Date: 20080328

Docket: IMM-3058-07

Citation: 2008 FC 403

Ottawa, Ontario, March 28, 2008

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

PAWEL PIOTR MUSIALEK
And
KAROLINA POLAK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Pawel Piotr Musialek and Karolina Polak are citizens of Poland. They claim refugee protection because they say they have a well-founded fear of persecution at the hands of Ms. Polak's father. Ms. Polak says that her mother was, and continues to be, physically abused by her father. Ms. Polak also says that, if she returns to Poland, she faces the same threat because she is in a common-law relationship with Mr. Musialek and has conceived a child with him outside of marriage. Ms. Polak further says that her father has threatened "to get even" with Mr. Musialek. Ms. Polak and Mr. Musialek believe that no protection would be available to them in Poland.

[2] The Refugee Protection Division of the Immigration and Refugee Board (Board) dismissed their claims to refugee protection because it found that they had not rebutted at the presumption of state protection and that the "compelling reasons" provision found in subsection 108(4) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), had no application. While not determinative of its conclusion, the Board also found that the claimants' delay in seeking protection showed a lack of subjective fear.

[3] This application for judicial review of that decision is dismissed because the Board's assessment of the existence of state protection was reasonable and the Board did not otherwise err.

STANDARD OF REVIEW

[4] The two significant issues raised in this application are the Board's conclusions with respect to state protection and subsection 108(4) of the Act. The parties did not make detailed submissions with respect to the standard of review.

[5] Counsel suggested that the finding of state protection should be reviewed on the standard of reasonableness. I agree. See: *Hinzman v. Canada (Minister of Citizenship and Immigration)* (2007), 362 N.R. 1 at paragraph 38 (F.C.A.), and *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 55, 57, 62 and 64.

[6] The applicants, citing no relevant portion of the *Dunsmuir* decision but relying instead upon prior jurisprudence, submitted that the standard of review applicable to the Board's interpretation of subsection 108(4) of the Act was correctness. The respondent suggested that *Dunsmuir*, at paragraph 55, "opened the door" to the conclusion that the standard of review was reasonableness. The matter was left for the Court to determine.

[7] A contextual analysis that takes into account the presence or absence of a privative provision, the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal may lead to the conclusion that reasonableness is the proper standard of review. See: *Dunsmuir* at paragraph 64.

[8] However, in the present case, I am satisfied that the Board's legal interpretation of subsection 108(4) withstands review on either the reasonableness or correctness standard. I prefer to leave this issue to be decided on the basis of more detailed submissions.

THE BOARD'S CONCLUSION WITH RESPECT TO STATE PROTECTION

[9] In *Canada (Minister of Citizenship and Immigration) v. Flores Carrillo*, 2008 FCA 94, the Federal Court of Appeal recently restated the relevant legal principles. At paragraph 30, the Court of Appeal wrote that 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 state protection is inadequate.

[10] A review of the transcript of the hearing shows that Ms. Polak testified that:

- her mother called the police on several occasions;
- when her mother called police, they would come and, in most cases, try to calm her father down;
- on one occasion, the police arrested her father and released him after 24 hours;
- she did not know how many times her mother called police, but perhaps five or ten times;
- she never called police to complain about her father; and
- she did not go to the police because she believed it would not help much and might put her mother in more danger.

[11] The Board found that Ms. Polak had never approached police to seek protection, but did take note of Ms. Polak's testimony that she feared contacting police would only increase the risk to her mother.

[12] The Board then reviewed the documentary evidence. It accepted that domestic abuse of women was a serious problem in Poland and that the responses of police were sometimes inadequate. However, the Board noted that the documentary evidence indicated that Poland was making serious efforts to address the problem. The Board pointed to the criminalization of

domestic violence, the introduction of the “Blue Card System,” and the increase in police intervention in domestic-related incidents. The Board also noted the increased awareness in Poland of the issue of violence against women, which it attributed in part to women’s groups and non-governmental organizations. The Board found that Ms. Polak failed to take any steps to obtain protection in Poland before seeking protection in Canada. After noting that five years had passed since Ms. Polak’s departure from Poland, the Board concluded that she would be able to access state protection upon her return. The applicants were found to have failed to rebut the presumption of state protection.

[13] In *Dunsmuir*, at paragraph 47, the majority of the Supreme Court of Canada instructed that:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[14] The reasons of the Board are intelligible, based on the evidence before it, and adequately justify the Board's conclusion that the applicants had not rebutted the presumption of state protection. The Board's application of the law to the evidence before it also leads me to conclude that the Board's decision falls within the range of acceptable outcomes. It is therefore reasonable.

[15] The applicants assert that the Board erred in three respects in concluding that adequate state protection existed.

[16] First, they argue that the Board misstated the applicants' testimony in a material respect: it stated that Ms. Polak's mother had only called the police only once. I agree that the Board did misstate the evidence. Ms. Polak testified that her mother called the police several times. I am not persuaded, however, that this error was material. A fair reading of the Board's reasons shows that its conclusion with respect to state protection was based upon the documentary evidence, Ms. Polak's own failure to seek state protection, and the length of time that Ms. Polak has been alway from Poland. The Board's error in stating the number of times that Ms. Polak's mother called the police did not influence its ultimate conclusion with respect to state protection.

[17] Second, the applicants argue that the Board's finding that Ms. Polak failed to seek state protection is unreasonable. The applicants say that she was a child for most of the relevant time and that she gave a reasonable explanation for not calling the police when she was older. Ms. Polak remained in Poland for two years after turning age eighteeen. In my view, given the heavy burden on a refugee claimant to seek protection when it may reasonably be forthcoming, the Board's conclusion was not unreasonable.

[18] Finally, the applicants argue that the Board ignored relevant evidence. The applicants say that the Board was obliged to expressly deal with other decisions of the Board, which found

inadequate state protection in Poland, and a 1990 report of the United Nations Human Rights Committee (UNHRC), which stated that Poland failed to protect female victims of domestic violence.

[19] It is trite law that the Board need not cite every document that is in evidence. The Board's prior decisions all turn upon their own facts and they are not binding on other panels of the Board. It is always possible the prior decisions were wrong or were set aside on judicial review. Thus, the Board was not obliged to specifically refer to its prior decisions. Similarly, it was open to the Board to prefer more recent documentary evidence, such as the 2004 Response to Information Request POL42815.E (Implementation and effectiveness of the Blue Card System (August 2003-August 2004) over the 1999 UNHRC report. Because of the age of the UNHRC report, it was not so relevant and material to the applicants' claim that I draw an adverse inference from the Board's failure to expressly mention it.

SUBJECTIVE FEAR

[20] As described above, while not a determinative finding, the applicants' delay in seeking protection was found by the Board to be inconsistent with a subjective fear of persecution. The applicants say that the Board erred in this conclusion because it ignored their explanation that they did not know that they could claim refugee protection on the basis of domestic abuse.

[21] At the hearing, the applicants provided the following explanations for the delay. Ms. Polak testified that:

- she intended to stay in Canada for six months and extended her visa for another year;
- after meeting Mr. Musialek, she was so happy that she did not want to go back to Poland;
- she did not approach anyone for legal advice, but thought that only political refugees could apply for protection; and
- she wanted to stay in Canada legally, approached a consultant, and made her claim approximately one month later.

[22] Mr. Musialek testified that:

- he intended to stay in Canada for one year;
- after learning of Ms. Polak's pregnancy, he did not want to go back to Poland and wished to stay in Canada; and
- they did not do anything to legalize their status for fear of being deported.

[23] Before finding that the applicants' delay in claiming protection was unreasonable, the Board ought to have dealt with Ms. Polak's explanation that they did not know that refugee protection was available for persons in their situation. However, in my view, this error does not warrant the Court's intervention for two reasons. First, and most importantly, the Board's decision was not premised upon this conclusion and any error had no impact on the Board's ultimate conclusion. Second, the balance of the applicants' testimony was not, in my view, consistent with a well-founded fear of persecution.

SUBSECTION 108(4) OF THE ACT

[24] The subsections 108(1) and 108(4) of the Act provide that:

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

(*a*) the person has voluntarily reavailed themself of the protection of their country of nationality;

(*b*) the person has voluntarily reacquired their nationality;

(*c*) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;

(*d*) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee

108. (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;

b) il recouvre volontairement sa nationalité;

c) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;

d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;

e) les raisons qui lui ont fait demander l'asile n'existent plus.

protection in Canada; or

(*e*) the reasons for which the person sought refugee protection have ceased to exist.

…

(4) Paragraph (1)(*e*) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

…

(4) L'alinéa (1)*e*) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

[25] The applicants argued that the "compelling reasons" exception found in subsection 108(4) applied to Ms. Polak's claim. The Board rejected the application of subsection 108(4) because Ms. Polak had not rebutted the presumption of state protection and was not a Convention refugee when she left Poland. This is said to be erroneous interpretation of subsection 108(4) of the Act.

[26] In my view, the Board did not err in failing to apply subsection 108(4) of the Act. The Board is only obliged to consider this provision when it finds there has been a change in circumstances so as to attract the application of paragraph 108(1)(e) of the Act. See: *Martinez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 421 at paragraphs 19-22 (QL); and *Ortiz v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1716 at paragraphs 60-62 (QL).

[27] In the present case, paragraph 108(1)(e) of the Act had no application. The Board found that state protection was available and correctly concluded that, in such a situation, the compelling reasons provision cannot be invoked.

SECTION 97 OF THE ACT

[28] The applicants submit that the Board erred by failing to conduct a separate analysis under section 97 of the Act of Mr. Musialek's claim. This is said to have been required because his claim is based on specific facts and is not a claim based on domestic violence.

[29] In my view, the Board did not so err for the following two reasons. First, at the hearing, Mr. Musialek's lawyer did not ask him any questions, stating that "I think that the female claimant's testimony underlies the same issues that are for the male claimant." It is difficult to see how this invited a separate analysis of Mr. Musialek's claim. Second, the Board specifically dealt with Mr. Musialek's testimony as to why he believed that he would not get police protection in Poland, and found it to be unpersuasive and inadequate to rebut the presumption of state protection. No further analysis was required.

CONCLUSION

[30] For these reasons, the application for judicial review will be dismissed. Counsel posed no question for certification and I agree that no question arises on this record.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

"Eleanor R. Dawson"
Judge

SOLICITORS OF RECORD

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APPEARANCES:

MR. MILAN TOMASEVIC	FOR THE APPLICANTS
MR. MANUEL MENDELZON	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MR. MILAN TOMASEVIC TORONTO, ONTARIO	FOR THE APPLICANTS
JOHN H. SIMS, Q.C. DEPUTY ATTORNEY GENERAL OF CANADA	FOR THE RESPONDENT