Federal Court  Cour fédérale

Date: 20091119

Docket: IMM-1404-09

Citation: 2009 FC 1187

Ottawa, Ontario, November 19, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

EDITHA BAUTISTA

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by a Pre-Removal Risk Assessment (PRRA) Officer, dated January 12, 2009, denying the applicant's application for protection because state protection along with an internal flight alternative (IFA) is available to the applicant in the Philippines.

FACTS

Background

[2] The thirty-three (33) year old applicant is a citizen of the Philippines.

[3] The applicant left the Philippines at the behest of her husband in 2003 to work in Hong Kong. She entered Canada on July 30, 2006 under the Live-in Care Giver Program. The applicant periodically remitted portions of her earnings to support her daughter and husband who are still in the Philippines.

[4] The applicant was dismissed from her position under the Live-in Care Giver Program on June 1, 2007. The applicant was arrested by Canadian Border Service Agency officers on August 1, 2007 after she began working for another employer without a work permit. A removal order was thereafter issued against her.

[5] The applicant has since given birth to a Canadian daughter born out of wedlock on March 7, 2008. The daughter is not a party to these proceedings.

[6] The applicant was ineligible to make a refugee claim but she availed herself of the opportunity to apply for a PRRA which was filed on August 16, 2007.

[7] On January 12, 2009 the applicant's PRRA was denied.

Decision under review

[8] In the PRRA submissions the applicant submitted that her marriage in the Philippines involved frequent domestic abuse in the form of beatings and humiliations from her alcoholic husband. The applicant does not allege that she was the victim of spousal rape. (This is not material to whether the applicant is a victim of spousal abuse, but is an issue which arises in the country condition documents on state protection.)

[9] The applicant left the Philippines to work overseas to provide for her husband and daughter and to distance herself from her abusive husband. Her family in the Philippines has come to rely on her remittances.

[10] The applicant submits that she will suffer stigma and humiliation for failing to provide for her family by reason of her deportation from Canada. The applicant submits that her husband will be furious if she were to return to the Philippines along with a child born out of wedlock. She fears the abuse that could be inflicted upon herself and her children, especially her newborn. The applicant submitted that police in the Philippines do not offer protection to victims of domestic abuse.

[11] The PRRA officer determined that credibility was not issue. On the other hand, state protection and IFA were the determinative issues. The PRRA officer stated that according to *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, refugee protection is surrogate to state

protection, which is presumed unless the applicant can rebut clear and convincing proof to the contrary.

[12] The PRRA officer acknowledged that domestic abuse is a problem in the Philippines, especially the enforcement of laws against spousal rape and abuse. The officer reviewed the objective country condition documentation and determined that the Philippine Government was making serious efforts to address the issue of domestic abuse, and while those "efforts may not always succeed, the evidence does indicate that perpetrators are charged and cases are before the court".

[13] The PRRA officer noted that the applicant never sought the protection of the state in the Philippines. The PRRA officer held that the applicant's refusal to seek state protection did not indicate the state's unwillingness or failure to provide protection. The PRRA officer reasoned that the Republic of the Philippines is a functioning democracy that battled the problem of domestic abuse by introducing "new laws to protect its citizens from violence and provide citizens with sufficient structures to support a citizen's right to lodge a complaint with the police". The officer concluded that the applicant provided insufficient objective evidence to prove that state protection would not be forthcoming if the applicant would actively seek it out. The PRRA officer therefore held that the applicant failed to discharge her burden to rebut the presumption of state protection.

[14] The PRRA officer noted that the applicant has not lived with her husband since 2003. Furthermore, insufficient evidence was provided to show that the applicant received threats from her husband during this time.

[15] The PRRA officer next considered the issue of a reasonably available IFA.

[16] The applicant submitted that it was unreasonable to expect her to move to an area of the Philippines where she has no family and to cut off contact with her extended family and her daughter, who all live in the same area as her abusive husband.

[17] The PRRA officer reviewed the case law on IFA before applying the test to the applicant's circumstances. The PRRA officer noted that the applicant lived away from her family since 2003 in two different countries and was able to support herself.

[18] The PRRA officer determined that the applicant provided insufficient evidence to show why the applicant could not live in another area of her home province given its size and population.

[19] The applicant's PRRA was therefore denied.

LEGISLATION

[20] Section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA), confers protection upon persons who are Convention refugees:

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 themself of the protection of each of those countries; or	*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*) 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.	*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.

[21] Section 97 of IRPA confers protection on persons who may be at a risk to their life or to a risk of cruel and unusual punishment which is personalized, or at risk of torture:

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	*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

Against Torture; or	Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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,	(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[22] Section 112(1) of IRPA allows persons subject to a removal order to apply to the Minister for protection:

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in	112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou

a certificate described in subsection 77(1).	nommée au certificat visé au paragraphe 77(1).
…	…

ISSUES

[23] The applicant raises the following issues:

1. Did the PRRA officer err by failing to consider the risk to the applicant of returning to her abusive husband with an illegitimate child?

2. Was the PRRA officer's finding on state protection unreasonable?

3. Did the PRRA officer err in finding that the applicant should have availed herself of state protection?

4. Did the officer err in finding that an IFA exists for the applicant in the Philippines?

STANDARD OF REVIEW

[24] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question": see *also Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53.

[25] It is clear that as a result of *Dunsmuir* and *Khosa* that questions of the reasonableness of a PRRA officer's factual determinations are to be reviewed on a standard of reasonableness: see also my decisions in *Oluwafemi v. Canada (MCI)*, 2009 FC 1045; *Gharghi v. Canada (MCI) et. al*, 2009 FC 1014; *Christopher v. Canada (MCI)*, 2008 FC 964; *Ramanathan v. Canada (MCI)*, 2008 FC 843.

[26] In reviewing the officer's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, *supra* at paragraph 47, *Khosa*, *supra*, at paragraph 59.

ANALYSIS

Issue No. 1: Did the PRRA officer err by failing to consider the risk to the applicant of returning to her abusive husband with an illegitimate child?

[27] The applicant submits that the officer failed to address risk of harm the applicant faces from her husband when he learns that she gave birth to an illegitimate child.

[28] The applicant argues that the impact of returning to the Philippines with an illegitimate child was a relevant consideration for the PRRA officer. The applicant specifically outlined in her PRRA submissions that she feared of her husband's future treatment of her newborn child.

[29] The respondent submits that the PRRA officer did not ignore the risk to the applicant of returning to her abusive husband with an illegitimate child.

[30] While the PRRA officer stated that the applicant's Canadian child will not be assessed in the PRRA (because the child is Canadian), the PRRA officer reproduced a portion of the applicant's submissions that indicated her fear of returning to the Philippines with her newborn. The PRRA

officer accepted that the applicant's husband will be abusive, but decided the case on issues of state protection and IFA.

Issue No. 2: Was the PRRA officer's finding on state protection unreasonable?

[31] The applicant submits that the PRRA officer erred in formulating the test for state protection as the state's "serious efforts" to provide protection, rather than effective protection: *Franklyn v. Canada (MCI)*, 2005 FC 1249 per Justice de Montigny at paragraph 21.

[32] If serious efforts of the state are considered, they should be viewed at the operational capacity level and not only at the legislative stage: *Elcock v. Canada (MCI)* (1999), 175 F.T.R. 116, 91 A.C.W.S. (3d) 820, per Justice Gibson at paragraph 15. The analysis of the state's operational capacity to protect should evaluate the state's real capacity to protect women and not the state's good intentions and initiatives: *Mitchell v. Canada (MCI)*, 2006 FC 133, per Justice O'Reilly at paragraph 10; *Wisdon-Hall v. Canada (MCI)*, 2008 FC 685, per Justice Hughes at paragraph 8.

[33] The respondent concedes that the PRRA officer must determine if there is sufficient evidence to establish the state's capacity and willingness to effectively implement the legislated scheme: *Linaogo v. Canada (Solicitor General)*, 2004 FC 335, per Justice Snider at paragraph 7. However, the respondent submits that this Court has previously supported a finding that there is adequate and effective state protection for victims of domestic abuse in the Philippines: *Linaogo*, *supra*.

[34] The PRRA officer did not neglect to analyze the operational capacity of the Philippines capacity to protect victims of domestic abuse. The officer reproduced portions of a Response to Information Request from the Immigration and Refugee Protection Board that considered the practical steps that the government was taking. Some of those steps included:

1. ability to obtain protection orders from a village office or a restraining order from a local court,
2. recognition of the "battered woman syndrome",
3. establishment of family courts in major urban centres to hear cases of domestic abuse,
4. justice reforms to tackle corruption,
5. educating women about the provisions of the new Anti-Violence Act, and
6. the establishment of crisis centres or "havens" for abused women.

[35] The PRRA decision referred to the U.S. Department of State Country Reports on Human Rights Practices for 2007 in the Philippines. This Report stated at page 33 of the Certified Tribunal Record:

> Women
>
> Rape continued to be a problem, with most cases unreported. During the year the PNP (Philippine National Police) reported 879 rape cases. There were reports of rape and sexual abuse of women in police or protective custody—often women from marginalized groups, such as suspected prostitutes, drug users, and lower income individuals arrested for minor crimes.
>
> Spousal rape and abuse are illegal, but enforcement was ineffective.
>
> Violence against women remained a serious problem. The law criminalizes physical, sexual, and psychological harm or abuse to women and their children committed by their spouses or partners.

> During the year the PNP reported 3,892 cases of wife battering and physical injuries. This number likely underreported significantly the level of violence against women.
>
> The PNP and DSWD both maintained help desks to assist victims of violence against women and to encourage the reporting of crimes. With the assistance of NGOs, officers received gender sensitivity training to deal with victims of sexual crimes and domestic violence. Approximately 9 percent of PNP officers were women. The PNP has a Women and Children's Unit to deal with these issues.

This is evidence of some state protection.

[36] The PRRA officer found that the applicant has not met her burden of establishing on the balance of probabilities that the police would not protect her from her abusive husband. The PRRA decision stated at page 6:

> While I acknowledge that domestic violence against women and children remain problematic despite various efforts by the government to address the issue, I find that the applicant has provided insufficient objective evidence that should she seek protection, the authorities would ignore her requests. Since the applicant has never approached the authorities, I find that she has not discharged her burden of rebutting the presumption of state protection with clear and convincing evidence.

[37] Based on the evidence before the PRRA officer, the Court is of the view that the PRRA officer's conclusion with respect to the availability of adequate state protection was reasonably open to the PRRA officer.

Issue No. 3: **Did the PRRA officer err in finding that the applicant should have availed herself of state protection?**

[38] The applicant submits that the PRRA officer erred by concluding that the applicant's failure to approach the state for protection defeats her PRRA. The applicant submits that there is no obligation on a claimant to literally approach the authorities for protection if it is objectively unreasonable for her to do so.

[39] The applicant notes that the PRRA officer acknowledged the applicant's claim that police protection would not have been forthcoming when he acknowledged that "the documentary evidence indicates that the enforcement of spousal rape and abuse was ineffective" in the Philippines.

[40] The applicant referred this Court to portions of objective country condition documentation which show how Filipino police officers often refuse to intervene in domestic abuse cases and the insensitive nature of the court system when it ultimately handles cases of rape and domestic abuse.

[41] In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, the Supreme Court of Canada held that refugee protection is a form of "surrogate protection" intended only in cases where protections from the home state are unavailable.

[42] Further, the Court held that except in situations where there has been a complete breakdown of the state apparatus, there exists a general presumption that a state is capable of

protecting its citizens. While the presumption of state protection may be rebutted, this can only occur where the refugee claimant provides "clear and convincing" evidence confirming the state's inability to provide protection. Such evidence can include testimony of similarly situated individuals let down by the state protection arrangement, or the refugee claimant's own testimony of past incidents in which state protection was not provided (see *Ward*, *supra*, at 724-725).

[43] In *Kadenko v. Canada (MCI)* (1996), 206 N.R. 272, 143 D.L.R. (4th) 532, per Justice Décary at paragraph 5, the Federal Court of Appeal held that in order to rebut the presumption of state protection**,** refugee claimants must make "reasonable efforts" at seeking out state protection**,** and that the burden on the claimant increases where the state in question is democratic.

[44] Consequently, the applicant had to adduce relevant and reliable evidence with sufficient probative value that satisfies the trier of fact on a balance of probabilities that state protection is inadequate: *Carillo v. Canada (MCI)*, 2008 FCA 94, 69 Imm. L.R. (3d) 309, per Justice Létourneau at paragraph 30.

[45] The applicant mischaracterized the PRRA officer’s reasons. By acknowledging that enforcement of spousal rape and abuse in the Philippines was generally ineffective, the PRRA officer made no determination on the personalized circumstances of the applicant. Contrary to the applicant’s submissions, the PRRA officer determined that the applicant provided insufficient objective evidence that it was unreasonable for the applicant to seek state protection. The officer reasoned that the government was making serious efforts to address the problem of domestic abuse,

which sometimes resulted with the perpetrators of domestic abuse being charged and tried before the country's courts.

[46] In my view the facts of this case do not bring it within the category of cases where it was objectively unreasonable for the applicant to seek state protection. Having failed to seek it, it was incumbent on the applicant to provide sufficient objective documentary evidence to show that state protection would not have been forthcoming had it been sought.

[47] The officer's ultimate determination that the applicant failed to discharge her burden was reasonably open to him.

Issue No. 4: Did the officer err in finding that an IFA exists for the applicant in the Philippines?

[48] The applicant submits that the PRRA officer erred concluding that an IFA is available to the applicant based on her prior experiences in Hong Kong and Canada, two countries of a very different economic situation than in the Philippines. The applicant submits that it is unreasonable to expect the applicant to resettle in an area where she has no pre-arranged job or family support, cut off all contact with her family, and care for her baby girl alone. Furthermore, the applicant has already strained her resources and is heavily in debt.

[49] In *Farias v. Canada (MCI)*, 2008 FC 1035, I set out at paragraph 34 a checklist summarizing the legal criteria for determining whether an IFA exists. The checklist is as follows:

1. If IFA will be an issue, the Refugee Board must give notice to the refugee claimant prior to the hearing (*Rasaratnam*, supra, per Mr. Justice Mahoney at paragraph 9, *Thirunavukkarasu*) and identify a specific IFA location(s) within the refugee claimant's country of origin (*Rabbani v. Canada (MCI)*, [1997] 125 F.T.R. 141 (F.C.), supra at para. 16, *Camargo v. Canada (Minister of Citizenship and Immigration)* 2006 FC 472, 147 A.C.W.S. (3d) 1047 at paras. 9-10);

2. There is a disjunctive two-step test for determining that there is not an IFA. See, e.g., *Rasaratnam*, supra; *Thirunavukkarasu*, supra; *Urgel*, supra at para. 17.

    i. Either the Board must be persuaded by the refugee claimant on a balance of probabilities that there is a serious possibility that the refugee claimant will be persecuted in the location(s) proposed as an IFA by the Refugee Board; or

    ii. The circumstances of the refugee claimant make the proposed IFA location unreasonable for the claimant to seek refuge there;

3. The applicant bears the burden of proof in demonstrating that an IFA either does not exist or is unreasonable in the circumstances. See *Mwaura v. Canada (Minister of Citizenship and Immigration)* 2008 FC 748 per Madame Justice Tremblay-Lamer at para 13; *Kumar v. Canada (Minister of Citizenship and Immigration)* 130 A.C.W.S. (3d) 1010, 2004 FC 601 per Mr. Justice Mosley at para. 17;

4. The threshold is high for what makes an IFA unreasonable in the circumstances of the refugee claimant: see *Khokhar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 449, per Mr. Justice Russell at paragraph 41. In *Mwaura*, supra, at para.16, and *Thirunavukkarasu*, supra, at para. 12, whether an IFA is unreasonable is a flexible test taking into account the particular situation of the claimant. It is an objective test;

5. The IFA must be realistically accessible to the claimant, i.e. the claimant is not expected to risk physical danger or undue hardship in traveling or staying in that IFA. Claimants are not compelled to hide out in an isolated region like a cave or a desert or a jungle. See: *Thirunavukkarasu*, supra at para. 14; and

6. The fact that the refugee claimant has no friends or relatives in the proposed IFA does not make the proposed IFA unreasonable. The refugee

> claimant probably does not have any friends or relatives in Canada. The fact that the refugee claimant may not be able to find suitable employment in his or her field of expertise may or may not make the IFA unreasonable. The same may be true in Canada.

[50] I am of the opinion that the PRRA officer's findings are reasonable with respect to the adequacy of the IFA. The jurisprudence establishes a very high threshold which the applicant must satisfy on the balance of probabilities to prove that an IFA is not reasonably available. To paraphrase the jurisprudence, it requires the existence of conditions which would jeopardize the life and safety of a claimant in traveling or temporarily locating in a safe area. The absence of relatives in a safe place can only amount to such a condition if it meets the threshold of jeopardizing the life and safety of the claimant. The Federal Court of Appeal in *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 164 held at paragraph 50 that there is a very high threshold for the unreasonableness test. The claimant must establish that her life or safety would be jeopardized and this is in sharp contrast with "undue hardship" resulting from loss of employment, reduction in quality of life and being away from relatives. These later factors do not make an IFA unreasonable. The PRRA officer found that the Philippines is a country with 81 provinces and 135 cities. It has a population of over 96 million people. The applicant has demonstrated that she is capable of living on her own as she has worked abroad and lived in Hong Kong and Canada by herself. The PRRA officer concluded at page 7 of the decision:

> The applicant has provided insufficient objective evidence that relocating anywhere (*sic*) in the Philippines would subject her to persecution or to a risk of torture, or a risk to her life or to a risk of cruel and unusual treatment or punishment.

[51] The Court finds that this conclusion was reasonably open to the PRRA officer.

CERTIFIED QUESTION

[52] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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