



RAD File No. / N° de dossier de la SAR : MB3-04608

Private Proceeding / Huis clos

2014 CanLII 10998 (CA IRB)

Reasons and decision – Motifs et décision

Person who is
the subject of the appeal

XXXXXX XXXXXX XXXXXX XXXXXX

Personne en cause

Appeal considered/heard at

Montréal, Quebec

Appel instruit à

Date of decision

February 25, 2014

Date de la décision

Panel

Normand Leduc

Tribunal

Counsel for the person who is
the subject of the appeal

M^c Claudette Menghile

Conseil de la
personne en cause

Designated representative

N/A

Représentant désigné

Counsel for the Minister

N/A

Conseil du ministre

REASONS AND DECISION

INTRODUCTION

[1] XXXXX XXXXX XXXXX XXXXX, a citizen of the Dominican Republic, is appealing against the decision of the Refugee Protection Division (RPD) rejecting her claim for refugee protection.

DETERMINATION OF THE APPEAL

[2] I find that the RPD erred in fact and in law in its determination. I am unable to set aside the RPD's determination and to substitute the determination that should have been made without holding another hearing to examine the evidence that was submitted to the RPD.

[3] Under subsection 111(1) of the *Immigration and Refugee Protection Act* (IRPA), the Refugee Appeal Division (RAD) refers the matter to the RPD for re-determination by a differently constituted panel.

BACKGROUND

[4] The appellant is a XXXXX -year-old woman who alleged before the RPD that her problems in the Dominican Republic started in XXXXX 2012 when an individual named XXXXX XXXXX made advances toward her on the street. This individual allegedly approached her again on the street two weeks later, inviting the appellant to accompany him. When the appellant refused to follow him, XXXXX XXXXX allegedly said that she [translation] "would not escape him" and that [translation] "if she was not with him, she would be with no one."

[5] The appellant alleged that she saw XXXXX XXXXX again on the street in her neighbourhood on XXXXX, 2013, and that he threatened to kill her. Apparently, she eventually complained to the police about him on XXXXX, 2013.

[6] The appellant alleged that she saw XXXXX XXXXX near her house in early May 2013. That is when she supposedly decided to leave the country, since the police had apparently done nothing to protect her.

[7] The appellant left her country on **XXXXXX**, 2013, for the United States of America, a trip that she had planned beforehand. She came to Canada, where she claimed refugee protection on August 19, 2013.

[8] The RPD found that the appellant was a credible witness. Therefore, it believed her allegations and, based on the evidence submitted, was able to conclude that her fear of persecution was because of her [translation] “status as a woman.”

[9] However, the RPD rejected the claim for refugee protection on the ground that the appellant failed to show with clear and convincing evidence that she could not receive adequate state protection in her own country.

[10] Before the RAD, the appellant submits that the RPD erred in its evaluation of Dominican state protection by not taking into account the documentary evidence regarding the situation of women in the Dominican Republic and the evidence regarding police inaction following the complaint that she filed.

[11] For these reasons, the appellant is asking the RAD to set aside the determination of the RPD and to refer the matter to the RPD for re-determination.

STANDARD OF REVIEW

[12] The IRPA does not expressly set out the standard of review that the RAD should apply when reviewing RPD decisions, nor is it specifically set out in the case law. The appellant also does not propose in her memorandum what the standard of review should be.

[13] In *Dunsmuir*,¹ rendered in 2008, the Supreme Court of Canada reviewed the foundations of judicial review and the standards of review that apply in various situations. In order to simplify that analysis, the Supreme Court decided that, henceforth, there ought to be only two standards of review: correctness and reasonableness.

[14] Although the RAD does not conduct judicial reviews of RPD decisions, but rather acts as an appellate body within the same administrative tribunal, the Immigration and Refugee Board of Canada, I am of the opinion that, without more direct guidance from higher courts, it is possible to apply to the RAD the principles developed in *Dunsmuir*.

¹ *Dunsmuir v. New Brunswick*, 2008 SCC 9, (2008) 1 SCR 190.

[15] In paragraph 51 of its decision in *Dunsmuir*, the Supreme Court writes the following:

...[Q]uestions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

[16] In paragraph 38 of its reasons in *Hinzman*,² the Federal Court of Canada writes as follows:

[38] Mactavish J. correctly identified that questions as to the adequacy of state protection are questions of mixed fact and law ordinarily reviewable against a standard of reasonableness (*Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 420, at paragraph 199, *Hughey v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 421, at paragraph 186).

[17] Consequently, I will apply the standard of review of reasonableness in this case to the issue of whether there is adequate state protection.

[18] In paragraph 47 of *Dunsmuir*, the Court states that reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process, but is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Deference is therefore required, and deference must be given to the decision of the RPD.

ANALYSIS

[19] The issue in this case is whether the RPD erred in its assessment of Dominican state protection.

[20] In my opinion, the answer to this question is in the affirmative for the following reasons.

[21] In its reasons, the RPD rightly wrote that there is a presumption that a state is capable of protecting its citizens and that it is the responsibility of the refugee protection claimant to show with clear and convincing evidence that the state is unable to provide the claimant with adequate protection.

[22] The RPD was of the opinion that the appellant failed to rebut the presumption of state protection because she did not ask the authorities what efforts had been made to protect her following the complaint she filed on **XXXXXX**, 2013, and because the fact that she saw the

² *Hinzman v. M.C.I.*, 2007, FCA 171.

individual against whom she had filed the complaint near her home afterward is not clear and convincing evidence of the state's inability to protect her.

[23] However, I find, as the appellant submitted in her memorandum, that the RPD erred in not taking into account in its analysis the documentary evidence that was filed on the subject of the effectiveness of the protection offered to women in the Dominican Republic.

[24] On this subject, the appellant cited the document from the U.S. Department of State (see page 23 of the RPD record) included in the national documentation package, which states as follows:

Despite government efforts to improve the situation, violence against women continued to be pervasive. Although more recent data were not available, in 2011 there were more than 70,000 gender violence complaints reported to authorities nationwide compared to 62,000 complaints filed in 2010. The law criminalizes violence against women, and the state can prosecute rape, incest, sexual aggression, and other forms of domestic violence. Penalties for these crimes range from one to 30 years in prison and fines from 700 to 245,000 pesos (\$18 to \$6,300). A local NGO estimated that 20 percent of women between the ages of 15 and 49 had been victims of physical abuse at some point in their lives.

The number of cases of violence against women exceeded the prosecutor general's capacity to deal with the situation. According to the National Police, more than 1,000 women lost their lives due to gender-based violence from January 2008 to October 2012. The vast majority of these victims never filed a complaint with the prosecutor general. The attorney general reported that from January to October, 160 women died as victims of domestic violence, compared with 179 deaths during this same period in 2011.

[25] In my opinion, this documentary evidence clearly constitutes evidence that could rebut the presumption that the Dominican state is capable of providing adequate protection for the appellant, and not taking it into account in its analysis was an error on the part of the RPD.

[26] In *Torres*,³ the Federal Court of Canada also writes as follows:

[17] I do not say, of course, that the decision would necessarily have been different if it had, but its failure to do so was a reviewable error and it would be unsafe to let the decision stand. The Board failed to effectively analyse, not merely whether a legislative and procedural framework for protection existed, but also whether the state, through the police and otherwise, was willing to effectively implement any such framework. As Mr. Justice Gibson said in *Elcock v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1438 at para. 15, the "Ability of a state to protect

³ *Torres v. M.C.I.*, 2005, FC 660.

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.”

[27] Consequently, I find that the RPD’s decision is unreasonable because it does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

REMEDIES

[28] I find that the RPD erred in fact and in law in its determination. I am unable to set aside the RPD’s determination and to substitute the determination that should have been made without holding a new hearing to examine the evidence that was submitted to the RPD, notably, but not exclusively, regarding the issue of whether the appellant would have access to an internal flight alternative in her country.

[29] Under subsection 111(1) of the IRPA, the RAD refers the matter to the RPD for re-determination by a differently constituted panel.

[30] The appeal is allowed.

Normand Leduc

Normand Leduc

February 25, 2014

Date

IRB translation

Original language: French