Date: 20080229

Docket: IMM-1818-07

Citation: 2008 FC 268

Ottawa, Ontario, February 29, 2008

PRESENT: The Honourable Orville Frenette

BETWEEN:

TRAYANKA STOYANOVA VELINOVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division (the "Board"), in which it determined that the applicant was not a refugee or a person in need of protection in accordance with sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, ch. 27 (the "Act"). Leave to apply for judicial review was granted by Justice Luc Martineau on November 13, 2007.

I. The facts

[2] The applicant is a citizen of Bulgaria, born on June 15, 1946. She married in 1969, had one daughter and was divorced from her husband in 1981.

[3] She was employed as a technologist for a company in Sofia. In 1984, she began a common-law relationship with a co-worker, Todor Yotou and resided in a house that she owned. She stated in her Personal Information Form (PIF) that the relationship deteriorated after 1984.

[4] In May 2002, the applicant obtained a visa to come to Canada as a “tourist”, and stayed with her daughter in Canada until May 2003. She returned to Bulgaria, because she was concerned with her employment and her personal relationship with Todor Yotou, but the situation deteriorated again and, on July 23, 2004, he threatened her with a knife.

[5] She reported the incident to the police, who came and talked to Todor Yotou and warned him but said that they had better things to do than settling domestic problems. She stayed at her brother’s residence but Todor Yotou continued to bother her.

[6] On October 5, 2004, the applicant returned to live with her daughter in Canada, and claimed refugee protection on May 5, 2005.

[7] She claimed that this delay to claim refugee protection was due to her daughter's marital difficulties in Canada. She testified that she had not made other efforts to get help in Bulgaria because other women had complained about domestic abuse to the police but to no avail.

II. The Board's decision

[8] The Board begins its analysis by writing "The Panel has taken the Gender Guidelines into consideration before rendering a decision in this claim". Although, according to the Board, there are some factors which indicate a lack of subjective fear, including the applicant's return to Bulgaria after being in Canada for one year, and her delay in claiming refugee status for several months when she came back to Canada, it concluded that the applicant "was a victim of domestic violence over the twenty odd years that she resided with her common-law spouse". However, the Board also concluded that the applicant had not demonstrated that state protection was unavailable:

> The panel accepts that domestic violence has, and still is of serious concern in Bulgaria. The panel further notes that Bulgaria has taken major steps in trying to alleviate the problem of domestic violence, some of which has been effective and some of which is still in need of further action. The panel finds that going to the authorities once over a twenty-year period of the alleged domestic violence indicates that the claimant has not exhausted her potential remedies for obtaining protection from the government of Bulgaria.

After citing documentary evidence regarding Bulgaria's *Protection Against Domestic Violence Act*, domestic violence legislation introduced in Bulgaria in 2005, the Board found that the applicant had failed to rebut the presumption of state protection with clear and convincing evidence. The Board preferred the documentary evidence to the claimant's testimony on this question because it, according to the Board, was free of bias, to the extent that it came from independent sources that

have no vested interest in whether or not claimants are determined to be Convention refugees. The Board concluded that the applicant was not a Convention refugee or a person in need of protection.

III. Issues

[9] This application raises the following issues:

(A) What is the effect of the applicant's failure to comply with subsection 80(2.1) of the *Federal Courts Rules*?

(B) Did the Board apply the wrong standard of proof when it determined that the applicant had not exhausted all available remedies in Bulgaria?

(C) Did the Board commit a reviewable error on the issue of state protection in its assessment of the documentary evidence?

IV. Analysis

(A) What is the effect of the applicant's failure to comply with subsection 80(2.1) of the Federal Courts Rules?

[10] As a preliminary matter, the respondent points out that the applicant's affidavit does not contain a jurat of translation as required by subsection 80(2.1) of the *Federal Courts Rules*, S.O.R./98-106 (the "Rules"), since the applicant had to have her PIF translated and testified at the hearing before the Board through an interpreter. According to the respondent, the application should be dismissed, or the affidavit should at the very least be given no weight. In reply, the applicant submits that this is a technical error, at best, and states that the affidavit was in fact translated.

[11] Subsection 80(2.1) of the Rules provides as follows:

Where an affidavit is written in an official language for a deponent who does not understand that official language, the affidavit shall (a) be translated orally for the deponent in the language of the deponent by a competent and independent interpreter who has taken an oath, in Form 80B, as to the performance of his or her duties; and (b) contain a jurat in Form 80C.	Lorsqu'un affidavit est rédigé dans une des langues officielles pour un déclarant qui ne comprend pas cette langue, l'affidavit doit : a) être traduit oralement pour le déclarant dans sa langue par un interprète indépendant et compétant qui a prêté le serment, selon la formule 80B, de bien exercer ses fonctions; b) comporter la formule d'assermentation prévue à la formule 80C.

[12] The Federal Court dealt with an application in which the applicant's affidavit did not contain an affidavit of translation in *Liu v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 375, [2003] F.C.J. No. 525 (QL), although it made no reference to subsection 80(2.1). In that case, Justice Judith Snider noted that the "usual practice" in such situations is to include an affidavit of translation, and that "[t]he lack of confirmation of translation might, if the facts were in dispute in a material way, lead me to conclude that this application should be dismissed" (at para. 13). However, since the parties essentially agreed on the facts, Justice Snider decided instead to give the affidavit no weight, as there was no indication that the applicant knew what was being signed when she swore the affidavit.

[13] This decision was followed in *Tkachenko v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1652, [2005] F.C.J. No. 2105 (QL) in which Justice Yvon Pinard made specific reference to subsection 80(2.1) but noted that, although the case was highly dependant on

the facts, "[t]o dismiss this case on the grounds that an interpreter's oath is lacking would be unjust" (at para. 8). Instead, the weight to be given to the affidavit would be "significantly affected".

[14] In this case, the issues raised by the applicant can be assessed without reference to the applicant's affidavit, since the necessary material can be found in the Certified Tribunal Record. Furthermore, there is essentially no dispute with regard to the facts, the question being whether the Board appropriately addressed the issue of state protection. Therefore, I will not dismiss this case on the basis of subsection 80(2.1), but, since there is no indication that the applicant understood what she was signing, without an affirmed statement that the content of the affidavit had been translated for her, I give no weight to the applicant's affidavit.

(B) Did the Board apply the wrong standard of proof when it determined that the applicant had not exhausted all available remedies in Bulgaria?

[15] According to the applicant, the Board imposed an "impossible standard of proof" when it stated that the applicant had not exhausted all available remedies in Bulgaria. The respondent, on the other hand, submits that the words of the Board, taken in context, clearly indicate that the Board had not expected the applicant to demonstrate that she had exhausted all available remedies, but considered that the applicant had not rebutted the presumption of state protection.

[16] Neither party has addressed the appropriate standard of review on this issue. However, the Supreme Court of Canada has mandated that a pragmatic and functional analysis be carried out for each issue the Court must address on judicial review (*Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, [2003] S.C.J. No. 17 (QL)). In this case, although the

Board has expertise and a large measure of discretion on the general question of the existence of state protection, there is no privative clause and the question is a pure question of law. In my opinion, the appropriate standard of review on this issue is correctness. Therefore, the Court's intervention is justified if it can be determined that the Board applied the incorrect standard.

[17] If an applicant can demonstrate a subjective fear of persecution combined with the state's inability to protect, he or she will fall within the definition of Convention refugee. Where the state is not the agent of persecution, "only in situations in which state protection 'might reasonably have been forthcoming,' will the claimant's failure to approach the state for protection defeat his claim" (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at para. 49, [1989] S.C.J. No. 74 (QL)). In other words, the failure of a claimant to exhaust all available remedies in their home country will not necessarily be determinative. However, in the absence of a complete breakdown of the state, there will be a presumption that state protection is available unless there is clear and convincing evidence to the contrary (*Ibid.*).

[18] The applicant takes issue with the following passage from the Board's decision:

> The panel finds that going to the authorities once over a twenty-year period of the alleged domestic violence indicates that the claimant has not exhausted her potential remedies for obtaining protection from the government of Bulgaria.

Had the Board left its decision there, its focus on the applicant's failure to exhaust the remedies available in Bulgaria may have indicated that it applied the wrong test. However, the Board, earlier in its reasons, noted that "a claimant must show that it was objectively unreasonable for him or her not to seek state protection." After the impugned passage, the Board continues its analysis to

determine that recourses are available to victims of domestic violence in Bulgaria, particularly since 2005. In my opinion, the applicant has not demonstrated that the Board applied an incorrect test. The Board assessed, not only what remedies the applicant had attempted, but also what remedies would be reasonably available to the applicant. Even if Bulgaria's *Protection Against Domestic Violence Act* is not fully implemented or is under funded, this does not mean that there is no state protection available.

(C) Did the Board commit a reviewable error when it determined that state protection was available to the applicant in Bulgaria?

[19] The applicant submits that the Board committed a reviewable error when it determined that state protection was available to the applicant in Bulgaria, by focusing on one piece of documentary evidence to the exclusion of others which support the opposite conclusion. For its part, the respondent submits that, generally speaking, this Court should not intervene in the Board's conclusions in the absence of a patently unreasonable error, which the applicant has not demonstrated in this case. Furthermore, the respondent notes that the Board need not mention every piece of evidence before it, and that the Board's reasons demonstrate that it had turned its mind to the correct issue and used terminology consistent with the documentation.

[20] A pragmatic and functional analysis has already been conducted by the Federal Court in relation to the standard of review applicable on the issue of the availability of state protection, in *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, [2005] F.C.J. No. 232 (QL). Although the lack of privative clause suggests a lower level of deference, some deference is

called for because of the Board's expertise in assessing the availability of state protection and the amount of discretion it is accorded on this issue. Furthermore, the question is one of applying a legal test to the facts. Therefore, the appropriate standard of review is reasonableness *simpliciter*. This means that the Court's intervention is not justified unless there is no line of analysis in the reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 53, [2003] S.C.J. No. 17 (QL)).

[21] When assessing documentary evidence, however, the Board has a large amount of discretion, and is entitled to give some documents more weight than others. The failure to mention some documentary evidence is not fatal to the Board's decision, as the Board "is assumed to have weighed and considered all the evidence presented to it unless the contrary is shown" (*Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 at para. 1 (C.A.) (QL). See also *Woolaston v. Canada (Minister of Manpower and Immigration)*, [1973] S.C.R. 102, [1972] S.C.J. No. 79 (QL); *Hassan v. Canada (Minister of Citizenship and Immigration)* (1992), 147 N.R. 317, [1992] F.C.J. No. 946 (C.A.) (QL); *Pohlot v. Canada (Minister of Citizenship and Immigration)* (2000), 102 A.C.W.S. (3d) 593, [2000] F.C.J. No. 2084 (T.D.) (QL)).

[22] In this case, the applicant submits that the Board ignored her evidence regarding women in similar circumstances, as well as documentary evidence to the effect that state protection was not available. The applicant also submits that, had the Board taken into account its own guidelines found in the document "Women Refugee Claimants Fearing Gender-Related Persecution", it would

have considered the applicant's evidence regarding similarly situated individuals as well as evidence which would explain her reticence to report the violence she was experiencing to the police.

[23] However, the applicant has pointed to no specific evidence of women in similar circumstances, and from reading the evidence submitted, including the transcript of the hearing before the Board, I can find no such evidence. Furthermore, the documentary evidence cited by the applicant essentially repeats the information which the Board actually cites, noting that there have been positive developments since the implementation of new domestic violence legislation, but that only 10 per cent of women completely escape from abusive situations. The documentary evidence cited by the Board also states that, although the Executive Director of the Center of Women's Studies and Policies believes that government efforts remain insufficient, the European Union's 2005 Comprehensive Monitoring Report on Bulgaria concluded that it is "generally meeting the commitments and requirements arising from the accession negotiations in the areas of equal treatment of women and men, health and safety at work, social protection as well as employment policy". In its decision, the Board specifically recognized that "domestic violence has, and still is of serious concern in Bulgaria", but noted that "Bulgaria has taken major steps in trying to alleviate the problem of domestic violence". Based on the above evidence, I do not find that the applicant has demonstrated that the Board's determination, that state protection was available to the applicant in Bulgaria, was unreasonable.

[24] In *Jahan v. Canada (Minister of Citizenship and Immigration)* (2000), 98 A.C.W.S. (3d) 649, [2000] F.C.J. No. 987 (QL), it was decided that one complaint to the police which did not rectify the situation does not mean that there is no state protection.

[25] Similarly, the Federal Court of Appeal in *Kadenko v. Canada (Solicitor General)* (1996), 143 D.L.R. (4th) 532 at page 3, [1996] F.C.J. No. 1376, wrote "The fact that their complaint to one police station did not bear fruit is not a sufficient basis for concluding that the state of Israel cannot protect them".

[26] While no democratic state can guarantee perfect state protection, it must engage in serious efforts to have effective protection at the operational level (*Garcia v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 79, [2007] F.C.J. No. 118 at para 15 (QL)).

[27] I would add that the applicant also submits that the Board erred by drawing negative inferences without specifying the effect of those inferences on its conclusion. Nevertheless, in my opinion, the determinative issue in the Board's decision was the existence of state protection. Having determined that the Board's decision on this question was not unreasonable, I can see no basis on which this Court's intervention would be justified. Therefore, I will dismiss this application for judicial review. No questions will be certified.

JUDGMENT

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

No questions need be certified.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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