

Federal Court



Cour fédérale

Date: 20111006

Docket: IMM-735-11

Citation: 2011 FC 1134

Ottawa, Ontario, October 6, 2011

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

MISHKA MATIKA WILLIAMS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In 2002, when she was 16 years old, Ms. Mishka Matika Williams came to Canada from St Vincent and the Grenadines to visit her mother. She began a relationship with a man from St Vincent named Peter who abused her. Peter assaulted her repeatedly. He was ultimately arrested and deported to St Vincent in 2006. He blames Ms. Williams for his removal from Canada, and has been threatening to harm her if she returns to St Vincent.

[2] Ms. Williams has sought refugee protection in Canada. A panel of the Immigration and Refugee Board dismissed her claim primarily on the basis that state protection is available to her in St Vincent.

[3] Ms. Williams argues that the Board's conclusion that adequate protection was available to her in St Vincent was unreasonable. She asks me to overturn the Board's decision and order a new hearing before a different panel. I agree that the Board's conclusion on state protection was unreasonable and must, therefore, allow this application for judicial review. In my view, the Board's analysis did not take sufficient account of Ms. Williams' personal circumstances.

[4] The sole issue is whether the Board's conclusion on state protection was unreasonable.

II. The Board's Decision

[5] The Board drew a negative inference from the fact that Ms. Williams did not seek refugee protection until 2009, even though Peter had been deported in 2006. This showed that she did not have a subjective fear of persecution if she returned to St Vincent.

[6] The Board then considered whether there was an objective basis for Ms. Williams' fear of being the victim of physical harm in St Vincent. In particular, it analyzed documentary evidence describing the state apparatus available in St Vincent to protect women who fear domestic violence.

[7] The Board noted that the burden fell on Ms. Williams to present clear and convincing evidence of an absence of state protection, and that the burden is greater in respect of a well-established democracy such as St Vincent.

[8] The documentary evidence before the Board showed that St Vincent has an independent judiciary and a growing police force. In addition, it has put in place several mechanisms to address the issue of domestic violence, including:

- The *Domestic Violence Proceedings Act* (1994), and the *Domestic Violence Summary Proceeding Act* (1995). The legislation enables the Court to issue restraining orders against aggressors; if the aggressor fails to respect the order, the police may arrest him without a warrant;
- Protective or restraining orders through the Family Court, available to victims if they can show that their spouse or partner has committed, tried to commit or threatened to commit acts of physical, sexual or mental abuse;
- *Criminal Code* sanctions for rape (including spousal rape) and sexual assault, carrying sentences of up to 10 years' imprisonment;
- Family Court assistance to victims of domestic violence in locating temporary shelter;

- Family Court counsellors that assist with the preparation of court documents, and counsel victims and perpetrators;
- Female police officers (there are now 121) and police officers trained to handle cases of domestic violence, with emphasis on filing a report (with copies available for the victims) and initiating court proceedings if there is sufficient evidence; and
- A Gender Affairs Division that provides a referral and information service to domestic abuse victims, educating victims on the role of the police, legal affairs and Family Court in dealing with domestic violence, and on the assistance provided by Non Governmental Organizations [NGOs].

[9] Police are now more likely to view domestic violence as a criminal act rather than a private concern. The coordinator of the Saint Vincent and the Grenadines Human Rights Association [SVGHRA] reports that police respond to all calls of domestic violence, and this organization holds national educational campaigns to make victims more aware of their legal rights and options. Statistics reflect that progress is being made, and that perpetrators are being arrested, prosecuted and convicted.

[10] The Board also noted that, where offenders go unpunished, it is often due to a culture where victims do not seek police assistance or do not follow through with charges. This makes police reluctant to proceed criminally and instead encourage parties to settle. To counter the social pressure

on women to drop charges, some courts imposed fines against people who brought charges but did not testify.

[11] Social services agencies and NGOs also provide assistance to victims of domestic violence.

[12] The Board acknowledged that violence against women remains a serious problem in St Vincent and that protection for victims is not perfect. However, it noted that there has been an improvement in the police response to violence against women as well as accessibility to legal remedies, demonstrating that St Vincent is making serious efforts to address the problem of domestic violence.

[13] In response to Ms. Williams' allegation that Peter had threatened to kill her family in St Vincent, the Board noted that murder convictions carry a mandatory death sentence. Her mother said in a letter that she had reported Peter to the police several times, but they had done nothing to protect them. The Board found that Ms. Williams had not provided any of the police reports regarding her family's complaints about Peter. Furthermore, a local failure to provide effective policing did not amount to a lack of state protection unless it was part of a pattern of state inability or refusal to provide protection (*Zhuravljev v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 3 (TD)).

[14] The Board also pointed out that a state cannot be considered to have failed to provide state protection when a claimant has not approached the state for protection. In the absence of a compelling explanation, a failure to pursue state protection will usually be fatal to a refugee claim,

at least where the state has the willingness and the apparatus necessary to provide its citizens with a measure of protection.

[15] The Board concluded that, although state protection in St Vincent is not perfect, it is effective and adequate, that St Vincent is making serious and genuine efforts to address the problem of domestic violence, and that police are both willing and able to protect such victims. For these reasons, Ms. Williams could reasonably expect protection from the authorities should she return to St Vincent. The Board therefore found that the applicant was neither a Convention refugee nor a person in need of protection, and rejected her claim.

III. Was the Board's Conclusion on State Protection Reasonable?

[16] Ultimately, given the definition of a refugee, the question to be answered in all refugee claims involving state protection is whether, taking account of all the evidence, including the evidence relating to the state's capacity and willingness to provide protection against persecution, the claimant has shown on the balance of probabilities that there is a reasonable chance that he or she will be subjected to persecution if returned to his or her country of origin.

[17] In this case, even though the Board cited the legislation on the books and various policies and initiatives, it did not consider whether the state was actually able and willing to provide Ms. Williams with protection against persecution. In failing to consider this, the Board's decision was unreasonable.

[18] The Board cited numerous examples of legislation, police training and resources that had been put in place in St Vincent in order to protect domestic violence victims. However, its reasons are virtually silent on whether those initiatives are actually protecting women from harm. When examining whether a state is making serious efforts to protect its citizens, that protection must be evaluated at the operational level, particularly in cases of violence against women: *Toriz Gilvaja v Canada (Citizenship and Immigration)*, 2009 FC 598, at para 39, and *Palomino v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1040, at paras 29-31.

[19] Although there is evidence that St Vincent is making serious efforts to combat the issue of domestic violence, there is just as much evidence showing that those efforts are not resulting in adequate state protection. In addition, the Board did not appear to take account of the fact that Ms. Williams was consistently physically abused throughout her year-long relationship with Peter; he attacked her while he was out on bail; and even after he was deported, he harassed her with threatening phone calls and messages sent through his family and friends. Ms. Williams believes that, if she returns to St Vincent, Peter will harm her or even kill her.

[20] The Board is to be commended for its thorough review of the documentary evidence. However, it failed to take the essential next step of considering whether the remedies available to Ms. Williams in St Vincent would actually offer her sufficient protection to justify a conclusion that her fear of persecution or serious mistreatment in St Vincent was not well-founded or not substantiated.

[21] To answer the questions inherent in s 96 and s 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (see Annex), the Board must consider whether, taking account of all the evidence, including the evidence relating to the state's ability and capacity to respond to the risks faced by the claimant, the claimant has shown on the balance of probabilities that, if returned to his or her country of origin, (1) there is a reasonable chance that he or she will be subjected to persecution (s 96); or (2) he or she will face a risk to life or of cruel or unusual treatment or punishment (s 97).

[22] Of course, the Board must review the relevant evidence, as the Board did here. It must look carefully at the state resources available in the claimant's country of origin. However, having done so, it must then go on to determine whether those resources would actually provide protection to the claimant. This demands a consideration of the specific threat to the claimant's safety and the degree to which the state's resources would provide meaningful protection to him or her.

[23] Without that final step, the Board's description of the state's apparatus is no more than that – a description – and not a real analysis of the degree to which the claimant will be put at risk if returned to her country of origin. And without that analysis, the Board's conclusion that state protection is available to the claimant is abstract and artificial, unresponsive to the actual circumstances the claimant faces. In such a situation, as here, the Board's conclusion is unreasonable because it fails to take account of the evidence before it relating to the claimant's particular circumstances.

IV. Conclusion and Disposition

[24] Because the Board's treatment of the issue of state protection did not evaluate St Vincent's real capacity to protect women in Ms. Williams' circumstances, I must find that the Board's conclusion was unreasonable. Accordingly, the application for judicial review must be allowed. Neither party proposed a question of general importance for me to certify, and none is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed and a new hearing before a different panel is ordered;
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

Annex

Immigration and Refugee Protection Act, SC 2001, c 27

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

Convention refugee

Définition de « réfugié »

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,

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
- (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.

- 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) 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
- (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
 - (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
 - (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

- 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
 - (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
 - (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

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.

(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.

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.

(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.

FEDERAL COURT
SOLICITORS OF RECORD

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