

Federal Court



Cour fédérale

Date: 20130904

Docket: IMM-9979-12

Citation: 2013 FC 930

Ottawa, Ontario, September 4, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

NANDEVIARA KAMBIRI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Refugee Protection Division [RPD], dated August 23, 2012 denying the Applicant refugee protection.

I. Facts

[2] The Applicant was sexually assaulted by her step-father in 2008. She was 18 years old at the time. The assaults continued until she turned 21.

[3] On one occasion, her step-father attempted to rape her and she told her mother. The Applicant's mother then left her husband, who blames the Applicant for the breakdown of his marriage and wants to kill her.

[4] The Applicant's mother sent her to live with her aunt in Windhoek because of her step-father's threats. He followed her and assaulted her. The Applicant believes that if her aunt did not stop her step-father from beating her, he would have killed her or abducted her.

[5] The Applicant did not make a complaint to the police against her step-father because of threats against her and her mother.

[6] She left Namibia and came to Canada on April 4, 2011 and filed a claim for refugee protection the same day.

II. Decision under review

[7] The RPD determined that the Applicant has not satisfied the burden of establishing a serious possibility of persecution on a Convention ground or that she would personally be subjected, on a balance of probabilities, to a risk to life or risk of cruel and unusual treatment or punishment or in danger of torture upon return to Namibia.

[8] The RPD indicated that it considered the Applicant's claim in light of the *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*.

[9] The RPD allotted little evidentiary weight to a letter by her aunt and her mother attesting to her step-father molesting her in Namibia as they do not provide objective evidence regarding the availability of state protection in Namibia.

[10] The RPD laid out the test for Internal Flight Alternative [IFA] and determined that the Applicant would have a viable IFA in Walvis Bay, although she states that her step-father would be able to locate her there and that it would be hard for her to settle down as a single woman, that it would be impossible to find work, that she is not financially independent and that people in Namibia depend on their extended family. The RPD considered that Namibia is a country with a population of more than two million people, that Walvis Bay has a good size population, that it is a good distance from Otjiteke village, where the Applicant's step-father had lived and that the explanations provided by the Applicant do not constitute undue hardship. The RPD also noted that there are women shelters in Walvis Bay. As for the availability of state protection in Walvis Bay, the RPD noted that the Applicant would be safe should her step-father approach her.

[11] With regards to state protection, the RPD noted that at no time, the Applicant filed a complaint against her step-father as he had threatened to kill her and her mother and because she did not believe that the police would help her as police in Namibia does not take violence against women seriously and that she heard that other women did not receive an appropriate response from the police. The RPD considered that the Applicant failed to submit detailed evidence as to the similarly situated women.

[12] The RPD considered that the documentary evidence filed does not support the Applicant's allegation that the government of Namibia does not protect women in respect of domestic violence and violence against women and that it shows that state protection is adequate. Indeed, the Women and Child Protection Unit [WCPU] was created by the Namibian police and assists victims of violence. It has seven units throughout the country. Moreover, there is comprehensive legislation covering domestic violence in Namibia, which also provides for the possibility of applying for a protection order. The RPD also considered the evidence to the effect that applicants have experienced long delays and are sometimes turned away and protection orders are sometimes not granted by magistrates because they did not receive all the necessary information and that the orders do not always suit the situation. There are laws against rape in Namibia and rape penalties are enforced. There are also a great number of shelters available to women in need in addition to NGOs that provide support to women, which shows that a societal support system for women is in place.

[13] As for the police, the RPD concluded that although they sometimes do not like to get involved in family matters, they have a duty to protect women and it is possible for the Applicant to speak to someone of a higher rank or to the Police Commissioner of Namibia.

[14] The RPD also noted that the step-father's threat of killing her if she goes to the police is no longer relevant as it seems that he is out to kill her no matter what and therefore, the Applicant could have reported the threats and molestations so that the police start an investigation. Moreover, a claimant may not rebut the presumption of state protection in a democracy by asserting a subjective reluctance to engage the state and the Applicant did not provide a reasonable explanation

for not going to the Namibian police. The RPD therefore considered that the Applicant did not take the necessary steps to access state protection in Namibia before seeking protection in Canada.

III. Applicant's submissions

[15] The Applicant submits that although the RPD stated that its decision is based partly on credibility, a reading of it shows that the Member did not make any adverse credibility finding with regards to any aspect of the Applicant's claim.

[16] The Applicant argues that there was evidence before the RPD showing that police in Namibia do not take domestic abuse seriously and that implementation of laws relating to domestic violence remains grossly inadequate. The Applicant submits that based on objective documentary evidence, it cannot be said that there is adequate state protection in Namibia notwithstanding the best efforts of the state as domestic abuse and violence against women in Namibia always go unpunished and that the government does little or nothing to address the problem. In its decision, the RPD failed to properly address the absence of effective implementation of the laws. Without effective implementation of the laws, it cannot be stated that there is effective state protection for victims of gender-based violence.

[17] The Applicant also argues that the RPD erred in concluding that the Applicant has a viable IFA in Walvis Bay. She explained clearly at the hearing that it would be easy for her step-father to track her down in that city, that she would suffer undue hardship if she were to go live there and that she would live in extreme fear. Moreover, as there is no adequate state protection for women in Namibia, it cannot be said that there is a viable IFA.

IV. Respondent's submissions

[18] The Respondent submits that the RPD's state protection finding is reasonable and made with regard to the evidence. The presumption of state protection is not easily rebuttable as a claimant needs to submit convincing evidence which satisfies the RPD, on a balance of probabilities, that state protection is inadequate. A claimant also needs to show that all possible protections available have been exhausted.

[19] The Applicant did not provide relevant, reliable and convincing evidence that Namibia was not able to protect her. She did not approach the police and her evidence regarding similarly situated people was vague. Her explanation that her step-father threatened to kill her if she went to the police is not credible as he had also threatened her as a result of the breakdown of his relationship with the Applicant's mother.

[20] The RPD examined the country conditions and concluded that state protection though not perfect, was available. The RPD noted that the police have established seven WCPUs across the country, which provide support to female victims of violence. Moreover, a number of rape cases have been prosecuted and resulted in penalties.

[21] The Respondent further submits that the Applicant's arguments regarding evidence invite the Court to reweigh the evidence and accordingly raise no serious issue. The RPD was not required to list each and every piece of evidence particularly and the fact that some of the documentary evidence could lead to a different conclusion is not a sufficient basis to find that the RPD made a reviewable error.

[22] As for the availability of a viable IFA, the Respondent argues that the RPD's determination is reasonable. The RPD reasonably concluded that there was no serious possibility of the Applicant being persecuted in Walvis Bay given that it was a good size and distance away from her step-father's village. It was open to the RPD to find that it would not be unreasonable for the Applicant to seek refuge there. The fact that she has no family there and that she is single does not make the RPD's finding unreasonable.

V. Issues

1. Did the RPD err in its state protection determination?
2. Did the RPD commit an error in concluding that the Applicant has a viable IFA in Walvis Bay?

VI. Standard of review

[23] The RPD's state protection determination and IFA are to be reviewed under the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

VII. Analysis

A. Did the RPD err in its state protection determination?

[24] The RPD's determination as to state protection and the availability of a viable IFA are both reasonable for the following reasons.

[25] The Applicant agrees that the RPD did analyze the laws in Namibia aimed at the protection of women, but submits that it failed to do the same with respect to its analysis of the effectiveness of their implementation.

[26] In its decision, the RPD did turn its mind to the issue of implementation. It specifically noted that the implementation of the laws to protect women is not perfect but that the evidence shows that a number of rape and sexual assault cases have been prosecuted and that they resulted in penalties. Moreover, it considered that there is a protection program in place, although the Namibian government has faced some challenges in implementing it.

[27] The record before the Court shows that the RPD conducted a comprehensive analysis of a number of country condition documents and while they show that state protection is not perfect, that is not the test as the RPD needs to verify whether state protection is adequate. Moreover, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation (*Canada (Minister of Employment and Immigration v Villafranca*, (1992) 18 Imm LR (2d) 130, 99 DLR (4th) 334 (FCA)).

[28] Based on that evidence, it was reasonable for the RPD to determine that the Applicant should have used the mechanisms available to access state protection as Namibia benefits from the presumption that it is capable of protecting its citizens (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 20 Imm LR (2d) 85). The Applicant cannot rebut the presumption of state protection in a functioning democracy by asserting only a “subjective reluctance to engage the state” (*Kim v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1126 at para 10, 141 ACWS (3d) 822).

The RPD's conclusion that she should have accessed the programs and initiatives aimed at protecting women such as filing a report with the police, applying for the protection program or getting help at one of the seven WCUPs created by the Namibian police is reasonable.

B. Did the RPD commit an error in concluding that the Applicant has a viable IFA?

[29] The RPD conducted a detailed analysis of the IFA. It noted the explanations provided by the Applicant as to why it would constitute undue hardship to relocate in that city but concluded that it would not.

[30] The RPD conducted a specific analysis with regard to the availability of state protection in Walvis Bay and noted that there is a shelter for women with trained police officers and a WCPU unit. Its determination that on a balance of probabilities, it would not be possible for her step-father to locate her at a great distance from his village, in a place where more than 40 000 people live is reasonable.

[31] The RPD committed no error in its analysis conducted under the second prong of the IFA analysis. The test is strictly an objective one. Its conclusion that the difficulties invoked by the Applicant which include living as a single woman in a town where she does not know anyone and the fact that people in Namibia depend on their family do not fall within the concept of undue hardship as interpreted by case law (*Ranganathan v Canada (Minister of Citizenship and Immigration)*), (2000) 11 Imm LR (3d) 142 at para 14, 266 NR 380 (FCA)).

[32] The parties were invited to submit questions for certification but none were proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. No question is certified.

“Simon Noël”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE: KAMBIRI v THE MINISTER
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**REASONS FOR JUDGMENT
AND JUDGMENT:** NOËL J.

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