capable of protecting its citizens. The presumption is only rebutted by clear and convincing evidence that state protection is inadequate or non-existent (*Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 38, [2008] 4 FCR 636 [*Carrillo*]). The onus is at all times on the applicant to provide that evidence; claimants "must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate" (*Carrillo*, above at para 30).

In the present case, the applicant's evidence is that she approached the police countless times and they did nothing. Her credibility was not challenged. However, the Board regarded her efforts as insufficient.

The Board did not consider whether making additional efforts, such as seeking out a higher-ranking police officer, would be reasonable in her circumstances, or would have made any difference, particularly given the fact that she had been labelled as mentally ill. Similarly, in suggesting that the applicant should have sought assistance from a shelter or other services, the Board ignored the jurisprudence that establishes that in matters of violence, the police are tasked with protection, not other social services (*Henguva v Canada (Minister of Citizenship and Immigration)*, 2013 FC 483 at para 19, 17 Imm LR (4th) 331 [*Henguva*]; *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, [2009] 1 FCR 237).

The Board also made several comments that appear to be excuses for the lack of police response, including that victims are reluctant to report and that some later recant, which "frustrates the regulators and enforcers". This was not a relevant factor for this applicant. The Board also noted that "abuse often occur (*sic*) at night when the police are not readily available

and accessible to victims is also problematic." This latter statement is absurd as it suggests that the police do not work at night, and is clearly irrelevant to the current facts or to any facts.

The Board demanded a level of effort from the applicant that does not reflect the principle that the reasonable steps to seek state protection must be assessed in the context of the circumstances of the applicant.

The Board noted that the applicant did not "really test the protection available because she was required to take reasonable steps to seek protection that would reasonably be forthcoming, and she did not do so." This finding ignores the fact that she did report to the police on many occasions and she did not receive the protection that would be reasonably forthcoming if the state protection measures the Board relied on were operational for her. It was reasonable for the applicant to expect the police to take her report seriously and to investigate it rather than to discount her report because her alleged abuser had told the police that she was mentally ill. Even if she had been mentally ill, and there was no such evidence, the police would have had the same duty to investigate her report.

In *Codogan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 739, 293 FTR 101, Justice Teitelbaum allowed judicial review with respect to a decision based solely on state protection for a victim of domestic abuse and noted, at para 32:

> The RPD did not consider the Applicant's particular fear in this case. [...] 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.

While the Board noted the legislative reforms and the ongoing challenges in St Lucia, it failed to consider the applicant's circumstances and that, in such circumstances, the police would be primarily responsible for the state protection needed and the police had not been of any assistance. While the Board identified possible assistance from shelters, as Justice Tremblay-Lamer noted in *Henguva*, above at para 19:

> [...] The fact that a claimant did or did not seek protection from non-governmental groups is irrelevant to the analysis of state protection. The jurisprudence of this Court is clear that the police force is presumed to be the main institution mandated to protect citizens and that other governmental or private institutions are presumed not to have the means nor the mandate to assume that responsibility (*Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326 at para 15).

As noted by the respondent, refugee protection in Canada is not a substitute for seeking state protection in one's home country. The Supreme Court of Canada set out the rationale underlying the international refugee protection regime in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 18, 103 DLR (4th) 1. Refugee protection is meant to be relied upon when the protection one expects from the state in which the claimant is a national is unavailable, and even then, only in certain situations. It is considered to be surrogate or substitute protection in the event of a failure of state protection. Claimants are, therefore, required to first approach their home state for protection before the responsibility of other states becomes engaged.

I agree with the respondent, as a general proposition, that individuals facing persecution or facing risks to their life or to cruel and unusual treatment or punishment in their home country must make all reasonable efforts to seek protection there rather than focussing their efforts on

leaving the country and seeking refugee protection abroad. However, the jurisprudence has established how those efforts should be assessed. This judicial review is not about the policy of the *Act* or the rationale for international refugee protection, which is well understood and provides the necessary context, but is about whether the Board's decision was reasonable, particularly whether it erred in assessing the adequacy of state protection for this applicant and whether her efforts to seek state protection were sufficient to rebut the presumption.

I find that the Board did err and, as a result, must reconsider the applicant's claim for refugee protection. In doing so, the Board should fully canvass the principles regarding state protection and apply them to the evidence provided by the applicant which the Board finds to be credible.

The application for judicial review is allowed. No question was proposed for certification.

"Catherine M. Kane"
Judge