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Docket: IMM-5987-05

Citation: 2007 FC 79

Vancouver, British Columbia, January 24, 2007

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

DEBORA DE ARAUJO GARCIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] In the present case, the Applicant is the survivor of extreme violence perpetrated by her powerful step-father while living in Brazil, and she fears the violence will continue if she is made to return to that country. On this ground she claims protection. The Refugee Protection Division of the Immigration and Refugee Board (RPD) accepted her evidence, but did not grant protection on a finding that she failed to rebut the presumption that the state of Brazil can protect her if she returns.

[2] Prior to the hearing of the present Application, the Respondent agreed that the RPD's decision was rendered in reviewable error because two important factual findings in the RPD's decision are not supported by the evidence on the record, and, as a result, without the Application going to hearing, requested the Applicant to consent to her claim being sent back for re-determination. Counsel for the Applicant refused to consent on the argument that the RPD erred in its determination on the issue for state protection, and that this determination must be scrutinized so that, on the inevitable re-determination, state protection can be properly determined. I agree with this argument. Therefore, given the admitted reviewable error, this matter will be sent back for re-determination, but on directions.

[3] On the issue of state protection, the Applicant argues that, while the RPD is correct in applying the Supreme Court of Canada's decision in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (*Ward*), the decision under review is in reviewable error because the RPD fails to correctly determine the effect of *Ward* on other precedents with respect to the issue of state protection. I agree with this argument. The analysis which leads to this conclusion has four components: the RPD's findings of fact; the RPD's findings of law; my opinion on the correct state of the law; and findings of reviewable error in the RPD's decision. In addition, the issues of directions on the re-determination and costs are addressed.

I. *The facts found by the RPD*

[4] In its decision of September 1, 2005, prior to making findings on state protection upon which the decision turns, the RPD states the Applicant's evidence of the violence she has suffered and her attempts to access state protection in Brazil. Since no negative credibility finding is made, I find that the RPD accepted the Applicant's evidence as true, and, subject to correction on two points, the statement constitutes facts upon which the claim for protection should be decided.

[5] The following are the factual findings the Officer made:

> The claimant testified that starting 2001, Silva regularly sexually harassed, beat and attempted to rape her when he began to cohabit with the claimant's mother when they lived in Juiz de Fora in Minas Gervais. In 2001, the claimant telephoned the police once and they came to the house, but spoke only to Silva and not with the claimant. She testified that because Silva is a retired colonel and a wealthy farmer, who was friendly with the authorities, no further action was taken by the police. Allegedly, the unwelcome sexual assaults continued, but the claimant never sought protection again although Silva continued his harassment unabated for years, until early 2004 when she moved to Sao Paulo, a distance of 600 km. from her former home. After several months, in August 2004, Silva came to Sao Paulo and attempted to rape and assaulted the claimant, but she was able to escape. The claimant reported this incident to the police in Sao Paulo and was given access to psychological counselling and medical support, <u>but despite years of alleged abuse she never sought or required medical treatment</u>. After this August 2004 incident, the claimant spoke to the police a second time in August, and once in September. When the claimant reported to the designated Police Station for the Defence of Women where they told her that they would check into Silva's background and take some action. This special station referred her to two non-governmental organizations (NGO), "Pro Women" where they did a psychological report and "Women's United" where she received

additional psychological support. The last time that the claimant saw Silva was in September 2004, when she came out of hiding from her friend's house to visit her apartment where he was waiting outside and he pounded on her door. The incident was never reported because the claimant planned to travel abroad. She travelled to Canada two months after Silva followed her to Sao Paulo and after her first report to the authorities in that province. On October 9, 2004, the claimant travelled to Canada where she claimed refugee protection after several weeks.

> The claimant testified that she was unable to obtain any documentation related to her police reports in Sao Paulo, to the police, or the NGOs and she never sought medical attention.
>
> (Emphasis added)
>
> (Tribunal Decision, pp.2-3)

[6] The facts found by the RPD constitute evidence of a well-founded fear on both objective and subjective grounds, but it is agreed that the findings emphasized by underline in the quotation above are not supported by the evidence and, therefore, should not be taken into consideration on the re-determination.

II. *The RPD's findings of law*

[7] The RPD denied the Applicant's claim on the basis of the following statements:

> The claimant has failed to rebut with clear and convincing evidence the presumption that the constitutional federal republic of Brazil is capable of providing protection for its citizens. There was no evidence provided that the government of Brazil is in chaos or disarray and unable to govern.
>
> […]
>
> I find that her efforts to avail herself of state protection falls far short of a diligent attempt prior to seeking asylum abroad and does not rebut the presumption that the state can protect its citizens (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 726). The claimant made no effort to approach higher authorities in Sao Paulo or to ascertain if the investigation and failure to prosecute Silva was limited to a certain officer (*Canada (Minister of Citizenship and Immigration) v. Kadenko* (1996), 143 D.L.R. (4th) 532). The claimant provided no evidence that the government of Brazil is in disarray and unable to govern and as perfect protection (*Zalzali v. Canada (Minister of Employment and Immigration*), [1991] 3 F.C. 605 (F.C.A.) and protection for all citizens at all times (*Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130), is not the criteria for adequate protection.
> (Tribunal Decision, pp.4-5)

III. *The correct state of the law on state protection*

[8] The focus in this component is *Ward* and the following decisions of the Federal Court of Appeal, as it then was, (Court of Appeal): *Zalzali v. Canada (Minister of Employment and Immigration*, [1991] 3 F.C. 605 (*Zalzali*); *Canada (Minister of Employment and Immigration) v. Villafranca,* [1992] F.C.J. No. 1189 (*Villafranca*); and *Kadenko v. Canada (Solicitor General* (1996), 143 D.L.R. (4th) 532 (*Kadenko)*. Each decision will be described, with some comment, in the order that they were decided.

A. *The decision in Zalzali*

[9] *Zalzali*, a decision rendered prior to *Ward*, concerns a national of Lebanon who claimed refugee protection based on a well-founded fear from militias in Lebanon due to his political opinions. An important feature of the claim is the fact that, at the time, the national government exercised control over no part of the country. In the decision, writing on behalf of Justices Hugessen and MacGuigan, Justice Décary states that the principal question for determination is whether there can be persecution where there is no form of guilt, complicity or participation by the state in question, and answers in the affirmative. In addition, Justice Décary makes the following observations: a state's inability to protect is governed by objective criteria which can be verified independently of the fear experienced (para.16); and insofar as it is established that meaningful national protection is available to a claimant, a fear of persecution cannot be said to exist (quoting Professor Hathaway with approval, para.17). The following findings were are also made:

> There are probably several reasons beyond a person's control why he might be unable to claim the protection of a State, one of them being, and this is obvious, the non-existence of a government to which that person may resort. There are situations, and the case at bar is one of them, in which the political and military circumstances in a country at a given time are such that it is simply impossible to speak of a government with control of the territory and able to provide effective protection. Just as a state of civil war is no obstacle to an application for refugee status, [See Salibian v. Canada (Minister of Employment and Immigration), [1990] 3 F.C. 250 (C.A.)] so the non-existence of a government equally can be no obstacle (para.20);
>
> […]
>
> In the case at bar the Refugee Division blamed the appellant for not trying to obtain protection from the Lebanese army. The evidence is that no established authority was able to provide the appellant with the desired protection. In the circumstances, therefore, the appellant was unable to avail himself of the protection of his country, and far from disqualifying him, this, on the contrary enabled him to meet one of the conditions imposed in the definition of a refugee (para.23).
>
> [Emphasis added]

B. *The decision in Villafranca*

[10] Some six months before the decision in *Ward* was rendered, the decision in *Villafranca* was delivered. *Villafranca* concerns a policeman from the Philippines who, because he had been marked for death by a communist terrorist group, fled his country in fear for his life. On review of the Refugee Division's decision granting refugee protection, the decision was set aside for the reason that, in reaching its decision, the Refugee Division failed to address the issue of state protection. Writing on behalf of Justices Marceau and Décary, Justice Hugessen made a number of observations; those that require comment are numbered in square brackets for easy reference:

> The burden of showing that one is not able to avail oneself of the protection of one's own state is not easily satisfied. The test is an objective one and involves the claimant showing either that he is physically prevented from seeking his government's aid (clearly not the case here) or that the government itself is in some way prevented from giving it.
>
> [1] 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.
>
> [2] 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.
>
> Terrorism in the name of one warped ideology or another is a scourge afflicting many societies today; its victims, however much they may merit our sympathy, do not become convention refugees simply because their governments have been unable to suppress the evil. Where, however, the state is so weak, and its control over all or part of its territory so tenuous as to make it a government in name only, as this Court found in the case of *Zalzali v. Canada (Minister of Employment and Immigration)* [[1991] 3 F.C. 605], a refugee may justly claim to be unable to avail himself of its protection.
>
> [3] Situations of civil war, invasion or the total collapse of internal order will normally be required to support a claim of inability.
>
> [4] On the other hand, where a state is in effective control of its territory, has military, police and civil authority in place and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough

> to justify a claim that the victims of terrorism are unable to avail themselves of such protection.
>
> [Emphasis added]

[11] In the passages emphasized in the quotation above, there are two distinct components to Justice Hugessen's observations. The first component comprises two statements of general principle (ie. [1] and [2]) which build on the decision in *Zalzali*: first, a democratic state cannot guarantee the protection of all of its citizens at all times; and, second, in order for a claimant to discharge the evidentiary burden of establishing that his or her state is unable to provide effective protection, it is just not enough to prove that the state has "not always been effective", that is, it has failed more than once to protect persons in the claimant's particular situation. The first statement is understandable without knowing the context, and is an obvious fact of life. However, the second statement requires cautious application. It can be fairly argued that the statement might apply in some or most claims, but whether it applies in any given claim depends upon an evaluation of the context in which that particular claim arises. That is, whether one failure, a few failures, or a number of failures, arising in a particular context is proven inability is a conclusion for a decision-maker to draw on the evidence presented.

[12] The second component comprises two statements (ie. [3] and [4]) pertaining to state protection in a claim dealing with fear of terrorism, and must be read in this light. Terrorism, by its very nature, is a direct threat to a state's authority. Therefore, it is fair to assume that a state will act to preserve itself, and its failure to meet all terrorist attempts to arrest its lawful authority cannot be accepted as lack of acceptance of responsibility to do so, or lack of ability to do so. It is within the context of a claim based on fear of terrorism that the words in statement [3] have meaning. The use of the word "normally" is an acknowledgement that state collapse is not needed in every case of fear of terrorism to prove state inability; again, the context drives the result.

[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.

C. *The decision in Ward*

[17] The unanimous decision in *Ward* comprises the Supreme Court of Canada's seminal statement on refugee protection law. In the decision, the Court sets out clear criteria to be applied when a person claims protection from Canada. The critical paragraphs of Justice La Forest's decision are quoted in the Appendix to these reasons, from which the following instructive points can be stated:

> 1. The evidentiary burden rests with a claimant to establish a well- founded prospective fear of persecution, on both subjective and objective grounds, if

> returned to his or her country of origin. It is presumed that, if his or her state is unable to provide effective protection, the objective element of the burden is discharged (paragraphs 45 and 52).
>
> 2. The state of origin is presumed to be capable of protecting its citizens, and the claimant bears the evidentiary burden of rebutting this presumption on the basis of some clear and convincing evidence (paragraphs 50 and 52). For example, the evidence can include descriptions of other similarly situated persons not having received protection, and the claimant's own testimony of having attempted to access the state's protection, but that protection did not materialize (paragraphs 50 and 52).
>
> 3. When, on the evidence, it is found to be objectively reasonable for a claimant to have sought state protection, a claimant must have approached the state for protection. However, when, on the evidence, it is found that it is unreasonable to expect the claimant to approach the state, the claimant's failure to do so will not defeat his or her claim (paragraph 49).

D. *The impact of Ward on Villafranca*

[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.

[19] By leaving open how a claimant can discharge the burden to rebut the presumption of state protection by setting the test at "some clear and convincing evidence", *Ward* requires a contextual approach to be taken to evaluating each and every claim for protection, without reliance on any generalized pre-conceptions. As noted below in the analysis of *Kadenko*, the Supreme Court of Canada in *R. v. Lavallee*, [1990] 1 S.C.R. 852 (*Lavallee*) has emphasized that findings with respect to a person's conduct must be made on the basis of an understanding of what to expect of that person's conduct in the context of his or her situation. Therefore, in my opinion, in any claim, including one based on fear of terrorism, the impact of *Ward* is that the statement in *Villafranca* that "situations of civil war, invasion or the total

collapse of internal order will normally be required to support a claim of inability" cannot any longer be applied as a point of law.

[20] Therefore, it might very well be that evidence of failures of state authorities to effectively respond to requests from women for protection from violent sexual predators will be found to constitute some clear and convincing evidence that rebuts the presumption of state protection.

E. *The decision in Kadenko*

[21] The decision in *Kadenko* deals with a claim of protection arising from evidence of discrimination and intolerance in Israel against Russian-speaking claimants. In setting aside the Refugee Division's decision rejecting the claim for protection, the reviewing judge certified the following question for consideration by the Court of Appeal:

> Where there has not been a complete breakdown of the governmental apparatus and where a State has political and judicial institutions capable of protecting its citizens, does the refusal by certain police officers to take action suffice to establish that the State in question is unable or unwilling to protect its nationals?

The Court of Appeal answered the question in the negative and, in doing so, made these statements:

> In our view, the question as worded must be answered in the negative. Once it is assumed that the state (Israel in this case) has political and judicial institutions capable of protecting its citizens, it is clear that the refusal of certain police officers to take action cannot in itself make the state incapable of doing so. The answer might have been different if the question had related, for example, to the refusal by the police as an institution or to a more or less general refusal by the police force to provide the protection conferred by the country's political and judicial institutions.
>
> In short, the situation implied by the question under consideration recalls the following comments by Hugessen J.A. in *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 150 N.R. 232, at p. 233, 99 D.L.R. (4th) 334 (F.C.A.):
>
> > No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all 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.
>
> When the state in question is a democratic state, as in the case at bar, the claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her (See *Canada (Minister of Employment and Immigration) v. Satiacum* (1989), 99 N.R. 171, at p. 176 (F.C.A.), approved by *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at p. 725, 103 D.L.R. (4th) 1.)
>
> [Emphasis added]

[22] The statements in this passage that reiterate *Villafranca* have already been addressed above.

[23] With respect to the realistic ability of a claimant to discharge the evidentiary burden of having sought state protection, the expectation on a claimant to "exhaust all courses of action open to him or her" is relative to the full context of the circumstances of the well-founded fear being experienced. This principle is particularly important with respect to a claim based on gender-based violence (see *Vidhani v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 60 at paras. 15 and 16; and *G.D.C.P. v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1331 at para. 18).

[24] The *Gender Guidelines* provide RPD members with the guidance that, in determining a gender-based claim, it is necessary to understand what actions can be realistically expected of a woman who has suffered violence:

> 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.
>
> When considering whether it is objectively unreasonable for the claimant not to have sought the

> protection of the state, the decision-maker should consider, among other relevant factors, the social, cultural, religious, and economic context in which the claimant finds herself. If, for example, a woman has suffered gender-related persecution in the form of rape, she may be ostracized from her community for seeking protection from the state. Decision-makers should consider this type of information when determining if the claimant should reasonably have sought state protection
>
> (*Gender Guidelines*, Section C.2)

[25] As guiding authority, the *Gender Guidelines* cite the Supreme Court of Canada's decision in *Lavallee* in footnote 31:

> For a discussion of the battered woman syndrome see *R. v. Lavallee*, [1990] 1 S.C.R. 852. In *Lavallee*, Madame Justice Wilson addressed the mythology about domestic violence and phrased the myth as "[e]ither she was not as badly beaten as she claims, or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it." The Court further indicated that a manifestation of the victimization of battered women is a "reluctance to disclose to others the fact or extent of the beatings". In *Lavallee*, the Court indicated that expert evidence can assist in dispelling these myths and be used to explain why a woman would remain in a battering relationship.

[26] It is important to expand on the reference to *Lavallee* with respect to the relevance of applying the statements in *Kadenko* to the circumstances of the Applicant's claim for protection.

[27] Justice Wilson in *Lavallee* enforces the concept that understanding the context in which an action or inaction takes place is essential to judging the action or inaction itself. While *Lavallee* dealt with judging the actions of a woman who killed her abusive husband, the following statements, at paras. 31 to 34 and 38, are instructive with respect to the approach to be adopted when dealing with a gender-based claim for protection, and, indeed, other factual scenarios calling for enhanced knowledge and understanding on the part of decision-makers:

> Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a

man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals.

The gravity, indeed, the tragedy of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its prevalence and its horrific impact on women from all walks of life. Far from protecting women from it the law historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his "right" to chastise her. One need only recall the centuries old law that a man is entitled to beat his wife with a stick "no thicker than his thumb".

Laws do not spring out of a social vacuum. The notion that a man has a right to "discipline" his wife is deeply rooted in the history of our society. The woman's duty was to serve her husband and to stay in the marriage at all costs "till death do us part" and to accept as her due any "punishment" that was meted out for failing to please her husband. One consequence of this attitude was that "wife battering" was rarely spoken of, rarely reported, rarely prosecuted, and even more rarely punished. Long after society abandoned its formal approval of spousal abuse tolerance of it continued and continues in some circles to this day.

Fortunately, there has been a growing awareness in recent years that no man has a right to abuse any woman under any circumstances. Legislative initiatives designed to educate police, judicial officers and the public, as well as more aggressive investigation and charging policies all signal a concerted effort by the criminal justice system to take spousal abuse seriously. However, a woman who comes before a judge or jury with the claim that she has been battered and suggests that this may be a relevant factor in evaluating her subsequent actions still faces the prospect of being condemned by popular mythology about domestic violence. Either she was not as badly beaten as she claims or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it.

> […]
>
> If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man".

IV. *Reviewable error in the RPD's decision*

A. *Regarding the application of Zalzali and Villafranca*

[28] In my opinion, the following statement of the RPD in the decision under review does not show a working understanding of the law on state protection:

> The claimant provided no evidence that the government of Brazil is in disarray and unable to govern and as perfect protection (*Zalzali v. Canada (Minister of Employment and Immigration*), [1991] 3 F.C. 605 (F.C.A.) and protection for all citizens at all times (*Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130), is not the criteria for adequate protection.

In particular, it appears from the statement that the Applicant was required to prove that the government of Brazil is in a condition of collapse in order to rebut the presumption of state protection which, as above described, is an error in law. In addition, the decision, considered as a whole, contains no meaningful contextual application of the law on state protection, which, as above described, is also an error in law. For these reasons, I find that the RPD's decision is patently unreasonable.

B. *Regarding the application of Kadenko*

[29] As quoted above, with respect to the Applicant's action or inaction in seeking state protection in Brazil, the RPD made the following finding:

> I find that her efforts to avail herself of state protection falls far short of a diligent attempt prior to seeking asylum abroad and does not rebut the presumption that the state can protect its citizens (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 726). The claimant made no effort to approach higher authorities in Sao Paulo or to ascertain if the investigation and failure to prosecute Silva was limited to a certain officer (*Canada (Minister of Citizenship and Immigration) v. Kadenko* (1996), 143 D.L.R. (4^{th}) 532).

Thus, *Kadenko* is applied by the RPD to create the expectation that the Applicant in the present case should have approached "higher authorities" or investigated the failure to prosecute the predator in order to establish that she attempted to access state protection. In my opinion, having regard to the decision in *Lavallee*, as advanced in the *Gender Guidelines*, the expectations are capricious because they are not based on a contextualized understanding of the Applicant's real life situation in Brazil; that is, there is no evidence that, for her, the expectations are realistic. As a result, I find that the RPD's application of *Kadenko* results in a reviewable error and renders the RPD's decision patently unreasonable.

IV. *Directions on the re-determination*

[30] Counsel for the Applicant argues that, given the uncontested facts found by the RPD in the decision presently under review, for the re-determination, I should direct the RPD to find that the Applicant is a person in need of protection. I find that the nature of the errors in the RPD's decision make it inappropriate to do so. However, I do agree that this is an appropriate case for directions to be given.

[31] On the re-determination, I direct that a differently constituted panel of the RPD is required to apply the principles of law above described, and, in addition, is required to evaluate the evidence, including the Applicant's conduct in seeking state protection, in a contextual analysis in conformity with the *Gender Guidelines*. As I agree with Counsel for the Applicant that it is unfair to the Applicant to be required to prove her credibility on the re-determination when no negative credibility finding was made in the decision under review, I further direct that the re-determination be conducted on the evidence in the existing record, and the Applicant's evidence already given be accepted as credible. However, I also direct that, on the re-determination, the Applicant is at liberty to supply any further elaborating evidence, and any new argument, as she might consider necessary.

V. *Costs*

[32] In my opinion, special circumstances warrant an order of costs in favour of the Applicant with respect to the present Application, quite apart from the fair agreement reached that the RPD's decision is rendered in error of fact. I find that the special circumstance that exists for making a costs order is the challenging obligation on Counsel for the Applicant to deal with the RPD's failure to critically analyse how to properly apply the decisions in *Villafranca* and *Kadenko*. In my opinion, fixed costs of $5,000 are warranted.

ORDER

Accordingly, the decision under review is set aside, and the matter is referred back for re-determination by a differently constituted panel according to the directions stated in the reasons provided.

Fixed costs are awarded to the Applicant in the sum of $5,000.

CERTIFIED QUESTIONS

Counsel for the Respondent proposes the following questions for certification:

> 1. Do judges of the Federal Court of Canada commit an error in law in issuing a directed verdict to the Refugee Protection Division of the Immigration and Refugee Board where the original panel hearing the claim did not make any factual findings with respect to the evidence required to support a refugee claim?
>
> 2. Do judges of the Federal Court of Canada commit an error in law when they exercise their discretion in ordering costs, pursuant to Rule 22 of the *Federal Court Immigration and Refugee Protection Rules*, where the successful party's counsel chose to persist in arguing a legal issue which was moot?
>
> 3. Do judges of the Federal Court of Canada commit an error in law when they exercise their discretion in ordering costs pursuant to Rule 22 of the *Federal Court Immigration and Refugee Protection Rules*, on the basis that the complexity of the legal issues constitutes a "special reason"?

To qualify for certification the issues underlying a question must: transcend the interests of the immediate parties to the litigation; be of broad significance or general application; and must be ones which could be determinative of the appeal (*Liyanagamage v. Canada (MCI)*, [1994] FCJ No.1637 (C.A.)).

The first question posed is based on the premise that the decision rendered herein constitutes a directed verdict. This premise is not correct. The directions given do not direct a result, but relate only to the evidence to be taken into consideration on the re-determination. Therefore, I find that this question is not certifiable.

The second question posed is based on the premise that the issue of state protection was rendered moot by the Respondent's consent to a re-determination due to factual error in the RPD's decision under review. As set out in the reasons, this premise is not correct. Therefore, I find that this question is not certifiable.

In my opinion, the third question does not meet the criteria for certification, and, therefore, it is not certifiable.

"Douglas R. Campbell"

Judge