

Date: 20060613

Docket: IMM-6907-05

Citation: 2006 FC 739

OTTAWA, Ontario, June 13, 2006

PRESENT: The Honourable Mr. Justice Teitelbaum

BETWEEN:

ALMAIDA DOREITHA CODOGAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under s.72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 ("IRPA") for judicial review of a decision of the Immigration and Refugee Protection Division ("RPD") of the Immigration and Refugee Board dated October 31, 2005, finding that the applicant, Almaida Doreitha Codogan (the Applicant) is not a Convention refugee or a person in need of protection. The Notice of Decision was dated November 2, 2005.

[2] The Applicant is a citizen of St. Vincent and the Grenadines who claimed a well-founded fear of persecution based upon membership in a particular social group, namely, gender-victims of sexual violence. She also claimed to be a person in need of protection.

[3] The Applicant was sexually abused during her childhood by both her brother and father. The incidents involving her father took place in Trinidad, and she was told by police to leave the country. The Applicant and her sister went to live with her aunt in St. Vincent.

[4] The RPD notes that the Applicant became pregnant at the age of fourteen. When her son was about one year old, she met Mr. Augustin Grant, with whom she had five children. When that relationship ended, the Applicant met Mr. Denis John. In 1998 the Applicant was beaten unconscious by Mr. John, and her son was injured while attempting to protect her which resulted in him losing one eye.

[5] The Applicant alleged that she tried to go to the police, but that "they simply laughed at me". She arrived in Canada in February 1999, but contends that Mr. John still asks about her. He has allegedly asked the Applicant's son for her phone number, and asks him when his mother is coming back. The Applicant claimed refugee protection in December, 2004.

[6] The RPD accepted the Applicant's identity, and held that, on a balance of probabilities, she was physically abused and threatened by Mr. John. The RPD also gave the Applicant "the benefit of the doubt" and held that a scar on her scalp was as a result of a beating at the hands of Mr. John, as she alleged.

[7] The Presiding Member noted the delay of nearly six years before the Applicant claimed refugee protection, but concluded that in this case, the delay was not fatal to the subjective requirement of a well-founded fear of persecution.

[8] The panel held that the issue of state protection is determinative of the Applicant's claim. It found that St. Vincent benefits from the presumption of state protection, since it has effective control of its territory, has military, police and civil authorities in place, and is making serious efforts to protect its citizens.

[9] It is difficult to understand their finding as, on the same day as their finding was made, the same hearing officer found, in a case involving the Applicant's daughter, that there was no evidence of state protection.

[10] The finding that St. Vincent has made serious efforts to provide protection to its citizens was the result of the RPD's lengthy examination of efforts taken to combat sexual violence in St. Vincent. The panel noted that the country documentation indicated that sexual violence is still a major problem, and that the police are not fully equipped to deal with it. However, the RPD then highlighted positive efforts taken to combat sexual violence. It noted that the country documentation referred to Marion House, an agency created by the Catholic Church to provide assistance to victims of sexual violence. The panel also referred to the *Domestic Violence Matrimonial Proceedings Act* (1994) and the *Domestic Violence Summary Proceedings Act* (1995), which the coordinator of the St. Vincent and the Grenadines Human Rights Association stated "were being implemented to the maximum". The RPD concluded that the country is making serious efforts to combat the problem of sexual violence.

[11] The RPD examined whether the Applicant had successfully rebutted the presumption of protection in her case. It found it plausible that the Applicant had either visited a police station or talked to a police officer about her abuse on one occasion, but noted that either way, the Applicant only made one effort to seek protection from police. The RPD explained that a local failure to provide state protection does not amount to a lack of state protection unless the evidence places the individual claimant's experience within part of a broader pattern of state inability or refusal to offer protection. The panel once again noted that the documentary evidence offered conflicting accounts of the level of state protection from sexual violence. While the Applicant referred to statements to the effect that the police attitude towards domestic violence is poor and marginalizes the problem, the panel also noted statements by the Family Court President and Chief Magistrate of the country who

stated that the judicial system is proving "effective". The RPD also noted that there was evidence indicating that the Courts are hearing a greater number of cases.

[12] The RPD concluded that St. Vincent is making serious efforts to deal with the issue of sexual violence and that the Applicant failed to provide clear and convincing evidence that would rebut the presumption of state protection.

[13] The Applicant makes three submissions that challenge the RPD's examination of the availability of state protection.

[14] First, the Applicant claims that the RPD erred in law by suggesting that the Applicant could have sought protection from Marian House. The Applicant highlights the fact that Marian House is a social service agency, and is not a state-run or state-funded organization. The Applicant claims that the jurisprudence does not require that claimants seek protection from authorities other than the police, and that there is no obligation to refer to counselling, or social agencies, or other agencies which are not mandated to protect its citizens: *Balogh v. Canada (M.C.I.)*, (2002) FCT 809 at para. 44 ["*Balogh*"]; *Molnar v. Canada (M.C.I.)*, 2002 FCT 1081 ["*Molnar*"]; *Cuffy v. M.C.I.*, (1996), F.C.J. No. 1316, at para. 11; *Risak v. M.E.I.*, (1994) F.C.J. No. 1581, at para. 11.

[15] Second, the Applicant submits that the RPD erred in law by determining that she failed to rebut the presumption of state protection. The Applicant contends that the RPD erred by failing to consider the clear and convincing evidence presented to it in the form of evidence of a similarly situated individual who was denied state protection. The Applicant claims that the similarly situated individual providing evidence in this case is her own daughter.

[16] The Applicant alleges that her daughter fled from St. Vincent because she had been the victim of sexual abuse. The Applicant's daughter had sought protection from the police, who counselled her to join her mother abroad. The Applicant's daughter's Refugee claim was allegedly heard by the same Presiding Member on the same day as the Applicant's case. The two matters were heard separately; however, both matters involved parties fleeing the same country because of sexual abuse. Both cases turned on state protection. The Presiding Member found adequate state protection for the Applicant, but found inadequate state protection for the daughter. The Applicant claims that the failure of the RPD to test the presumption of state protection against the daughter's clear evidence of a lack of state protection is an error of law.

[17] Third, the Applicant claims that the RPD erred by failing to test the presumption of state protection against her own personal experience where state protection did not materialize: *Balogh*, above.

[18] The Respondent relies on *Goolram v. Canada (M.C.I.)*, [2005] F.C.J. 795 ["*Goolram*"] to argue that the RPD's assessment of state protection can only be overturned if it was patently unreasonable. It maintains that the RPD decision was not patently unreasonable since the Applicant failed to present clear and convincing evidence that authorities in her country would be either unwilling or unable to protect her. The Respondent maintains that it was open to the RPD to find that although the

situation in St. Vincent is imperfect, the country is making serious efforts to deal with the problem of sexual violence and domestic abuse.

[19] The Respondent argues that the Marion House reference in the RPD decision is not fatal to the panel's decision. The RPD acknowledges that Marion House is not a state-funded resource, and the Respondent notes that this agency was only one of several elements used by the panel to conclude that St. Vincent is making serious efforts to deal with sexual violence and domestic abuse. The argument is that the RPD did not draw any negative inference from the fact that the Applicant did not consult Marion House, and that since the RPD's mention of this agency had no impact on its decision, the Applicant has failed to show any error in law.

[20] The Respondent maintains that the RPD was under no obligation to consider the daughter's experience. The RPD notes that the Applicant and daughter's claims were not joined and heard together. The claims were heard separately. The Respondent explains that the claim of one family member is not determinative of another family member, since each decision is made separately.

[21] The Respondent argues that the daughter's claim was accepted because specific elements from the daughter's claim successfully rebutted the presumption of the availability of state protection in her case. The daughter had more than one interaction with police and one officer even declared that the daughter should try to join her mother abroad. In contrast, the Respondent claims, the Applicant was unable to successfully rebut the presumption of availability of state protection based on the evidence in her case. The Respondent reminds the Court that the RPD found that the Applicant only attempted to obtain state protection on one occasion. The argument appears to be that the RPD reached different conclusions regarding the Applicant's claims and her daughter's claim because it had different evidence from the two applicants with respect to their efforts at obtaining state protection.

[22] In sum, the Respondent's position is that it was not patently unreasonable for the RPD to conclude that the Applicant failed to present clear and convincing evidence that authorities in her country would be unable or unwilling to protect her.

[23] The Respondent relies on the 2005 decision by Justice Judith Snider of *Goolram*, above, for its assertion that the standard of review of patent unreasonableness applies to a review of an RPD decision with respect to state protection. However, the debate as to the appropriate standard of review to be applied to the RPD's decision on state protection has recently shifted towards favouring the application of the reasonableness *simpliciter* standard. As Justice Snider has herself recently indicated in *Castro v. Canada (M.C.I.)*, 2006 FC 332 (IMM-10496-04, 14th March, 2006), at para. 5:

While there is some debate within the Federal Court jurisprudence as to the appropriate standard of review to be applied to decisions of the Board on state protection, I am prepared to accept the results of a pragmatic and functional analysis carried out by my colleague Justice Tremblay-Lamer in *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193. In that case, Madam Justice Tremblay-Lamer determined that a standard of reasonableness *simpliciter* was the most appropriate on the issue of adequate state protection.

For purposes of this application, I would agree with and adopt her reasoning at paras. 7-12. A decision satisfies the reasonable standard "if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at para. 55).

The *Chaves* decision mentioned in the above passage applied the pragmatic and functional approach to determine the applicable standard of review in relation to a finding of state protection, while the jurisprudence relied upon by the Respondent did not engage in this detailed examination of the appropriate standard. I therefore adopt the standard of reasonableness *simpliciter* as the appropriate standard of review.

[24] It is clear that the Applicant could not have been required to seek assistance from Marian House. As the Court previously noted in *Molnar*, above, at para. 24, "The purpose of the police is to protect citizens. If they refuse or are unwilling to act, this Court has indicated that there is no obligation on an individual to seek counselling, legal advice, or assistance from human rights organizations."

[25] This position is supported by the *Chairperson's Guideline 4*, Women Refugee Claimants Fearing Gender-Related Persecution, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the *Immigration Act*, Update, Effective November 13, 1996 ["*Chairperson's Guidelines*"]. The *Chairperson's Guidelines* were referred to by the Presiding Member, which makes it surprising that Marian House was considered, since the document states at section C.2. that, "the fact that the claimant did or did not seek protection from non-government groups is irrelevant to the assessment of the availability of state protection." It is clear from both *Molnar*, above, and the *Chairperson's Guidelines* that the RPD would err in imposing on the Applicant the burden of seeking assistance from Marian House.

[26] The Respondent claims that when the reasons are considered in their totality, the RPD did not draw a negative inference from the fact that the Applicant did not consult Marian House. I cannot agree with this argument. Although in my view the RPD's reference to the Applicant's statement that she had never contacted Marian House was not used to impugn her credibility, the RPD did mention the existence of Marian House in support of its ultimate conclusion that St. Vincent "is making serious efforts at the legislative, judicial and enforcement levels to deal with the problem of sexual violence.": RPD Decision, at 4. But Marian House is a non-governmental organization. Its services may show St. Vincent's civil society sector's efforts to combat the problem of sexual violence, but it does not demonstrate that the state has made efforts at the legislative, judicial or enforcement levels. In my view, the reference indicates that the Presiding Member gave the state greater credit for making serious efforts than it should have properly been accorded.

[27] That said, I am not convinced that this error is necessarily fatal to the RPD Decision. In this case, the RPD did not solely rely on the presence of services offered by non-governmental organizations to find adequate state protection. The panel only referred to one service offered by non-state actors. However, it referred to steps being taken at the legislative, judicial and enforcement levels to address sexual violence. In my view, although the RPD considered an extraneous factor, in all likelihood it would

have reached the same conclusions with respect to state protection without referring to Marian House.

[28] Nevertheless, in my view, the RPD still erred in its finding on state protection by failing to consider the Applicant's own situation and the result of his finding, on the same day of the Applicant's daughter's case where he found no state protection. The RPD decision emphasises that the Applicant failed to seek state protection more than once, and finds that the Applicant has failed to provide clear and convincing evidence that would rebut the presumption of state protection.

[29] I am satisfied the RPD overemphasized the fact that the Applicant only went to the police one time and thereby failed to adequately consider the Applicant's situation. The *Chairperson's Guidelines* state in the section entitled "Evidentiary Matters" that:

2. Decision-makers should consider evidence indicating a failure of state protection if the state or its agents in the claimant's country of origin are unwilling or unable to provide adequate protection from gender-related persecution. If the claimant can demonstrate that it was objectively unreasonable for her to seek the protection of her state, then her failure to approach the state for protection will not defeat her claim. Also, the fact that the claimant did or did not seek protection from non-government groups is irrelevant to the assessment of the availability of state protection.

[...]

In cases where the claimant cannot rely on the more standard or typical forms of evidence as "clear and convincing proof" of failure of state protection, **reference may need to be made to alternative forms of evidence to meet the "clear and convincing" test.** Such alternative forms of evidence might include the testimony of women in similar situations where there was a failure of state protection, or the testimony of the claimant herself regarding past personal incidents where state protection did not materialize.

[emphasis in original removed; emphasis added].

[30] In my view, the RPD erred by failing to adequately consider whether it was reasonable to expect the Applicant to have sought state protection a second time from state authorities in St. Vincent when she was living there. The RPD does not consider this question, yet used the fact that the Applicant had only sought protection from the police on one occasion to find that the Applicant had not provided clear and convincing evidence that state protection was unavailable. The Applicant claimed that the police laughed at her when she tried to report that she had been sexually assaulted. The documentary evidence clearly notes that St. Vincent suffered from "a culture in which victims learn not to seek assistance from the police or the prosecution": Tribunal Record, at 16. In my view, the RPD should have at least assessed whether the Applicant could have reasonably been expected to seek state protection again.

[31] I also note that the RPD did not fully explore whether the recent developments in combating sexual violence in St. Vincent would be effective for the Applicant. As the *Gender Guidelines* note:

3. A change in country circumstances, generally viewed as a positive change, may have no impact, or even a negative impact, on a woman's fear of gender-related persecution. In situations where a woman's fear is related to personal-status laws or where her human rights are being violated by private citizens, a change in country circumstances may not mean a positive change for the woman, as these areas are often the last to change. An assessment should be made of the claimant's particular fear and of whether the changes are meaningful and effective enough for her fear of gender-related persecution to no longer be well-founded. [Guideline emphasis removed, emphasis added].

[32] The RPD did not consider the Applicant's particular fear in this case. It was not contested that the Applicant's ex-boyfriend still attempts to learn about her whereabouts through her children who still live in St. Vincent. Nor was it contested that the ex-boyfriend would likely be abusive towards the Applicant should he find her. In my view, the RPD could not simply refer to the documentary evidence and determine that state protection would be available to the applicant. This approach fails to consider the particular circumstances of the individual. In my opinion, the RPD should have examined the Applicant's situation, and, with the assistance of the documentary evidence, determined whether state protection could be available for the Applicant's situation of having an abusive ex-boyfriend still seeking her. The panel's failure to consider the Applicant's context in my view amounts to a reviewable error.

[33] I am satisfied the RPD erred against a standard of reasonableness *simpliciter*. The RPD erred by considering irrelevant factors in determining that St. Vincent is making serious efforts to address sexual violence by referring to a non-government organization. While this error is not fatal to the RPD decision, the RPD erred by failing to adequately consider the Applicant's situation. In my opinion the panel gave undue weight to the factual finding that the Applicant only sought police protection on one occasion to find that the Applicant had not refuted the presumption of the availability of state protection. I believe that this second error is fatal to the RPD's decision.

JUDGMENT

For the above reasons, the application for judicial review is set aside. The matter is returned for a new hearing before a different board in accordance with these reasons.

No question was submitted for certification.

"Max M. Teitelbaum"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-6907-05

STYLE OF CAUSE: ALMAIDA DOREITHA CODOGAN v.
MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Montreal, Qc

DATE OF HEARING: June 8, 2006

REASONS FOR JUDGMENT: TEITELBAUM J.

DATED: June 13, 2006

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