Federal Court  Cour fédérale

Date: 20120119

Docket: IMM-3218-11

Citation: 2012 FC 72

Ottawa, Ontario, January 19, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

OMAIMA MAKDESI ABBOUD
MARIO ABBOUD
MAYA ABBOUD
MARINA ABBOUD

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application put forward by the Minister of Citizenship and Immigration pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee

Board (the Board) rendered on April 19, 2011, wherein the Board held that the respondents were entitled to refugee protection in Canada.

[2] The applicant seeks an order setting aside the decision and remitting the matter for redetermination by a differently constituted panel of the Board.

Factual Background

[3] Ms. Omaima Makdesi Abboud (the principal respondent) and her three children, Mario Abboud, Maya Abboud and Marina Abboud, are citizens of France and Syria.

[4] The principal respondent, a civil engineer in Syria, married her husband in Syria in 1991. Together they had three children.

[5] The principal respondent claims that she was physically, psychologically and verbally abused by her husband shortly after their marriage began. As well, the principal respondent alleges that her husband was also abusive to their children.

[6] In 2001, upon her husband's insistence, the principal respondent and her three children moved from Syria to the French overseas territory of Martinique where her husband had been living since 1997. She maintains that her husband's abusive behaviour continued after they relocated to Martinique.

[7] In 2004, the principal respondent alleges that she was the victim of an episode of severe abuse, after which she decided to leave home and report the incident to the local police. She

explains that the police arranged for a mediation session between herself and her husband. She also advances that due to her limited abilities in the French language, her husband acted as interpreter during the mediation session.

[8] The principal respondent claims that her husband continued to abuse her and her children between 2004 and 2008.

[9] As her husband's behaviour continued to worsen, the principal respondent made arrangements to fly to Canada with her children on December 27, 2008. The family claimed refugee protection upon their arrival in Montreal.

[10] The applicant's claim was heard by the Refugee Protection Division of the Immigration and Refugee Board on April 19, 2011 and its decision and oral reasons were issued the same day.

Decision under Review

[11] In a brief decision, the Board determined that the central issues of the claim were the respondents' identity, their credibility, the existence of an internal flight alternative (IFA) and the availability of state protection. On the issues of identity and credibility, the Board determined that these two elements had been satisfactorily established.

[12] On the issue of an IFA, the Board concluded that it was "not obvious" that an IFA existed. The Board made the following comments on this issue in paragraph 6 of its decision:

> … the claimant, as I understood the testimony, is not a rich person, her parents are not rich. If they were to deploy funds to hop around the world in Tahiti, in

> France and in the Caribbean using an insurmountable fund of money, of course they could keep ahead of their fractious husband and father, but that is not the situation. I don't believe that there is a practical IFA available in part for the same reason that there many not be State protection.

[13] Moreover, while the Board acknowledged the fact that France was a democratically developed country, the Board found that the principal respondent and her children could not obtain protection from the French State. Essentially, the Board stated the following in paragraph 7 of the decision:

> What I do find, in this case, is that in practice for this principal claimant, for this woman, the normal State protection that a French woman could obtain in France disappeared, was simply not there. That is a function of two things that came out during the examination of the Tribunal Officer. There was the fact that, at the first mediation, there was no independent interpreter for the claimant. The other participant, her husband, a very cunning individual it seems to me, acted as the interpreter and the claimant was unable to say what the mediator said to him or, vice-versa, what he said to the mediator. The only thing that she understood was the words spoken to her in Arabic by her husband.

[14] Furthermore, aside from the unfair mediation due to the lack of an independent interpreter, the Board also noted that the principal respondent was free to pursue other recourses against her husband but she was unaware of them, or did not understand them based on her lack of understanding of the French language (in paragraph 8 of the decision). Consequently, the Board found that the principal respondent could not benefit from state protection in France:

> Normally, the availability of State protection, which is presumed, would prevent that recourse. Here I find that there is no prevention to that recourse for the reasons that I have expressed, which I repeat, which is that although this country is a country from which normally we would expect the offering of State protection to its citizens, in this particular case, in view of how the participants were linguistically capable […] produced a situation where there was no State protection with respect to France, available at that particular moment (paragraph 9 of the decision).

[15] Finally, the Board treated the possibility of state protection in Syria in the following manner in paragraph 10 of the decision:

> With respect to Syria, I have already indicated that this being an Arabic-dominated society, there is little room for women to express themselves and to claim their rights, and the police, as can be found in the articles that are indexed under the Index for the National Documentation Package, it can be seen that notwithstanding recent legislative changes in most of those countries, the police continues to believe that domestic problems are to be settled within the home by the normal standards, and that means that in the end, the husband is going to decide.

[16] Thus, the Board ultimately concluded that the respondents were indeed members of a particular social group – that of the abused spouse – under section 96 of the Act and granted them refugee protection in Canada.

Issues

[17] The issues put forward by the applicant can be synthesized as to whether the Board failed to apply the appropriate legal test for state protection and an internal flight alternative (IFA).

Statutory Provisions

[18] The following provisions of the *Immigration and Refugee Protection Act* are applicable in these proceedings:

REFUGEE PROTECTION, CONVENTION REFUGEES AND PERSONS IN NEED OF PROTECTION	NOTIONS D'ASILE, DE REFUGIE ET DE PERSONNE A PROTEGER
Conferral of refugee protection	Asile
95. (1) Refugee protection is conferred on a person when	**95.** (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas :

(*a*) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;
(*b*) the Board determines the person to be a Convention refugee or a person in need of protection; or
(*c*) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

a) sur constat qu'elle est, à la suite d'une demande de visa, un réfugié ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d'un permis de séjour délivré en vue de sa protection;
b) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger;
c) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).

Protected person

(2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).

Personne protégée

(2) Est appelée personne protégée la personne à qui l'asile est conféré et dont la demande n'est pas ensuite réputée rejetée au titre des paragraphes 108(3), 109(3) ou 114(4).

Convention refugee

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,

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail

Définition de « réfugié »

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) 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

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

la protection de chacun de ces pays;
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.

Person in need of protection

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
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(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,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

Personne à protéger

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) 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 Convention contre la torture;
b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) 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.
Person in need of protection	Personne à protéger
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Standard of Review

[19] The applicant submits that the issues it has raised concerning the correct legal test to be applied in the determination of the existence of an IFA and the appropriate test for state protection are both questions of law which are reviewable according to the standard of correctness as per the established case law (*Farias v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1035, [2008] FCJ No 1292 at paras 30-31 [*Farias*]; *Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400, [2010] FCJ No 458 at para 30; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339). The Court agrees.

[20] As well, the Board's application of the legal tests mentioned above to the facts at hand involves determinations of fact or mixed fact and law. Thus, in accordance with *Dunsmuir v New Brunswick*, 2008 SCC 9, 372 NR 1, *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 362 NR 1 [*Hinzman*]; and *Navarro v Canada (Minister of Citizenship and*

Immigration), 2008 FC 358, 169 ACWS (3d) 626, these questions must be reviewed according to the reasonableness standard.

Arguments

Position of the Applicant

[21] The applicant maintains that the Board erred in fact and law by determining that the respondents did not have access to state protection or an internal flight alternative in either of their countries of citizenship.

Position of the Respondents

[22] For their part, the respondents contend that the Board's findings were entirely reasonable in the case at hand. The respondents are of the view that the applicant has only submitted a selective and minute portion of the total evidence that was before the Board in their application. The respondents further argue that the documentary evidence before the Board indicated (i) that women in France are abused, (ii) how the principal respondent and her children were treated and, (iii) that the police in Martinique did not charge the principal respondent's husband after he severely abused her. Rather, the respondents note that the police organized a mediation session between the principal respondent and her husband.

[23] The respondents also maintain that the Board correctly applied the IFA legal test and the correct legal test for state protection.

[24] The respondents allege that the Board based its findings on the respondents' testimony and the evidentiary record and avoided technicalities and academic discussions. The respondents submit that the applicant is asking the Court to reweigh the evidence in order to arrive at another conclusion and that the Court must show deference to the Board's findings.

Analysis

[25] At the outset, the Court recalls that refugee protection is a form of "surrogate protection" which is intended only in situations where protections from the home state are unavailable (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 153 NR 321 and *Farias*, above, at para 15). Moreover, this Court constantly has held that a general presumption of state protection exists except in situations where it is clear that a complete breakdown of the state apparatus has occurred.

[26] In the present case, the Court finds that the Board committed reviewable errors for the reasons that follow.

[27] Firstly, the Board failed to apply the correct legal test as to the existence of an IFA. The Court cannot agree with the respondents that the failure to correctly address the IFA test is a mere technicality. As argued by the applicant, the law on internal flight alternatives outlines that an individual cannot be granted the status of a Convention refugee if an IFA exists. It is trite law that refugee claimants must first seek safety in another part of their country (or countries) of citizenship before claiming refugee protection in Canada. If they fail to do so, the refugee claimants have the heavy burden of establishing that there is no IFA available and that seeking safety in another part of their country would be objectively unreasonable in the circumstances at hand (see

Thirunavukkarasu v Canada (Minister of Employment and Immigration) (CA), [1994] 1 FC 589, [1993] FCJ No 1172 [*Thirunavukkarasu*]; *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, [2000] FCJ No 2118 [*Ranganathan*]; *Canada (Minister of Citizenship and Immigration) v Kaaib*, 2006 FC 870, [2006] FCJ No 1106).

[28] More particularly, the Board failed to address either of the two prongs of the legal test as outlined in *Thirunavukkarasu*, above, and *Rasaratnam v Canada (Minister of Employment and Immigration)* [1992] 1 FC 706, [1991] FCJ No 1256 [*Rasaratnam*]. The legal test provides that the Board must be satisfied on a balance of probabilities that: i) there was no serious possibility of the refugee claimant being persecuted or subjected to a danger of torture or to a risk to life or of cruel and unusual treatment or punishment in the proposed IFA area; and ii) that the refugee claimant cannot reasonably, without undue hardship, seek refuge in the proposed IFA area.

[29] In its decision, the Board did not attempt to determine whether an IFA existed in Martinique, in continental France or in Syria. Rather, the Board solely based its IFA analysis on financial considerations. It found that the existence of an IFA was “not obvious” because the respondents did not have unlimited resources “to hop around the world in Tahiti and in France and in the Caribbean”. Although the Board concludes that it would be difficult for the respondents to travel to France, it ignores the fact that they travelled to Canada. Further, given France’s large territory, its strong democratic and legal systems and its diverse population, the Board’s factual findings were insufficient.

[30] Secondly, the Court notes that the Board failed to apply the appropriate test for state protection in the present case. It is also trite law that a general presumption of state protection exists; this presumption can only be rebutted if the refugee claimant provides “clear and convincing” evidence that their country (or countries) of citizenship are unable to provide protection or that the protection provided is “ineffective” (*Ward* and *Hinzman*, above).

[31] In the present case, the principal respondent explained that her reason for not seeking help from the police in 2008, after experiencing abuse from her husband, was that she had lost trust and confidence in the police due to her negative experience with them in 2004. The Court agrees with the applicant that the Board incorrectly applied the legal test for state protection as it concluded that, while state protection would normally be available in France, no state protection was “available at that particular moment” – that moment being the episode in 2004 when the principal respondent sought help from the police. The Board only examined the single attempt of the respondents to seek assistance from state authorities and failed to include this attempt in the broader context of the analysis of state protection.

[32] Again, there is no indication in the Board’s decision that this test was considered in the Board’s analysis of the existence of state protection. Moreover, the Court notes that the Board did not question whether the respondents made any “reasonable efforts” at seeking out state protection before leaving for Canada. Pursuant to the case of *Kadenko v Canada (Solicitor General)* [1996] FCJ No 1376, 206 NR 272 (FCA), the refugee claimant’s burden increases where the state in question is deemed democratic. The Court has found that “the more democratic the state's

institutions, the more the claimant must have done to exhaust all the courses of action open to him or her" (*Kadenko*, above, at para 5).

[33] Also, the Board failed to consider the evidence before it. Despite counsel for the respondents' able arguments, the Court cannot agree, based on the evidence, that state protection was not available in France for the following reasons. The evidence demonstrates that France takes domestic violence seriously, violence against women is illegal and, the French government generally enforces the law (Applicant's Record, pp 45-47). Further, French citizens located in its overseas territories benefit from the same rights as its citizens located in continental France (Applicant's Record, p 58).

[34] The applicant also contends that the Board erred in determining that state protection was unavailable to the respondents as independent interpretive services were not accessible to them during the mediation session of 2004. The applicant reminds that the respondents' abilities in the French language and the limited availability of legal aid are both irrelevant considerations to the objective test of the existence of state protection. On this point the Court also agrees with the applicant, and observes that the principal respondent's PIF was completed in French, it contained no attestation of an interpreter and it included a declaration that the principal respondent understood sufficient French to understand the content of the form. The Board did not consider the principal respondent's current abilities in French or her ability to access state protection in France. The Board relied solely on the respondents' disillusionment with the Martinique police department subsequent to the mediation session of 2004 and her linguistic limitations in order to rule out state protection. The Court concludes that the incident of 2004 is not sufficient in and of itself to rebut the general

presumption of state protection. The Court also recalls that state protection need not be perfect but adequate (see *Canada (Minister of Employment and Immigration) v Villafranca (FCA)*, [1992] FCJ No 1189, 99 DLR (4th) 334, at para 7; *Baku v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1163, [2010] FCJ No 1507, at para 15; *Emile v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1321, [2011] FCJ No 1614, at para 36.)

[35] Hence, the Court is of the opinion that the Board's factual findings on state protection in France were unreasonable, were based on irrelevant considerations, and, were made without regard to the evidence before it.

[36] Finally, the Court agrees with the applicant that the Board also failed to adequately address the dual citizenship of the respondents in the present case.

[37] The Court sympathizes with the respondents' situation. However, in light of the applicable law, the Court must set aside the Board's decision. As neither party has proposed a question for certification, none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted.

2. The matter is referred back for redetermination by a differently constituted panel in accordance with the reasons given in this Judgment.

3. No question of general importance is certified.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jessica DiZazzo	FOR THE APPLICANT
Rezaur Rahman	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE APPLICANT
Law firm of Rezaur Rahman Ottawa, Ontario	FOR THE RESPONDENTS