Date: 20071018

Docket: IMM-1311-07

Citation: 2007 FC 1073

BETWEEN:

ROSITA VASCILCA MYLE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] St. Vincent and the Grenadines does not have a good record when it comes to protecting women from domestic violence. A number of such women have sought refuge in Canada on the ground that the state is unable to protect them. While the Refugee Protection Division of the Immigration and Refugee Board has generally recognized that violence against women has been and remains a serious problem in St. Vincent, many panels thereof have found that serious efforts have been in the recent years to provide protection. I come now to the case of Rosita Vascilca Myle.

[2] This is the second time her case has come before this Court on judicial review. The first time the panel of the RPD determined that she had not provided credible or trustworthy evidence and

found she was neither a convention refugee nor a person otherwise in need of international protection. The panel was of the view that she lacked the subjective fear required under section 96 of the *Immigration and Refugee Protection Act* (IRPA) and that, in any event, she had not rebutted the presumption that state protection was available to her in St. Vincent. The lack of subjective fear was based on the time delay in filing her claim.

[3] Accompanied by a most powerful set of reasons, Mr. Justice Shore granted judicial review and referred the matter back for redetermination by a different panel (*Myle v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 871, [2006] F.C.J. No. 1127). This time around, her application was again dismissed, but only one the grounds of state protection. This is a judicial review of that decision.

[4] The second hearing was allegedly *de novo*, meaning new evidence could and should have been considered (*Canada (Minister of Citizenship and Immigration) v. Qureshi*, 2007 FC 1049). The RPD found that Ms. Myle's fear of persecution was by reason of one of the grounds enumerated in the *United Nations Convention* i.e. her membership in a particular social group defined by her gender as a woman. Her subjective fear arising from her previous subjection to domestic violence at the hands of her former common-law husband, and her fear that she would be seriously harmed or killed by him, were not really considered. The challenge was on her allegation that the police and government authorities in St. Vincent would be unwilling or unable to protect her.

[5] While the panel accepted that domestic violence against women is a serious problem in St. Vincent and the Grenadines, it was of the view that Ms. Myle had not rebutted the presumption of state protection as per the decision of the Supreme Court in *Canada (Attorney General) v. Ward,* [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, with "clear and convincing evidence". The panel considered documentary evidence commencing in 1997 and ending with the *U.S. Country Report for 2004* published in February 2005. Particular reference was made to a response to information request issued in July 2004 by the IRB's Research Directorate, which was based on a telephone interview the previous month with the coordinator of the St. Vincent and the Grenadines Human Rights Association (SVGHRA). The report was to the effect that the government had finally set up a shelter for victims of domestic violence. However, it was then currently under renovation and not yet open to the public. The coordinator did not know how many victims would have access to the building which apparently would only serve as a temporary shelter.

[6] The panel also found that police and government authorities in St. Vincent are now making serious efforts to provide protection to victims of domestic violence, albeit not always successfully. The panel's conclusion was:

> Based on the foregoing analysis, I find there is insufficient evidence before me to establish that the claimant's fear of persecution in St. Vincent and the Grenadines for a convention ground is well founded. There is no serious possibility that the claimant's removal to St. Vincent and the Grenadines will subject her to persecution.

[7] It also said:

> I prefer the foregoing more recent documentary evidence to the claimant's evidence as it comes from reliable and independent sources with no interest in the outcome of these proceedings.

[8] On first reading the decision, the Court was of the impression that the "more recent documentary evidence" was evidence which had not been before the first panel, and that Ms. Myle's evidence was older and did not come from reliable and independent sources. Since the second decision was rendered in early 2007, one would assume the shelter was now operational.

ISSUES

[9] This case presents the following issues:

a. what is the applicable standard of review?

b. on a hearing *de novo* is the evidence limited to that which was before the first panel?

c. did the panel properly weigh the evidence it did consider?

d. did the panel take into consideration all the relevant evidence? and

e. was the panel justified in implying that Ms. Myle's evidence came from unreliable, non-independent sources who had an interest in the outcome of her case?

STANDARD OF REVIEW

[10] It is well established that the overall standard of review on humanitarian and compassionate applications is that of reasonableness *simpliciter (Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39). Other issues, however, might arise which could be reviewed on a different standard (*Canada (Attorney General) v. Sketchley*, 2005 FCA 404, [2005] F.C.J. No. 2056). For instance, a pure finding of fact is usually not disturbed unless patently unreasonable (*Dr. Q. v. College of Physicians and Surgeons of British Columbia,* [2003] 1

S.C.R. 226, 2003 SCC 19 and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20). On the other hand, breaches of natural justice or procedural fairness are beyond the functional and pragmatic approach to judicial review (*C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29). Put another way, in such instances the Court owes the underlying tribunal no deference. The decision must be correct (*Sweet v. Canada (Attorney General)*, 2005 FCA 51, 332 N.R. 87).

HEARING *DE NOVO*

[11] The panel acknowledged that the hearing was *de novo*. This means, within the context of this case, that the decision on state protection should be based on the information currently available, and not limited to the information available to the earlier panel.

[12] Indeed, be it a determination on a refugee application, a pre-removal risk assessment, or a humanitarian and compassionate application, *de novo* or not, the decision maker has not only the right, but also the duty, to examine the most recently available information.

[13] It often comes about that an applicant complains of not being put on proper notice that certain documentation might be considered. Mr. Justice Blais put it well in *Hassaballa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 489, [2007] F.C.J. No. 658, at paragraphs 33 through 35:

> [33] First of all, it is important to emphasize that the PRRA officer has not only the right but the duty to examine the most recent sources of information in conducting the risk assessment;

> the PRRA officer cannot be limited to the material filed by the applicant.
>
> [34] In this case, the applicant is concerned by the use of updated versions of the U.S. Department of States Human Rights Report (U.S. DOS report) and the U.S. Department of States International Religious Freedom Report (Religious Freedom report). In his own submissions, the applicant relied on the 2003 U.S. DOS report and on the 2004 Religious Freedom report. The PRRA officer, for her part, relied on the 2004 and 2005 U.S. DOS reports and on the 2004 and 2005 Religious Freedom reports.
>
> [35] There is no question that these updated reports are in the public domain, that they originate from well-known sources, that they are general in nature, and that they are frequently quoted by counsel involved in immigration cases on both sides. In fact, they are part of the standard country documentation packages relied on by immigration officers when considering various applications under the Act.

[14] In this case, however, the complaint is not that the panel breached procedural fairness by relying on updated documents and independent internet research, without providing her with an opportunity to respond (*Zamora v. Canada (Minister of Citizenship and Immigration)*, 260 F.T.R. 155, 41 Imm. L.R. (3d) 276, 2004 FC 1414 and *Fi v. Canada (Minister of Citizenship and Immigration)*, [2007] 3 F.C.R. 400, 56 Imm. L.R. (3d) 131, 2006 FC 1125). Rather, the issues are whether the panel considered documents in the IRB's own country documentation package at all, and whether it properly considered the information provided by Ms. Myle.

WEIGHING OF THE EVIDENCE

[15] One of the documents relied upon by the panel was the IRB's own response to information request VCT41518 to support the proposition that state protection was available. That very report was considered by Mr. Justice O'Keefe in *King v. Canada (Minister of Citizenship and*

Immigration), 2005 FC 774, [2005] F.C.J. No. 979. He pointed out that there was contrary evidence in that report and that the failure of the panel to refer to that evidence constituted a reviewable error. He was of the view that the Board made a finding of fact without regard to all the evidence.

[16] In his reasons, Mr. Justice Shore not only referred to *King* but also to the decision of Mr. Justice Evans in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35, [1998] F.C.J. No. 1425 where he said at paragraph 17:

> However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[17] The panel simply did not address the concerns of this Court as set out in *King*, and in the first *Myle* decision.

[18] This Court owes deference to the Board because it is supposed to have more expertise in country conditions. However, when time and time again this Court grants judicial review on the same point, the Board must deal with those issues squarely. That is part of the deference it owes to this Court. It must keep up with the case law. This is not to say a particular result is dictated. The

Court has not interfered with findings that state protection in St. Vincent is available, if the Board's analysis was considered to be reasonable (*Hutchins v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 367)

WAS ALL THE RELEVANT EVIDENCE CONSIDERED?

[19] The tribunal record produced under rule 17 of the *Federal Courts Immigration Rules* includes a letter from the Board dated 4 May 2005 addressed to Ms. Myle's solicitor with an enclosed list of exhibits. This is the same letter and list of exhibits used in the first hearing! There is absolutely nothing in the reasons for the panel's decision to suggest that it looked beyond that exhibit list to the Board's own more recent information. The recent documentary evidence that the government had purchased a women's shelter, which was being renovated in 2004, was only new in the sense that it was only first mentioned that year. It was, nevertheless, before the first panel which did not see fit to refer to it.

[20] As aforesaid, the panel had a duty to, at the very least, consider the information in its own documentary package, most of which is readily available in the Board's own website. This matter was heard in February of this year.

[21] In response to information request VCT100481.FE dated 12 August 2005, based on an interview with the SVGHRA coordinator on 15 July 2005: "The authorities recently purchased a building that, once renovated, will serve as a shelter for battered women." Since the response to information the previous year said the same thing, an inference that the shelter is operational cannot

be justified. Either there is a shelter or there is not. This is a readily ascertainable fact, and the Board has contacts, not only with the government, but also with NGOs such as SVGHRA and Marion House. If the shelter is operational, then it will be a matter of opinion as to its effectiveness. The panel failed to consider its own documentation.

[22] In response to information request VCT1000478.E dated 26 August 2005, the Board reported:

> In a July 2005 story, Kingstown-based newspaper, *The Vincentian*, published the story of Morris Cupid, a Campden Park resident, who had reportedly requested police intervention on numerous occasions for a domestic dispute he was having with relatives (22 July 2005). The newspaper stated that Cupid "got no assistance" from the police and he claimed that he was living in an unsafe situation (*The Vincentian* 22 July 2005).
>
> Also in July 2005, *The Vincentian* reported on the acquittal of five suspects in a murder trial because "the police did not carry out their investigations in conformity with the law" (28 July 2005). Specifically, in addition to acknowledging their ignorance of arrest procedures, the police reportedly beat the suspects and threatened them with firearms (*The Vincentian* 28 July 2005).

WAS MS. MYLE'S EVIDENCE UNRELIABLE?

[23] If one has begun to suspect that this was a "good news" decision, consider Ms. Myle's new evidence. In her affidavit she referred to a woman in Kingstown who had complained to the police that she was being harassed, but they did not investigate. She was killed in December 2006 in broad daylight at the bus terminal. The man cut off her head. She said: "All of the country knows about this, it is a national scandal that the police do nothing to help women like me." She referred to an

article in *The Vincentian* newspaper which corroborates the death and which implies that the police had not acted on a complaint. The paper quoted the Chief Executive Director of the Caribbean Association for Feminist Research and Action who said she was appalled that: “The laws that exist in St. Vincent and the Grenadines inhibit the action of the police with respect to acting on reports made of threats or actual incidents of domestic violence or harassment.”

[24] Since the Board itself frequently refers to *The Vincentian* and to other NGOs, how can the panel imply that Ms. Myle’s information does not come from reliable and independent sources?

[25] For all these reasons, judicial review will be granted, and the matter referred back to a new panel for redetermination. That panel is directed to consider the most up-to-date information available on St. Vincent and the Grenadines. If the answer is not contained in that documentation, the panel is directed to ascertain from SVGHRA or Marion House whether the proposed women’s shelter is now operational and, if so, to assess its effectiveness.

[26] The Minister shall have until November 1, 2007 to pose a question or questions of general importance for certification. Ms. Myle shall have one week thereafter to reply.

“Sean Harrington”

Judge

Ottawa, Ontario
October 18, 2007

FEDERAL COURT

SOLICITORS OF RECORD

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