Federal Court  Cour fédérale

Date: 20110408

Docket: IMM-4636-10

Citation: 2011 FC 442

Ottawa, Ontario, April 8, 2011

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

SHEILA MONKIE LESHIBA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant seeks judicial review of a decision by the Immigration and Refugee Board (Board) denying her refugee and protection claims despite accepting that she had been beaten and intimidated by an ex-boyfriend.

II. FACTUAL BACKGROUND

[2] Ms. Leshiba is a citizen of Botswana and claimed fear of persecution by her ex-boyfriend.

[3] The incidents relied upon were the threat of a beating, two actual assaults and an attempt to burn her out of her home. These incidents occurred between 2002 and 2008, each being approximately two years apart.

[4] During that time frame, the Applicant went to South Africa twice but refused to seek protection there because of violence in that society.

[5] After the attempted arson, the Applicant decided to come to Canada but waited over a year before doing so while she obtained sufficient funds for her departure.

[6] The Applicant had reported the assaults and attempted arson to police but the most that occurred was that the perpetrator was held overnight. He was never charged with any offence.

[7] The Board found the Applicant to be credible and to have a genuine fear of the perpetrator. However, the Board recognized the difficulty in drawing the line between persecution and harassment. In this case, the Board found that there was no serious risk that she would be persecuted if she returned to Botswana.

[8] The Board concluded that the threats were infrequent, sporadic and seemingly random as well as being separated by quite lengthy periods of time (with one exception).

[9] The Board also noted that the Applicant had lived unharmed for 13 months after the last incident in 2007. Between then and her departure for Canada she went to South Africa twice. The Board found her explanation for delaying her departure from Botswana to be unreasonable. Her delay combined with such factors as never being contacted at her workplace by the perpetrator, her biding her time to obtain funds, and her open and undisturbed living were inconsistent with a well-founded fear of persecution.

[10] The Board acknowledged the documentary evidence that violence against women was prevalent but accepted that Botswana had taken steps to address this problem with new anti-violence laws which gave the Applicant the tools to address her particular problem. State protection was held to be adequate.

III. ANALYSIS

[11] As the Applicant has raised the issue of the correct legal test for persecution, that is a question of law for which the standard of review is correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9). The application of that legal test to the facts of the case and the Board's state protection analysis are matters of mixed fact and law for which the standard of review is reasonableness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

A. *Legal Test*

[12] The Board was correct to apply the dicta of *Ward* (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689) in respect of "persecution" and "sustained or systemic violation of basic human rights".

[13] A fair reading of the Board's reasons confirms that it asked the right question in applying the law: did the acts committed amount to a sustained or systemic violation. The phrase "systemic and sustained" appears to be a typographical error and is of no importance given the articulation of the applicable law and the analysis of the facts and law. That error came in quoting *Ward*, above, but the correct test is articulated in other places in the decision.

[14] The Applicant asserts that the Board wrongfully relied upon the requirement for repeated acts and failed to consider systemic violence. It was argued that the violence in this case is systemic because it was aimed at a woman.

[15] Having laid out the proper legal test, the matter of determining whether there is a well-founded fear of persecution requires an examination of the evidence to determine if an applicant faces a serious possibility of persecution where persecution is understood to mean "sustained or systemic violation of basic human rights".

[16] There is no suggestion in the Board's reasoning that a single act of violence could not be persecution, as clearly it can. Nor did the Board conclude that repetitive or sustained acts alone

would be persecution. The frequency of offending acts is a relevant consideration in the context of the seriousness of the acts themselves and the specific facts of each case.

[17] The Board took into consideration the incidents of assault in 2002 and 2007, the attempted arson in 2007, and a threat to the daughter in 2009 after the Applicant had left Botswana. It was reasonable for the Board to take into consideration the delay in departure and the absence of any contact from the perpetrator during that time as part of its analysis of the possibility of future harm.

[18] It was open to the Board on these facts to conclude that the Applicant did not have an objective basis for fear of future persecution. There is no inconsistency in this conclusion and the Board's acceptance of the facts alleged or of the Applicant's subjective fear.

[19] This finding effectively disposes of the Applicant's claim. The Board's conclusions as to adequacy of state protection are an alternative finding.

[20] That finding suffers from a failure to analyse the effectiveness of state protection under Botswana's new legislative scheme to address domestic violence. It is not sufficient to rely solely on the legislation without considering whether the legislative intent is actually being implemented. This is a particular challenge with new legislation which requires training of police, prosecutors and judges and education of the public to truly be fully implemented. The Board did not actually consider current effectiveness of state protection and its likely improvement under the new legislation.

IV. CONCLUSION

[21] However, whatever the difficulties with state protection may be, the central decision is reasonable. This judicial review will be dismissed with no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ms. Catherine Bruce	FOR THE APPLICANT
Ms. Eleanor Elstub	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MS. CATHERINE BRUCE Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
MR. MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT