

Federal Court



Cour fédérale

**Date: 20130417**

**Docket: IMM-4049-12**

**Citation: 2013 FC 385**

**Ottawa, Ontario, April 17, 2013**

**PRESENT: The Honourable Mr. Justice Scott**

**BETWEEN:**

**KEITUMETSE ISRAEL, IKOKETSENG  
ISRAEL, FERGUSON ISRAEL and PEARL  
MICHELLE ISRAEL**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] This is an application for judicial review of a decision by the Refugee Protection Division (the RPD) rendered on April 10, 2012 denying Keitumetse Israel (Ms. Israel), Ikoketseng Israel (Mr. Israel), Ferguson Israel and Pearl Michelle Israel's (the minor Applicants) claims under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow this application is allowed.

## **II. The facts**

[3] The Applicants are citizens of Botswana.

[4] In 1999, Ms. Israel entered into a relationship with William Camm (Mr. Camm). Shortly thereafter, Ms. Israel discovered that Mr. Camm was abusive.

[5] In 2000, Mr. Camm told Ms. Israel that he wanted to have a baby. Ms. Israel refused because she was planning to further her studies. Mr. Camm sexually assaulted Ms. Israel and she became pregnant with the minor Applicant Pearl Michelle, as a result. Mr. Camm abandoned Ms. Israel after she became pregnant and failed to provide any financial support. Pearl Michelle was born on August 31, 2000. Mr. Camm and Ms. Israel had no contact until 2003.

[6] Ms. Israel met Mr. Israel at school in 2001.

[7] In 2003, Mr. Camm called Ms. Israel and told her he wanted to contribute financially to assist in the upbringing of Pearl Michelle. Ms. Israel travelled 100 km from Francistown to the village of Lethakane where Mr. Camm lived. When Ms. Israel met Mr. Camm in his home, he told her that he heard that she was in a new relationship and demanded that she leave her partner because their relationship had never truly ended.

[8] When Ms. Israel told him that their relationship ended when he left in 2000, Mr. Camm punched, kicked and strangled her with a towel. Ms. Israel managed to escape and went to a police station to report the assault. Mr. Camm was arrested and fined 50 Pula (roughly \$6 CAD).

[9] In 2006, Mr. Camm located Ms. Israel at the hospital where she was employed as a nurse. He told her that both his parents had died, he had lost his job, and that he had no one to take care of him. He wanted to get back together with her. When Ms. Israel refused because she was in a happy relationship, Mr. Camm threatened to hurt her and kill her if she reported him to the police.

[10] Frightened, Ms. Israel feigned she needed time to reflect and applied for an emergency transfer to another hospital. She received her transfer immediately and moved to Palapye, approximately 300 km south of Francistown.

[11] Ms. Israel did not hear or see from Mr. Camm for almost 4 years. On May 7, 2007, Ms. Israel gave birth to the minor Applicant, Ferguson, and on December 18, 2010, she married Mr. Israel.

[12] In September 2010, Mr. Camm found Ms. Israel again. He confronted her at her home and physically assaulted and threatened her. Mr. Israel was present at the time but was unable to overcome him. Mr. Camm gave Ms. Israel one month to break up with her husband and come back to him.

[13] Neither Ms. Israel nor Mr. Israel reported the assault to the authorities because they felt it would make matters worse.

[14] On December 25, 2010, Mr. Camm approached Ms. Israel in her backyard. Yet again he insisted she get back together with him and assaulted her when she refused. Mr. Israel heard the commotion outside, confronted Mr. Camm and was thrown to the ground.

[15] The Applicants did not report this incident to the police either. Ms. Israel took time off work because of stress and contacted a friend living in Canada who agreed to provide her with accommodation. Ms. Israel said she knew she did not need a Visa to enter Canada and wanted to keep her options open in case she needed to flee the country quickly.

[16] Ms. Israel returned to work on January 17, 2011. On January 19, 2011, Mr. Camm confronted the married couple once more at their home demanding Ms. Israel return to him. He punched and took off his shirt to strangle her. Mr. Israel attacked Mr. Camm but was overpowered. Fortunately, a group of men passing by intervened. Mr. Camm ran away.

[17] Soon after the incident, on January 24, 2011, Ms. Israel flew to Calgary. She made a claim for refugee protection on February 3, 2011. Mr. Camm continued to pursue Ms. Israel after she left. Mr. Israel fled to Canada with Pearl and Ferguson on March 27, 2011, after Mr. Camm had threatened him if he did not disclose Ms. Israel's whereabouts.

### **III. The impugned decision**

[18] The determinative issue for the RPD in this case is Ms. Israel's failure to rebut the presumption of state protection in Botswana.

[19] In arriving at that conclusion, the RPD considered: 1) the fact that Botswana has been multiparty democracy since its independence in 1996 and that its security forces report to civilian authorities; 2) Ms. Israel's own experience with state protection after the attack in 2003; and 3) Ms. Israel's failure to seek out state protection after subsequent attacks.

[20] The RPD held that while Ms. Israel was not satisfied with the punishment Mr. Camm received after the first assault, this does not mean that state protection is inadequate in Botswana. The RPD incorrectly indicated in its decision that Mr. Camm was fined 50,000 pula instead of 50.

[21] On the subject of Ms. Israel's reluctance to seek out state protection, the RPD determined that Ms. Israel's reasons (i.e. that it would only fuel Mr. Camm's anger and that she did not believe it would prevent further assaults given the response she received on the first occasion) were unacceptable.

[22] The RPD noted that Ms. Israel did not hear from Mr. Camm for three years after his arrest and found that this fact suggests that reporting him to the police would not have fuelled his anger. Consequently the RPD found that Ms. Israel's subjective belief was not supported by the objective evidence.

[23] Regarding Ms. Israel's position that the police's intervention would not be more effective than on her first complaint, the RPD noted that "[d]oubting the effectiveness of state protection when she did not really test it does not rebut the presumption of state protection [...]" (*Rio Ramirez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1214 at para 28).

[24] The RPD determined that Ms. Israel adduced insufficient credible evidence to conclude that state protection would not have been forthcoming. In fact, the RPD found that Ms. Israel's previous experience indicates the opposite. As to the evidence presented that domestic violence is viewed as a private matter in Botswana and that authorities refuse to be involved, the RPD found that this was of limited relevance because it did not view the case as a "domestic matter".

[25] The RPD concluded that "whether considered under section 96 or 97, [its] finding that state protection would be available to the [Applicants] is fatal to both" (RPD Reasons, para 42).

#### IV. Legislation

[26] Section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 provide as follows:

***Immigration and Refugee Protection Act, SC 2001, c 27***

**Convention refugee**

96. A Convention refugee is a person who, by reason of a

***Loi sur l'immigration et la protection des réfugiés, LC 2001, c 27***

**Définition de « réfugié »**

96. A qualité de réfugié au sens de la Convention — le réfugié

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 themselves 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.

#### **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

— 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 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.

#### **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) the person is unable or, because of that risk, unwilling to avail themselves 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

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

## V. Issues and standard of review

### A. Issue

- *Did the Board err in finding that the Applicants failed to rebut the presumption of state protection?*



## **B. Standard of review**

[27] The standard of review for a state protection finding is reasonableness (*Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 36; *Lozada v Canada (Minister of Citizenship and Immigration)*, 2008 FC 397 at para 17; *Trinidad Reyes v Canada (Minister of Citizenship and Immigration)*, 2012 FC 926 at para 14).

[28] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

## **VI. Parties’ submissions**

### **A. Applicant’s submissions**

[29] Ms. Israel alleges the RPD committed a number of reviewable errors in its state protection analysis.

[30] First, the RPD erred in concluding that Botswana provided adequate protection after Ms. Israel reported the 2003 assault. At the hearing, Ms. Israel testified that both she and her sister had

tried but were unable to obtain a copy of the police documents related to the 2003 assault. The police indicated they had no knowledge about Ms. Israel's complaint. Ms. Israel testified that consequently police must have been lying when they stated that Mr. Camm had been charged. Ms. Israel claims that the RPD committed a reviewable error by failing to mention or analyse this important evidence which contradicted its findings.

[31] Ms. Israel also alleges that the RPD erred when it concluded that the police's response to her complaint was adequate because it misapprehended the evidence she adduced. Contrary to what the RPD indicated in its reasons, Ms. Israel did not testify that Mr. Camm was brought before a court or that he was fined 50,000 pula. Rather, Ms. Israel explained that when she phoned the police they told her that Mr. Camm had been given a 50 pula fine for an admission of guilt. Given the significant difference between the RPD's understanding and the actual fine as stated by the police, Ms. Israel claims that the RPD's assessment constitutes a reviewable error since it goes to the heart of the RPD's state protection analysis (i.e. whether Ms. Israel was justified in not seeking out state protection for subsequent assaults).

[32] Ms. Israel submits that she adduced credible evidence of "similarly situated individuals" at the hearing and that the RPD erred in dismissing it as not credible without any explanation or analysis. Citing *Hilo v Canada (Minister of Employment and Immigration)* (1991), 130 NR 236 (FCA) [*Hilo*], Ms. Israel argues that the RPD is required to explain its credibility findings in clear and intelligible terms.

[33] Ms. Israel also takes issue with the RPD's finding that this case is not a "domestic matter". Ms. Israel submits that the RPD wrongly focussed on the current state of her relationship with Mr. Camm to conclude that the abuse she suffered was not domestic in nature. This finding lead the RPD to assign little weight to the evidence presented establishing that authorities in Botswana regard "domestic abuse" as a private matter and refuse to be involved. Ms. Israel underlines that the genesis of the violence she experienced was her initial relationship with Mr. Camm. He was abusive while they were together and that abuse continued because of her refusal to renew that relationship.

[34] Finally, Ms. Israel alleges that the RPD should not have used its own viewpoint instead of that of the authorities in Botswana to determine whether she was a victim of domestic abuse or not. Relying on *Hilo*, above, Ms. Israel submits that "when determining whether an applicant belongs to a protected group as defined under [...] 3(2)(d) of the *IRPA*, the Tribunal must make that determination from the point of view of the agent of persecution, and not from the point of view of the Tribunal" (Applicant's Memorandum, para 21).

[35] Ms. Israel also relies on paragraph 80 of *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*] to claim that she belongs to a particular social group as defined in that Supreme Court decision and that the RPD failed to take notice or evaluate her claim on that basis.

## **B. Respondent's submissions**

[36] The Respondent submits the RPD's state protection finding was reasonable. The RPD did not err in failing to address Ms. Israel's evidence that the police were unable to produce a record of

the 2003 assault eight years after the fact. The Respondent argues there exists any number of reasons to explain that the police could not find a record and the RPD was under no obligation to address Ms. Israel's inference that the police had lied to her in 2003.

[37] The Respondent acknowledges that in its decision, the RPD misstated the amount Mr. Camm was fined for the 2003 assault but contends that a review of all the evidence adduced indicates that the error was merely typographical and not determinative. The Respondent claims that the RPD was aware that the fine was minimal and that Ms. Israel considered it far too lenient. If, on the other hand, the misstatement constituted a misapprehension of the evidence, the Respondent insists that the error was not so significant that it requires the decision to be quashed.

[38] On the issue of the RPD's treatment of the evidence adduced by Ms. Israel of similarly situated individuals in Botswana, the Respondent argues that the RPD's failure to proceed to an in depth analysis does not necessarily mean that said evidence was ignored. In addition, the Respondent claims that the issue was not determinative in the RPD's state protection analysis which focussed far more on "the context in which the assaults occurred and the personal experience of the [PA] in reporting [the] assault, having it followed up on and the resulting fine" (Respondent's Further Memorandum, para 42).

[39] The Respondent submits that when reading the RPD's decision as a whole, one can conclude that the RPD did not find the experiences of other individuals presented by Ms. Israel as "similar" because they involved domestic violence whereas the RPD concluded the case at bar was not a domestic matter. The Respondent argues that its finding was reasonable and supported by the

facts. For one, all but one of the assaults occurred at least three years after Ms. Israel and Mr. Camm had separated. Second, the assaults and threats were not of a private nature. Mr. Camm assaulted and threatened Mr. Israel, as well as Ms. Israel.

[40] Finally the Respondent alleges that the RPD was not required to evaluate whether the case was a domestic matter from the point of view of the authorities in Botswana. The Respondent points out that while the viewpoint of persecutors is relevant in cases where claimants are being persecuted by the state for political activity; that is not applicable in this instance as the agent of persecution is a private individual. The Respondent also notes the absence of evidence adduced before the RPD related to the Botswanan authorities' viewpoint on domestic violence.

## VII. Analysis

- *Did the Board err in finding that the Applicants failed to rebut the presumption of state protection?*

[41] The Court finds that the Board erred in finding that the Applicants had failed to rebut the presumption of state protection for the following reasons. The case law is clear. A claimant can adduce evidence to rebut the presumption of state protection. In the present case the RPD based its refusal of Ms. Israel's claim on the basis that she failed to rebut that presumption. In *Ward*, cited above, at para 57, the Supreme Court set out the types of evidence required to refute this presumption:

The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the

reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant. [Emphasis added].

[42] In the case at bar, Ms. Israel claims to have provided evidence of “similarly situated individuals let down by the state protection arrangement [and] [...] testimony of past personal incidents in which state protection did not materialize”. On the subject of her own experience of seeking state protection, she argues that adequate state protection did not materialize because the penalty Mr. Camm received was far too lenient. The RPD disagreed. In fact, it found that Ms. Israel’s past experience suggested that adequate state protection would have been forthcoming to her and that her failure to seek it out was fatal to her claim.

[43] Ms. Israel testified that Mr. Camm received a fine of 50 pula (roughly \$6 CAD) for admitting to her assault. The RPD indicated in it reasons that Mr. Camm received a fine of 50,000 pula (roughly \$6000 CAD). The Court finds that Ms. Israel’s testimony clearly established that adequate state protection did not materialize after her 2003 assault. A six dollar fine for a brutal assault (which included strangulation) is obviously inadequate. If the RPD’s error was merely typographical then the Court finds that its assessment of the police’s response was unreasonable. If

its error was a misapprehension of the evidence then it had a direct influence on its conclusions regarding the police's response to Ms. Israel's 2003 complaint.

[44] Ms. Israel also proffered evidence at the hearing of two similarly situated individuals (her sister and a neighbour) who were not provided adequate state protection. The RPD dismissed this evidence as not credible without any explanation or analysis. At paragraph 40 of its reasons, the RPD noted that "there is no credible evidence of similarly situated individuals who did not receive state protection". It is basic tenet of the law on credibility findings that a tribunal must provide a clear explanation for such conclusions:

"That said, it is insufficient, as a matter of law, for the RPD to simply state that it considered the applicants' evidence to be incredible. The RPD is obliged to give reasons in clear and unmistakable terms for rejecting a claim on the ground of credibility. See: *Armson v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm L.R. (2d) 150 (F.C.A.); *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 130 N.R. 236 (F.C.A.); *Wilanowski v. Canada (Minister of Employment and Immigration)* (1993), 154 N.R. 205 (F.C.A.)" (*Vila v Canada (Minister of Citizenship and Immigration)*, 2005 FC 41 at para 5).

[45] The Court rejects the Respondent's argument that the RPD did not assign any weight to Ms. Israel's evidence of similarly situated individuals because they were not "similarly situated". The RPD may have found Ms. Israel's experience was distinct from her neighbour and sister, it did not do so. The RPD clearly indicated that it did not accept Ms. Israel's evidence of similarly situated individuals because it was not credible but offered no explanation for its finding. A review of the hearing transcript also offers no indication as to why the RPD concluded that Ms. Israel's evidence was not credible.

[46] The Respondent contends that even if the RPD erred in failing to provide a clear explanation for its credibility finding, the error should not overturn the decision because “those facts were not central to the Board’s decision” (Respondent’s Further Memorandum, para 42). The Respondent asserts that in coming to its decision on the existence of state protection, the RPD “primarily relied on the context in which the assaults occurred and the personal experience of [Ms. Israel] in reporting an assault, having it followed up on, and the resulting fine” (Respondent’s Further Memorandum, para 42). The Court disagrees. After closely reviewing the evidence presented and the transcript of the hearing, it is clear that this is a case of domestic abuse and gender related violence. The RPD refused to accept the basic tenet of Ms. Israel’s domestic violence claim and did not provide reasons for refusing to accept this fact. Consequently, the RPD rejected the evidence adduced by Ms. Israel to substantiate her position that the state of Botswana had failed to protect her sister and neighbour (both similarly situated individuals as per *Ward*). Given the RPD’s error and the consequential failures in the treatment of the evidence adduced by Ms. Israel, the Court finds that the decision cannot stand.

[47] In view of the RPD’s error, its conclusion that the Applicants are not persons in need of protection because they have failed to rebut the presumption of state protection does not “fall within the range of possible outcomes” (*Dunsmuir*, cited above, at para 47).



**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application is allowed and that there is no question of general importance to certify.

"André F.J. Scott"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-4049-12

**STYLE OF CAUSE:** KEITUMETSE ISRAEL  
IKOKETSENG ISRAEL,  
FERGUSON ISRAEL  
and PEARL MICHELLE ISRAEL  
v  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** March 14, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** SCOTT J.

**DATED:** April 17, 2013

**APPEARANCES:**

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