**Date: 20090107**

**Docket: IMM-95-08**

**Citation: 2009 FC 20**

**Ottawa, Ontario, January 7, 2009**

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

**BETWEEN:**

**GRACEL BERNADET JESSAMY**
**and SADREENA GRACEL JESSAMY**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP**
**AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of a Pre-Removal Risk Assessment (PRRA) officer (Officer), dated October 3, 2007 (Decision) refusing the Applicants' application for protection.

**BACKGROUND**

[2] Gracel Jessamy (Principal Applicant) was born in St. Vincent and the Grenadines where she lived until the age of fifteen. The Principal Applicant believes that she has lost her Vincentian citizenship as a result of being outside of St. Vincent for five years or more.

[3] The Principal Applicant moved to Barbados and, at the age of seventeen, she met Nigel Jessamy and they started dating. When the Principal Applicant's aunt moved away, she had little choice but to move in with Nigel. The Principal Applicant's son, Jason, was born on July 28, 1984 and her daughter, Sadreena on September 23, 1991 in Barbados.

[4] In 1987, the Principal Applicant and Nigel got married. Soon after their marriage began, Nigel became physically and verbally abusive. The Principal Applicant also discovered that Nigel had an addiction to marijuana and smoked it daily. He was not employed throughout their marriage.

[5] The Principal Applicant was the sole income provider for her family. If there was not enough money left over to buy drugs after the family purchased groceries, Nigel would fly into a rage and hit the Principal Applicant. Sometimes there was no money at all for groceries because Nigel would take it all to buy drugs.

[6] The Principal Applicant was with Nigel for fifteen years and over that time he took a screwdriver and jabbed her leg with it, struck her on the forehead with a hammer, hit her with a belt

buckle, a vase and a shovel. He also placed a hot cooking pot on her left arm and threatened her with an ice pick to her throat. She was also threatened with a gun numerous times and her son was beaten quite frequently. The Principal Applicant says she has numerous scars all over her body as a result of this physical abuse.

[7] The Principal Applicant was also sexually assaulted by Nigel. She was so depressed that she attempted to commit suicide by slashing her wrists.

[8] She attempted to escape Nigel's violence many times and would go to the homes of family and friends in Barbados. She also fled to St. Vincent and called the police many times, but Nigel would always find her and force her to come home.

[9] Nigel's drug habit progressed and he started owing money to dealers who would come to the house and demand money. The dealers also threatened to hurt the Principal Applicant and her children. Nigel even began taking his son's money for drugs when the boy started working.

[10] In August 2002, the Principal Applicant decided to leave for Canada with her daughter Sadreena. They arrived on August 15, 2002 in Toronto. On November 17, 2002, she made a refugee claim and shortly after Christmas 2002, Jason joined the Applicants in Canada. In support of their claim, the Applicants' former lawyer submitted a psychological report, a medical report and some other documents.

[11] On December 22, 2003, the Refugee Protection Division (RPD) heard the Applicants' claim and on February 13, 2004, found that the Applicants were not Convention refugees. The RPD found that the Principal Applicant lacked credibility because she did not mention as many incidents of abuse in her Personal Information Form (PIF) as she did in oral testimony.

[12] The Principal Applicant claims that she was so traumatized when she left Barbados that she tried to forget the abuse and her near death experiences, which is why they were not mentioned in her PIF. The psychologist's report confirms this. The medical report also confirms the Principal Applicant's physical wounds. However, because of the negative credibility finding, the RPD found those reports not to be credible.

[13] In December 2004, the Principal Applicant wrote to the Queen Elizabeth Hospital in St. Michael, Barbados, to try to obtain a copy of the hospital record from her stay there. On January 3, 2005, the hospital responded by requesting a $50.00 fee in order to release the report. The Principal Applicant asked her brother to go to the hospital and pay the $50.00, which he did, but the hospital still did not give him the report.

[14] In December 2006, the Principal Applicant was asked to appear for an interview at the Greater Toronto Enforcement Centre (GTEC). She was given a PRRA application which she filled out on her own and sent to the GTEC. On January 17, 2007, with the help of a friend, the Principal Applicant submitted a letter explaining why she could not return to Barbados. Included with that

letter was a 1998 US DOS report, excerpts from more recent DOS reports, and a photo showing the scar on her forehead from the attack with the hammer.

[15] On November 1, 2007, the Principal Applicant was asked to appear at GTEC to receive the PRRA decision. Her son, Jason, had applied separately for his PRRA. The Applicants' PRRA decision was negative and the Principal Applicant and her daughter were given a removal date of November 23, 2007.

[16] On November 13, 2007, present counsel submitted a request to defer the Applicants' removal until the end of January so that Sadreena could finish her Grade 11 school term. About one week later, the enforcement officer phoned counsel and told him that she would be granting the request to defer the Applicants' removal. On November 30, 2007, the officer confirmed the deferral with an e-mail to counsel.

[17] On December 24, 2007, the Principal Applicant's son was removed from Canada. He left behind his Canadian girlfriend and their six-month-old daughter.

[18] The Principal Applicant has spoken to Jason many times since his removal. Jason has told the Principal Applicant that Nigel has contacted him and has been threatening him. Nigel believes that the Principal Applicant is in a relationship with another women and has threatened to kill her for taking the children away from him.

[19] On January 8, 2008, the Principal Applicant filed an application for leave and for judicial review of the PRRA Decision.

[20] Jason has tried to obtain the medical records from the Barbados hospital but he was asked to pay $500.00 for their release because the Principal Applicant is out of the country. If she was in Barbados, it would cost $300.00 to obtain the medical records.

**DECISION UNDER REVIEW**

[21] The Officer found that the risks described were basically the same as those that were presented to the RPD panel. The RPD panel found that the Principal Applicant lacked credibility due to the omissions in her PIF when compared to her oral testimony. Her inability to provide corroborative evidence about the attack by her husband with a hammer in 1998 and her subsequent treatment in the hospital undermined her credibility. The RPD panel concluded as follows:

> The panel considered all the protection grounds under sections 96 and 97(1) of the IRPA and found that, as adequate state protection is available to Gracel Bernadet Jessamy, there is no serious possibility that the claimant and her daughter Sadreena Gracel Jessamy, who relies on her mother's testimony, will be harmed in Barbados or St. Vincent, regardless whether the alleged harm would amount to persecution, a risk to their lives, risk of cruel and unusual treatment or punishment, or a risk of torture.

[22] The Officer would not accept the photo showing the scar on the Principal Applicant's forehead as new evidence that meets the requirements of section 113(a) of the Act. The scar on her forehead, according to the Principal Applicant, was caused by her husband attacking her with a

hammer in 1998. The Officer found that the Principal Applicant could have presented the same photo to the RPD panel when her refugee claim was heard in February 2004, but had chosen not to.

[23] The Officer also did not accept that the Human Practices Report of 1998 had any new evidence in it, as it was publicly available before the RPD decision and should have been readily available before the RPD panel. Because it was released after the RPD decision, the Officer accepted the US Department of State 2005 Country Report on Barbados as new evidence.

[24] The Officer stated that he had reviewed the Country Report and did not find it supported the Principal Applicant's subjective fear of being killed by her husband. The Officer found that violence and abuse against women continue to be a significant social problem in Barbados. The laws of Barbados prohibit domestic violence, provide protection to all members of the family, including men and children, and apply equally to marriages and common law relationships. Victims can request restraining orders, which the courts often issue. Offenders are jailed for breaching such an order.

[25] The Officer reviewed the latest version of the US reports concerning conditions in Barbados and St. Vincent and Grenadines in 2006, and found that country conditions had not substantially deteriorated since the RPD made its decision.

[26] Based on what the Officer read, he found that there was state protection in Barbados and St. Vincent and Grenadines. He found that the Applicants had failed to provide sufficient evidence that

the police would not offer protection to her and her daughter. Based on the Principal Applicant's written evidence, the Officer found that there was state protection available to the Applicants because the police had responded to her phone call and had come to her house.

[27] The Officer concluded by finding that the Applicants did not face more than a mere possibility of persecution as described in section 96 of the Act. There were no substantial grounds to believe that the Applicants would face a risk of torture; nor were there reasonable grounds to believe they would face a risk to life or a risk of cruel and unusual punishment as described in paragraphs 97(1)(*a*) and (*b*) of the Act, if returned to Barbados or St. Vincent and Grenadines.

**ISSUES**

[28] The Applicants raise the following issues:

1) Did the Officer fail to assess whether there was new evidence of new risks before him?
2) Did the Officer err with respect to the analysis of state protection?
3) Did the Officer err in law by not according the Applicants an oral hearing?

**STATUTORY PROVISIONS**

[29] The following provisions of the Act are applicable in these proceedings:

**Convention refugee** **Définition de « réfugié »**

**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 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.

**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

**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 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*) 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.

**Person in need of protection**

(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.

**Personne à protéger**

(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.

**Application for protection**

**112.** (1) A person in

**Demande de protection**

**112.** (1) La personne se

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 a certificate described in subsection 77(1).

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 nommée au certificat visé au paragraphe 77(1).

**Consideration of application**

113. Consideration of an application for protection shall be as follows:

**Examen de la demande**

113. Il est disposé de la demande comme il suit :

(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

*a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

*b*) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

*c*) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in

*d*) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et,

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| section 97 and | d’autre part : |
| (i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or | (i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada, |
| (ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada. | (ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu’il constitue pour la sécurité du Canada. |

[30] The following provision from the Regulations (*Immigration and Refugee Protection Regulations* SOR/2002-227) is also applicable:

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| **167.** For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following: | **167.** Pour l’application de l’alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d’une audience est requise : |
| (*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act; | *a*) l’existence d’éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur; |
| (*b*) whether the evidence is central to the decision with respect to the application for protection; and | *b*) l’importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection; |
| (*c*) whether the evidence, if | *c*) la question de savoir si ces |

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| accepted, would justify allowing the application for protection. | éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection. |

**STANDARD OF REVIEW**

[31] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[32] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[33] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to issues (1) and (2) to be reasonableness. 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* at paragraph 47). Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[34] Issue (3) raises issues of procedural fairness and should be reviewed on a standard of correctness: *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056; *Rahman v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1661; *Suresh v. Canada (Minister of Citizenship and Immigration*), [2002] 1 S.C.R. 3.

**ARGUMENTS**

**The Applicants**

**New Evidence**

[35] The Applicants cite and rely upon *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 240 at paragraphs 26-27 for the rules applicable to new evidence under section 113(a) of the Act:

> **26** I am prepared to accept that subsection 113(a) refers to three distinct possibilities and that its three parts must be read disjunctively. If the use of the word "or" is to be given meaning, the three parts of subsection 113(a) must clearly be seen as three separate alternatives. While the first part refers to evidence that postdates the Board's decision, the second and third parts obviously relate to evidence that predates its decision. Only evidence that existed before

> the Board's negative decision requires an explanation before it can be admitted with a PRRA application. As for evidence that arises after the Board's decision, there is no need for an explanation. The mere fact that it did not exist at the time the decision was reached is sufficient to establish that it could not have been presented earlier to the Board.
>
> **27** That being said, a piece of evidence will not fall within the first category and be characterized as "new" just because it is dated after the Board's decision. If that were the case, a PRRA application could easily be turned into an appeal of the Board's decision. A failed refugee applicant could easily muster "new" affidavits and documentary evidence to counter the Board's findings and bolster his story. This is precisely why the case law has insisted that new evidence relate to new developments, either in country conditions or in the applicant's personal situation, instead of focusing on the date the evidence was produced: see, for example, *Perez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1379, 2006 FC 1379; *Yousef v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1011, 2006 FC 864; *Aivani v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1231, 2006 FC 1231.

[36] The Applicants also cite and rely upon *De Silva v. Canada (Minister of Citizenship and Immigration)* 2007 FC 841 at paragraph 17:

> **17** Although the PRRA process is meant to assess only evidence of new risks, this does not mean that new evidence relating to old risks need not be considered. Moreover, one must be careful not to mix up the issue of whether evidence is new evidence under subsection 133(a) with the issue of whether the evidence establishes risk. The PRRA officer should first consider whether a document falls within one of the three prongs of subsection 113(a). If it does, then the Officer should go on to consider whether the document evidences a new risk. (Applicant's emphasis)

[37] The Applicants say that the recent Federal Court of Appeal decision of *Raza v. Canada (Minister of Citizenship and Immigration)* 2007 FCA 385 at paragraph 13 supports their argument that the Officer erred in the present case. In *Raza*, the Court held that evidence that provides proof

of an event that occurred after the RPD decision must be considered by the PRRA officer unless it is not credible, relevant, new or material.

[38] The Applicants submit that they identified new risks that have arisen since the RPD decision, including a renewed fear resulting from the husband's belief that the Principal Applicant is in a relationship with a woman. In addition, the husband threatened to kill the Principal Applicant because she kidnapped their daughter and encouraged their son to leave and turn against his father.

[39] The Applicants submit that the Officer erred in his assessment of whether the evidence was new or not. The Officer failed to determine whether the evidence falls within one of the three prongs of s. 113(a) of the Act before dismissing it. Since the Applicants' statement and evidence post-date the RPD decision, the Officer should have gone on to determine if it establishes a new risk, or new evidence of the same risk that was presented to the RPD. In doing neither, the Officer erred.

[40] The Applicants point out that there is no mention of a risk to the Applicants' lives in the Decision, which risk is based on the husband's belief that the Principal Applicant is involved in a relationship with a woman. Nor is anything mentioned about a risk to her life due to her husband's anger of having taken their children out of the country. The Officer had a duty to assess whether state protection would be adequate, should the Principal Applicant seek it. By not doing so, the Officer erred.

[41] The Officer should also have consulted documentation on the situation in Barbados concerning gays and lesbians. If the Officer had done this, he would have found that relations between members of the same sex are prohibited and are punished by imprisonment in Barbados. The Applicants submit that, given the criminalization of homosexual activity in Barbados, it is unlikely the Principal Applicant would obtain police protection. Since the Officer never conducted this assessment, he erred in law.

[42] The Applicants also cite and rely upon *Hassaballa v. Canada (Minister of Citizenship and Immigration)* 2007 FC 489 at paragraph 33 which discusses the issue of whether a PRRA officer has a duty to notify applicants of updated country reports that he/she relies upon, even if a decision is made two years after the application is submitted:

> First of all, it is important to emphasize that the PRRA officer has not only the right but the duty to examine the most recent sources of information in conducting the risk assessment; the PRRA officer cannot be limited to the material filed by the applicant.

[43] The Applicants conclude that the Immigration Refugee Board (IRB) documents, which the Officer failed to consult, post-date the US DOS report and address specific issues: the availability of state protection for victims of domestic violence and the treatment of homosexuals, including protection by the state.

**State Protection**

[44] The Applicants submit that the Principal Applicant testified that she had called the police numerous times, but they did not come every time. If they did come, they would talk to her husband and then leave. The Applicants say that the Officer neglects the fact that, if the police do come, they leave the abuser to further torment the caller.

[45] The Applicants submit that the Officer erred in his assessment of the facts before him. The fact of the police coming to the Applicants' house does not mean that the police offered protection. The case law provides that, for protection to be adequate, it must be effective. The Applicants cite and rely upon *Elcock v. Canada (Minister of Citizenship and Immigration),* [1999] F.C.J. No. 1438 (F.C.) at paragraph 15:

> …I am satisfied that the same result must follow here and that the CRDD committed a reviewable error in failing to effectively analyse, not merely whether a legislative and procedural framework for protection existed, but also whether the state, through the police, was willing to effectively implement any such framework. Ability of a state to protect must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework.

[46] *Garcia v. Canada (Minister of Citizenship and Immigration)* 2007 FC 79 at paragraphs 13-16 outlines what is effective state protection:

> **13** With respect to statement [4], the use of "serious efforts" in this sentence is equated to a state's "due diligence" efforts to provide practical state protection. However, there is a sharp difference between due diligence in developing policy and giving education on a certain issue, and putting the policy or education into actual operation. This point has particular importance to

protection against violence against women if the sentence under consideration is extended to contexts other than terrorism.

**14** It cannot be said that a state is making "serious efforts" to protect women, merely by making due diligence preparations to do so, such as conducting commissions of inquiry into the reality of violence against women, the creation of ombudspersons to take women's complaints of police failure, or gender equality education seminars for police officers. Such efforts are not evidence of effective state protection which must be understood as the current ability of a state to protect women (see *Franklin v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1508 at para. 21).

**15** Further, women are not protected by non-governmental agencies that advise or shelter women from the violence. Indeed, the Refugee Board's *Guidelines issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* (*Gender Guidelines*) agrees:

> 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.
> (Section C.2)
> [Emphasis added]

Therefore, "serious efforts" must be viewed at the operational level of the protection services offered by the state. As stated in *Elcock v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. 1438 at para.15:

> Ability of a state to protect must be seen to comprehend not only the existence of an effective legislation and procedural framework but the capacity and the will to effectively implement that framework.
> [Emphasis added]

**16** For example, when a woman calls the police at 3:00 am to say that her estranged husband is coming through the window, the question is, are the police ready, willing, and able to make serious efforts to arrive in time to protect her from being killed? While it is true that even the best trained, educated, and properly motivated police force might not arrive in time, the test for "serious efforts"

> will only be met where it is established that the force's capability and expertise is developed well enough to make a credible, earnest attempt to do so, from both the perspective of the woman involved, and the concerned community. The same test applies to the help that a woman might be expected to receive at the complaint counter at a local police station. That is, are the police capable of accepting and acting on her complaint in a credible and earnest manner? Indeed, in my opinion, this is the test that should not only be applied to a state's "serious efforts" to protect women, but should be accepted as the appropriate test with respect to all protection contexts.

[47] The Applicants submit that, given the police efforts in this case, there is no effective state protection in Barbados. As well, the only document relied upon by the Officer was the US DOS report, which presents a different picture from the other documentation that was available. Nothing is mentioned in the US DOS report that establishes the availability of state protection. The Applicants submit that the Officer erred in mistaking the indicia of protective improvements with proof of the adequacy of the implementation of these measures. There was no evidence before the Officer that state protection was adequately in place to protect victims of domestic violence in Barbados.

[48] The Applicants also cite and rely upon *Garcia* at paragraph 18 where the Court analysed what constitutes “clear and convincing” evidence in light of the *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 decision and concluded that *Canada (Minister of Employment and Immigration) v. Villafranca*, [1992] F.C.J. No. 1189 is no longer a valid point of law:

> **18** In my opinion, *Ward* amends the decision in *Villafranca* in a particularly important respect. *Ward* makes a clear statement on the quantity and quality of the evidence which a claimant must produce to rebut the presumption of state protection; that is, a claimant is only required to provide some clear and convincing evidence. Therefore,

> in my opinion, the statement in *Villafranca* that "it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation" cannot any longer be applied as a point of law. Thus, evidence of the failure of state authorities to effectively respond to requests from women for protection from violent sexual predators, exclusive of all other evidence, can be found to constitute some clear and convincing evidence that rebuts the presumption of state protection. Whether this finding is made depends on the quality of the evidence produced in the judgment of the decision-maker involved.

[49] The Applicants submit that they did adduce clear and convincing evidence of the state's inability to protect them and that if the Officer had fulfilled his duty to research the case before him and had consulted the IRB documents he would have arrived at a different conclusion regarding state protection. The Applicants also point out that *Hinzman v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 584 at para. 41 (F.C.A.) (*Hinzman*), relied upon by the Respondent, supports the Applicants' position that if an applicant calls the police many times and the police respond once, ineffectively, the applicant can be said to have unsuccessfully sought the protection of her home country.

**Failure to Grant a Hearing**

[50] The Applicants cite section 167 of the Regulations which outlines the factors to be considered when deciding whether an oral hearing is required. They submit that the Officer erred by not granting the Principal Applicant an oral hearing to determine credibility issues. The RPD found the Principal Applicant not to be credible. The Officer reviewed the RPD's decision and restated its credibility findings and conclusion. No analysis of the RPD's decision is conducted by the Officer.

Instead, the Officer refuses to take the Principal Applicant's photo of her forehead scar into account, stating that it could have been presented to the RPD in February 2004. The Officer also makes no mention of the fact that the scar was brought to the RPD's attention, via medical and psychological reports, but the RPD dismissed both.

[51] The Applicants further submit that there is no finding of subjective fear by the Officer. The Officer only makes an objective fear finding based on the US DOS report. The reason for this is that the Officer relied entirely on the RPD's negative credibility finding and never considered the evidence before him.

[52] The Applicants cite and rely upon *Latifi v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1388 at paragraphs 49, 64 and 52-53. In that case the PRRA officer entirely adopted the RPD's credibility findings and erred in not making an independent assessment in the PRRA application.

[53] The Applicants also cite *Tekie v. Canada (Minister of Citizenship and Immigration)* 2005 FC 27 at paragraph 17 for the proposition that deciding a PRRA application on grounds other than credibility does not diminish the right to an oral hearing. The Applicants submit that the Officer never reviewed the credibility finding of the RPD, or made a credibility finding on his own. The RPD's credibility finding was fully imported into the Decision. By not giving the Principal Applicant an oral hearing to address credibility concerns, the Officer erred.

**The Respondent**

**New Evidence**

[54] The Respondent submits that the Application Record in this application contains several documents that were not before the Officer. These include:

(a) Request to defer removal dated November 13, 2007;

(b) E-mail from officer Tokunbo Famewo dated November 30, 2007;

(c) To Whom it May Concern Letters dated January 4 and 7, 2008;

(d) United States Officer of Personnel Management Investigation Service: Citizenship Laws of the World.

[55] The Respondent argues that the Officer did not have the benefit of the information contained in these documents. Evidence that was not before the Officer is not relevant on judicial review: *Asafov v. Canada (Minister of Employment and Immigration),* [1994] F.C.J. No. 713 (F.C.T.D.); *Franz v. Canada (Minister of Employment and Immigration),* [1994] F.C.J. No. 862 (F.C.T.D.); *Barran v. Canada (Minister of Citizenship and Immigration),* [1999] F.C.J. No. 258 (F.C.T.D.); *Singh v. Canada (Minister of Citizenship and Immigration),* [1997] F.C.J. No. 566 and *Lemiecha v. Canada (Minister of Employment and Immigration),* [1993] F.C.J. No. 1333.

[56] The Respondent states that the only exception to this rule is that new evidence is permissible on judicial review to show a denial of natural justice or a breach of procedural fairness: *Beci v. Canada (Minister of Citizenship and Immigration),* [1997] F.C.J. No. 584 and *Qazi v. Canada*

*(Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 2069. The documents tendered do not fall within this exception; therefore, they should be disregarded.

[57] The Respondent submits that the Decision under review is a risk assessment. Bearing in mind the objectives of such an assessment, the Officer has the sole jurisdiction over the facts and the Court should not re-weigh the evidence. The Respondent also points out that a PRRA decision attracts significant deference: *Ahani v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 2 at paragraph 17 and *Suresh* at paragraph 39.

**State Protection**

[58] The Respondent submits that the Applicants must provide sufficient evidence to substantiate their claim. Two oblique references concerning two separate fears, with no additional evidence, does not oblige the Officer to investigate further. In the context of an H&C application, the Court of Appeal in *Owusu v. Canada (Minister of Citizenship and Immigration)* 2004 FCA 38 at paragraphs 5, 8-9, found that applicants have a duty to provide sufficiently clear evidence to support a positive obligation for a decision maker to render a finding concerning a particular aspect of the application.

[59] The Respondent reminds the Court that the onus is on the Applicants to establish their claim; it is not for the Officer to establish that the Applicants are not entitled to protection in Canada. The Respondent cites *Ward*, where the Supreme Court of Canada found that there is a presumption that a state is capable of protecting its citizens, provided there has not been a complete

breakdown of the state apparatus. A claimant can only rebut this presumption by providing "clear and convincing proof" of the state's inability to protect.

[60] The Respondent submits that the Applicants have not provided "clear and convincing" evidence that state protection is not available in accordance with *Ward.* It is not enough for the Applicants to merely show that their government has not always been effective at protecting persons in their situation. Evidence that the protection being offered is "adequate though not necessarily perfect" is not "clear and convincing proof" of the state's inability to protect. The Respondent cites and relies upon the Federal Court of Appeal in *Villafranca v. Canada (Minister of Employment and Immigration)* (1992), 99 D.L.R. (4th) 334 at paragraph 7:

> No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation…

[61] The Respondent goes on to cite and rely upon *Hinzman* at paragraph 41 where the Court stressed that refugee protection is meant to be a form of surrogate protection to be invoked only in those situations where the refugee claimant has unsuccessfully sought the protection of their home state. The Court in *Hinzman* also emphasised the importance of seeking protection within the home state before claiming refugee protection elsewhere. A failure to do so is fatal to a refugee claim, at least in situations where the home state is a functioning democracy with a willingness, and the necessary apparatus, to provide a measure of protection to its citizens.

[62] The Respondent submits that it was open to the Officer to conclude that the Applicants had failed to rebut the presumption of state protection. The evidence before the Officer indicated that Barbados, where the agent of persecution resides, is a multiparty, parliamentary democratic state whose civilian authorities maintain effective control of its security forces. The evidence before the Officer was that Barbados has made serious efforts in combating domestic violence by creating victim support units within police forces, providing the right to seek restraining orders and having orders enforced beyond and above enacting laws prohibiting domestic abuse. As well, according to the Applicants' own evidence, the police responded, albeit once, to her call.

[63] The Respondent submits that the existence of certain elements supporting the Applicant's position in the documentary evidence is not proof of an error. The possibility of an opposing view in the documentary evidence is not a reason for concluding that the Decision is unreasonable. A decision must be wrong on its face: *Conkova v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 300 at paragraph 5. None of the Applicants' arguments indicate that there is an overriding error in the Officer's reasons and conclusions. Therefore, it was reasonably open to the Officer to conclude that the Applicants did not discharge the burden of proving a lack of state protection.

**Failure to Call a Hearing**

[64] The Respondent submits that the Officer did not err by not holding an oral hearing. An oral hearing is only necessary when credibility is at the heart of a decision, which was not the case on this application.

[65] The Respondent submits that the Officer simply preferred certain documentary evidence, and this does not require a hearing to be held: *Iboude v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1316 at paragraph 13; *Sen v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1435 at paragraphs 24-25; *Selliah v. Canada (Minister of Citizenship and Immigration)* 2004 FC 872, aff'd on other grounds 2005 FCA 160; subsection 167(a) of the Regulations. The Respondent says that the Officer's assessment is based on the documentary evidence indicating the availability of state protection.

[66] The Officer did not make any credibility determinations and, therefore, no oral hearing was required. Nowhere in the Decision does the Officer declare that the application was denied on the basis of the Applicants' lack of credibility. The Respondent submits that it is not within the Officer's jurisdiction to review the reasonableness of the RPD findings, particularly a determination pertaining to credibility.

[67] The Respondent concludes by stating that the Principal Applicant has asserted that she was advised by her counsel that it is possible she may have lost her status as a citizen in St. Vincent. The

purpose of this information is unclear in the Respondent's view, as the information before the Officer was that she was a citizen of Barbados and St. Vincent.

**ANALYSIS**

[68] I do not regard the issue of credibility as playing any role in the Officer's Decision. The Officer refers to the RPD decision which did make a finding on credibility. But the Officer makes it very clear that the Decision is based upon the fears which the Principal Applicant set out in her PRRA application to the effect that "she and her daughter will be subjected to abuse and being killed by her husband." The Officer does say that he finds "the risks described [in the application] are basically the same as those that have been presented to the RPD panel," but a reading of the Decision as whole makes it clear that state protection is the deciding issue and that state protection is examined from the perspective of the fears set out by the Applicants in their application. This being the case, no oral hearing was required under section 113(b) of the Act.

[69] In this regard, the facts of this case are very different from *Latifi v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1388 and *Shafi v. Canada (Minister of Citizenship and Immigration)* 2005 FC 714 relied upon by the Applicants. In the present case, the Officer did not simply accept at face value the RPD's credibility findings without asking whether the new evidence could challenge such a finding, as alleged by the Applicants. The Officer stated that the risks put forward by the Applicants were "basically the same as those that have been presented to the RPD

panel" and then examined whether state protection was available to protect the Applicants against those risks. No credibility finding was made either explicitly or implicitly.

[70] The Applicants also say that the Officer was wrong in his conclusion that there was no new risk in this case because "the risks described … are basically the same as those that have been presented to the RPD panel." They say that the application raised the following new risks:

a. The Principal Applicant's husband was still attempting to discover her whereabouts and would kill her because "he said I kidnap his daughter from him and encourage his son to leave him and turn them against him"; and

b. Her husband was also accusing her "of having a relationship with a woman."

[71] The Applicants say that the Officer should have dealt with this evidence of new risks both from the perspective of what the husband would do to them upon their return and from the perspective of the Principal Applicant being able to access state protection in a country where homosexuality is a criminal offence.

[72] First of all, it is clear from the Decision that the Officer identified and examined the Principal Applicant's submission "that she fears that she and her daughter will be subjected to abuse and being killed by her husband."

[73] The fact that the husband may have thought up new motives for wanting to harm the Applicants does not change the fact that the husband and his abuse are still the cause of the

Applicants' fears. Whatever the reasons for the husband's conduct, the Officer accepted that he was still pursuing the Applicants. This being the case, the Officer addressed state protection.

[74] When the Officer says that he "finds the risks … basically the same as those that have been presented to the RPD panel," this does not prevent the Officer from considering those risks. As the Decision as a whole makes clear, the Decision is based upon state protection and whether it is adequate to protect the Applicants from the risk "of abuse and being killed by her husband."

[75] The Applicants say that the husband's accusation that the Principal Applicant was "having a relationship with a woman" would affect their ability to access state protection. But this is entirely speculative. The Principal Applicant is not involved in any such relationship and there is no evidence to suggest that the state authorities in Barbados would simply accept the mere accusation of the husband. The Applicants are attempting to raise an implication that the police in Barbados would simply accept the husband's accusation at face value and would be unable or unwilling to ascertain the truth and act upon it. There is no evidence before me to support such a position and there was no evidence before the Officer that a mere accusation by an aggressive husband would impact the availability of police protection.

[76] As the Court has pointed out on numerous occasions, it is the applicant who has the burden of adducing proof of any claim upon which an application is based. See, for example *Owusu* at paragraph 5.

[77] The central issue in this application is whether the Officer's findings on state protection were reasonable. On this issue, the Officer relies upon the findings of the RPD but also looks at new evidence in order to determine whether it established and supported the Principal Applicant's fear of being killed by her husband.

[78] The Officer accepted into evidence and examined the latest version of the US Department of State Country Report which was put forward by the Applicants and found that "country conditions in Barbados and Saint Vincent and Grenadines have not substantially deteriorated since the RPD made its decision." The RPD found that "there is state protection available in Barbados" and, even though the Applicants now say the RPD was wrong on this issue, they did not challenge that decision when it was made.

[79] Hence, there was nothing unreasonable about the Board's conclusion based upon the 2006 DOS report.

[80] The Applicants say, however, that the Officer had a duty to consult, and should have consulted, the Response to Information Request of March 8, 2007.

[81] I agree with the Applicants that the Officer should have consulted this document even though it was not brought forward by the Applicants. See *Roger George S. Rizk Hassaballa v. Canada (Minister of Citizenship and Immigration)* 2007 FC 489 at paragraph 33.

[82] The issue for me to decide, then, is whether, if the Officer had consulted the Response to Information Request of March 8, 2007, it would have provided contrary information that should have been taken into account on the state protection issue. In *Pinky Lourice Mark Adaina Theresa Tenisha v. Canada (Minister of Citizenship and Immigration),* a case decided by Chief Justice Lutfy on March 4, 2008 and relied upon by the Applicants, the Chief Justice made it clear that the RIR report at issue in that case was important because of "its different emphasis on relevant issues."

[83] The Respondent says that there is no real conflict between the 2006 DOS report and the Response to Information Request in this case. They both say that there is a cultural problem concerning domestic violence in Barbados. The Applicants say there is a significant difference because the DOS report simply deals with the framework of protective measures and not effectiveness and implementation, while the Response to Information Request deals with effectiveness and directly challenges the DOS conclusions that there is a protective framework in place that actually works.

[84] The Response to Information Request refers to January 26, 2007 correspondence with the Barbados Association of Non-governmental Organization (BANGO) that provided information "on

the recourse to the law available to women who are victims of domestic violence in Barbados." That correspondence indicated the following:

a. The depth of the cultural rootedness of domestic violence "sometimes eludes" the application of the *Domestic Violence (Protection Orders) Act* and the *Sexual Offences Act*;

b. The courts tend to be lenient when sentencing perpetrators of domestic violence and "very unsympathetic to the female victims";

c. A man "against whom a restraining order was made, would still stalk, harass and physically abuse or violate his victim with impunity";

d. Many women are reluctant to report incidents of domestic violence for fear of reprisal.

[85] The Response to Information Request adds that this information "could not be corroborated by the Research Directorate among the sources consulted within the time constraints of this Response" but it also refers to the *Country Reports on Human Rights Practices for 2005* which concludes that "even though Barbados has laws and programs designed to protect women, abuse and violence against women remain 'significant social problems' in the country," thus suggesting that the protective framework may not be effective.

[86] Nevertheless, this information strongly suggests that the Officer's independent research (i.e. the 2006 DOS Report) and the conclusions he draws from that research may have yielded a different

result if he had consulted the Response to Information Request and its “different emphasis on relevant issues,” to use the words of Chief Justice Lutfy in *Thomas*.

[87] The Officer should have consulted and considered the Response to Information Request Information in his Decision. The fact that he did not do so renders that Decision, on the facts of this case, unreasonable and it must be returned for reconsideration.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that**

1. This Application is allowed and the matter is returned for reconsideration by a different officer;
2. There is no question for certification.

James Russell
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-95-08 |
| **STYLE OF CAUSE:** | **GRACEL BERNADET JESSAMY ET AL**<br><br>**v.**<br><br>**THE MINISTER OF CITIZENSHIP AND IMMIGRATION** |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | 4-NOV-2008 |
| **REASONS FOR JUDGMENT AND JUDGMENT :** | RUSSELL J. |
| **DATED:** | January 7, 2009 |

**APPEARANCES:**

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| TAMRAT GEBEYEHU | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| JOHN H. SIMS, Q.C.<br>DEPUTY ATTORNEY GENERAL<br>OF CANADA<br>TORONTO, ONTARIO | FOR THE RESPONDENT |