Date: 20070326

Docket: IMM-822-06

Citation: 2007 FC 320

Ottawa, Ontario, March 26, 2007

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

MARIA DEL ROSARIO FLORES CARRILLO

Applicant

and

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

[1] Ms. Maria Flores Carrillo claims that she is afraid of being murdered by her former common-law spouse in Mexico. She says that she tried to get help from Mexican police, but that her efforts only made things worse. Her spouse found out that she had made a complaint to police and beat her severely. His brother was a police officer.

[2] Ms. Flores Carrillo sought refugee protection in Canada in 2004. A panel of the Immigration and Refugee Board dismissed her claim because it doubted her version of events and concluded that she had failed to show that state protection was unavailable to her in Mexico. Ms. Flores Carrillo argues that the Board erred in its treatment of her evidence and in its analysis of the issue of state protection. She asks for a new hearing.

[3] I agree that the Board erred and will allow this application for judicial review.

I. Issues

[4] Given my conclusion that the Board erred in law in its analysis of the issue of state protection, I need not address the credibility issue.

II. Analysis

(a) The Board's decision

[5] The Board noted that Mexico is a democracy and, therefore, can be presumed to provide protection to its citizens. Further, Mexico has put in place various measures to deal with domestic violence – legislation, law enforcement, legal services, shelters for abused women, and health services. The Board found that Ms. Flores Carrillo had not made a determined effort to obtain state protection, having only approached the police once during four years of abuse.

[6] The Board went on to conclude on the evidence before it that Ms. Flores Carrillo had not established that, "within the preponderance of probability category, the state of Mexico would not be reasonably forthcoming with serious efforts to protect the claimant if she was to return to Mexico and approach the state for protection". It relied on the decision of Justice Marshall Rothstein (sitting as applications judge) in *Xue* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1728 (T.D.) (QL), in which he held that refugee claimants must satisfy, "for purposes of rebutting a presumption of state protection, the burden of a higher degree of probability commensurate with the clear and convincing requirement in *Ward*" (citing *Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689).

[7] Ms. Flores Carrillo argues that the Board erred in its approach to the issue of state protection and, as a result, failed to analyze the documentary evidence before it suggesting that state protection for victims of domestic violence is seriously limited in Mexico.

[8] The respondent argues that the Board properly applied the presumption of state protection, and suggests that to impose on the Board an obligation to analyze the evidence in greater detail would have the effect of watering down that presumption and defeating the spirit of the *Ward* decision.

[9] To address these arguments, I must go back to first principles.

(b) The law of state protection

[10] State protection is an issue that arises from the very definition of a refugee. A refugee is a person who has "a well-founded fear of persecution" and is "unable or, by reason of that fear, unwilling" to obtain protection from their country of nationality (s. 96(*a*), *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 – see Annex A). The definition contains both subjective and objective elements: the claimant must actually fear persecution and that fear must be well-founded.

[11] The issue of state protection arises within the objective branch of the definition of a refugee. Simply put, a person's fear of persecution is not well-founded if state protection is available. The contrary is also true – a person's fear of persecution is well-founded if state protection is unavailable (see *Ward*, above at para. 52). Further, the definition of a refugee goes on to refer explicitly to the person's inability or unwillingness, out of fear, to secure state protection. Accordingly, the issue of state protection can arise in more than one way but, practically speaking, it usually comes up in the consideration of the well-foundedness of a claim (*Zhuravlvev* v. *Canada (Minister of Citizenship and Immigration*), [2000] F.C.J. No. 507, at para. 18).

[12] The question of state protection generally arises only in cases where the person alleges persecution by persons who are not state agents. In those cases where the person claims persecution by the state itself, it can usually be assumed that no state protection is available (*Zhuravlvev*, above, at para. 19).

[13] The burden of proof lies on claimants to show that they meet the definition of a refugee. To do so, they must prove that they actually fear persecution and that their fear is "well-founded". To establish a well-founded fear, refugee claimants must show that there is a "reasonable chance", a "serious possibility" or "more than a mere possibility" that they will be persecuted if returned to their country of nationality (*Adjei* v. *Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680, F.C.J. No. 67 (C.A.) (QL)). (By contrast, a person who claims to be in danger of being tortured, killed or subjected to cruel and unusual treatment must establish his or her claim on the balance of probabilities: *Li* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] F.C.J. No. 1 (C.A.) (QL)). In respect of particular underlying facts, the claimant shoulders a burden of proof on the balance of probabilities (*Adjei*, above, at para. 5).

[14] In most situations, decision-makers are entitled to presume that states are able to protect their citizens (*Ward*, above). Justice La Forest, in *Ward*, stated for the Court: "Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens" (at para. 50). The exception is where there has been a complete break-down of a state's apparatus (*Canada (Minister of Employment and Immigration)* v. *Villafranca*, [1992] F.C.J. No. 1189 (C.A.) (QL)).

[15] However, from my reading of the cases, the concept of the "presumption of state protection" does not mean that there is a higher burden of proof on claimants in cases involving the question of state protection. It simply means that, in those cases, claimants must tender reliable evidence on the point or risk failing to meet the definition of a refugee. In other words, the presumption is not a special hurdle that refugee claimants must overcome where the issue of state protection arises – rather, it simply establishes a starting point for analyzing the well-foundedness of a claim.

[16] The presumption that Justice La Forest had in mind was clearly a legal presumption, not a factual one. There was no underlying fact, proof of which would give rise to the presumption of state protection. Rather, he stated a rule of law, similar to the presumption of innocence in criminal cases. This raises the question, which Justice Rothstein sought to answer in *Xue*, above, of what burden of proof falls on refugee claimants to rebut that presumption. In criminal matters, the burden on the Crown is to supply proof of guilt beyond a reasonable doubt. What burden falls on refugee claimants to rebut the presumption of state protection?

[17] In my view, Justice La Forest contemplated a burden merely to adduce reliable evidence on the point. It is important to note that Justice La Forest referred to the presumption of state protection within his discussion of the kind of evidence claimants might present to satisfy the definition of a refugee in those cases where it was an issue (*i.e.* where claimants alleged persecution on the part of persons not associated with the state). He said that claimants must provide "*some* evidence" of a lack of protection – in other words, merely an evidentiary burden. He never mentions any particular standard of proof, such as a balance of probabilities. However, he gave examples of where the burden would be met: "For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize" (at para. 50). Claimants would not have to provide that evidence where it was clear that the state's apparatus had completely broken down. In other cases, "it should be *assumed* that the state is capable of protecting a claimant" (at para. 50 – emphasis added).

[18] In the paragraph following the statements set out above, Justice La Forest states that "this presumption increases the burden on the claimant" (at para. 51). Again, however, one must look at that statement in its context. Justice La Forest had just referred to a case in which a fugitive from the United States sought refugee protection in Canada on the grounds that he feared persecution within the American prison system (*Minister of Employment and Immigration* v. *Satiacum* (1989), 99 N.R. 171 (F.C.A.)). There, the Federal Court of Appeal had held that the United States should be presumed to treat its prisoners fairly. It said:

> In the absence of exceptional circumstances established by the claimant, it seems to me that in a Convention refugee hearing . . . Canadian tribunals have to assume a fair and independent judicial process in the foreign country. In the case of a non-democratic state, contrary evidence might be forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching, for example, the jury selection process in the relevant part of the country, or the independence or fair-mindedness of the judiciary itself. (At p. 176.)

[19] In my view, when Justice La Forest noted that the presumption of state protection increased the burden on claimants, he was merely referring to the reality that a claimant would have a difficult time showing a lack of state protection in a country that had established elaborate civil and judicial institutions, such as the United States, as compared to countries where the state apparatus is more rudimentary. He was not, as I read his decision, establishing a special standard of proof in relation to state protection.

[20] This interpretation is borne out by subsequent case law in which it has been made clear that a refugee claimant's evidence about a lack of state protection must be looked at in the context of the civil and judicial institutions of the state in question. For example, it will not always be enough for the claimant simply to show that he or she asked the police for protection and was turned down. There may have been other remedies reasonably available (*Kadenko* v. *Canada (Solicitor General)* (1996), 143 D.L.R. (4th) 532 (F.C.A.)). Similarly, evidence of a local failure to provide protection does not mean that the state as a whole fails to protect its citizens (*Zhuravlvev*, above, at para. 31). As mentioned, the burden falls on claimants to prove underlying facts on a balance of probabilities. They also shoulder the burden of establishing that they meet the definition of a refugee. Therefore, in state protection cases, the claimant's evidence may, for example, establish that he or she went to the police for protection and was denied it. The question then is whether that fact is sufficient to support the well-foundedness of the claim – that is, whether it establishes that there is a reasonable chance of persecution on return. Obviously, to answer that question, the claimant's evidence must be analyzed within the context of the conditions in his or her state of nationality.

[21] Another of Justice La Forest's statements in *Ward* is often cited as providing support for imposing a substantial burden of proof on refugee claimants, and it is the phrase that Justice Rothstein relied on *Xue*, above. Justice La Forest said that, unless a state concedes its inability to provide protection (which was the situation in *Ward*), claimants must provide "clear and convincing confirmation of a state's inability to protect" (at para. 50).

[22] The words "clear and convincing confirmation" could be interpreted as creating a standard of proof. They are sometimes used to refer to a standard of proof greater than a balance of probabilities and just short of proof beyond a reasonable doubt (see Kenneth S. Brown, ed. *McCormick on Evidence*, 6th ed. (St. Paul, Minn.: Thomson West, 2006 at §340)). However, this is rare. In my view, Justice La Forest could not have intended to establish such a unique and elevated standard of proof in relation to state protection without any discussion on the point or any reference to the prior jurisprudence dealing with the burden of proof in refugee cases. In particular, he did not refer to the *Adjei* case, cited above, in which the Federal Court of Appeal specifically dealt with the burden of proof on refugee claimants in relation to the objective branch of the definition of a refugee. In fact, Justice La Forest held that, since the issue of state protection forms part of that objective aspect, evidence of a lack of state protection in itself amounts to proof of the well-foundedness of a refugee claim. He said:

> A subjective fear of persecution combined with state inability to protect the claimant creates a presumption that the fear is well-founded. (At para. 52.)

[23] It seems inconsistent with this approach to require claimants to prove a lack of state protection on an elevated standard of proof. It also would appear to be inconsistent with the interpretation and humanitarian purpose of the Refugee Convention (see, e.g. Brian Gorlick, "Common burdens and standards: legal elements

in assessing claims to refugee status" (October 2002); Office of the United Nations High Commissioner For Refugees, "Note on Burden and Standard of Proof in Refugee Claims" (16 December 1998) – for complete citations see Annex B). In my view, to meet the objective branch of the definition of a refugee, the claimant must prove that there is a reasonable chance of persecution if returned to his or her country of nationality. Accordingly, where the fear of persecution derives from a lack of state protection, the decision-maker must simply determine whether the relevant evidence meets that standard. If it does, then the claimant's fear is well-founded.

[24] Once again, I note that the reference to "clear and convincing confirmation" appears within Justice La Forest's discussion of the kind of evidence claimants should be expected to provide to show an absence of state protection. He is describing the nature of that evidence, not the burden of proof on claimants. He specifically noted, as mentioned above, that a description of the treatment of similarly situated persons or of a past failure to obtain protection would be sufficient. Claimants have to provide "some evidence". Obviously, that evidence must be reliable or else the claimant's fear of persecution could not be considered to be objectively "well-founded". A mere assertion by a refugee claimant that a state is unable to provide protection would not be enough, which Justice La Forest made clear in his reference to *Satiacum*, above. In my view, looking at his judgment as a whole, the words "clear and convincing" do not erect a standard of proof; they simply describe the kind of evidence that would be capable of satisfying the objective branch of the definition of a refugee.

[25] As mentioned, the words "clear and convincing" can be used to stipulate a standard of proof. But those, or similar, words can also be used to describe the evidence that is capable of meeting a particular standard of proof, quite apart from the standard itself. For example, the Supreme Court of Canada has held that a requirement to show there are "reasonable grounds to believe" that a person has committed a crime against humanity can only be met where there is "compelling and credible information" to support it: *Mugesera* v. *Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at paras. 114-117. Similarly, it has held that a decision to detain a permanent resident on a security certificate must be based on "compelling and credible" evidence: *Charkaoui* v. *Canada (Citizenship and Immigration)*, 2007 SCC 9, at para. 39. In both cases, the Court made clear that a relatively low standard of proof, "reasonable grounds to believe" (similar to the "reasonable chance" standard), could be met only by "compelling and credible" evidence. Without it, there would be no objective foundation for the finding in question. Similarly, in my view, without clear and convincing evidence of a lack of state protection, a claimant will fail to show that his or her claim is objectively well-founded. However, this should not translate into a heightened standard of proof. The essential question remains: Has the claimant established that there is a reasonable chance that he or she will be persecuted if returned?

[26] As Justice Denis Pelletier has noted, "the question of state protection is rarely a yes/no proposition" (*Zhuravlvev*, above, at para. 19). Similarly, as Professor Audrey Macklin has stated, the "availability of state protection can rarely be described in absolutes" ("Refugee Women and the Imperative of Categories" (1995), 17 *Human Rights Quarterly* 213, at p. 266). It would be extremely onerous to place on refugee claimants the burden of proving a definitive absence of state protection. After all,

refugees "are generally persons who fled with little else than what they could carry in their arms" and their "knowledge may not extend beyond their own experience and that of others who are similarly placed" (*Zhuravlvev*, at para. 24). The effect of imposing such a high burden of proof might be to require claimants in some cases to prove a likelihood of persecution, which the Federal Court of Appeal expressly rejected in *Adjei* in favour of a requirement that they merely prove a reasonable chance of persecution. In addition, it could mean that claimants who had discharged the general burden, by proving a genuine fear and a reasonable chance of persecution, would be denied refugee protection if they failed to establish an absence of state protection at a high standard of proof. In other words, claimants could be denied refugee protection even though they had met the definition of a refugee. Further, it could result in imposing a higher burden on persons who allege persecution by non-state agents than on those who claim to have been persecuted by the state. I see no support for these propositions in Canadian law.

(c) Application to this case

[27] Ms. Flores Carrillo stated that her common-law spouse began abusing her in 2001. She complained to police in 2004 after a severe beating, and then hid at a friend's house. Her spouse, with the help of his brother, a police officer, found her and beat her again. She decided to flee to Canada.

[28] The Board expressed concern about the claimant's credibility because of inconsistencies between her oral testimony and her written narrative. As a result, the Board gave little weight to her claim to have sought state protection. In particular, it discounted the significance of a written denunciation against her spouse issued by the Mexican Attorney General's Office, which described the details of her complaint and referred to a medical report supporting her description of her injuries.

[29] However, the Board went on to state that even if Ms. Flores Carrillo's account was true, she had not done enough to obtain state protection and had failed to discharge the high burden of proof on her. In particular, the Board found that Ms. Flores Carrillo had not "rebutted the presumption of state protection with 'clear and convincing' evidence within the 'preponderance of probability category'".

[30] In light of my discussion of the burden of proof on refugee claimants, I find that the Board erred in law. In my view, the presumption of state protection falls away once the claimant has provided reliable evidence of a lack of state protection. At that point, the Board must determine whether it is satisfied that the claimant's case is well-founded. The question is: does the evidence establish that there is a reasonable chance that the claimant will be persecuted on return? Accordingly, where state protection is an issue, the Board should ask itself whether the limitations on the availability of state protection for the claimant give rise to that reasonable chance of persecution. I do not accept the respondent's contention that the presumption of state protection relieves the Board of the duty to analyze the relevant evidence.

[31] I must emphasize that there is more than one way to express the burden and standard of proof on refugee claimants. It is only where a decision-maker has imposed a standard that is clearly too high, or has failed to make clear what standard was applied, that the Court should order a new hearing. Even then, a new hearing is

not necessary if, based on the paucity of evidence supporting the claimant's case, the result would inevitably have been the same: *Alam v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 4, [2005] F.C.J. No. 15 (T.D.) (QL). In this case, the Board imposed too high a standard and I cannot conclude, based on the evidence Ms. Flores Carrillo supplied, that the result would necessarily have been the same had the proper standard been applied.

[32] I will entertain any submissions regarding a question for certification that are provided within ten days of this decision.

JUDGMENT

THIS COURT'S JUDGMENT IS that:

1. The application for judicial review is allowed. A new hearing is ordered.

2. Submissions regarding a certified question must be filed within ten (10) days of the date of this judgment.

"James W. O'Reilly"

Judge

Annex "A"

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Convention Refugee

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;

Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27

Définition de « réfugié »

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;

Annex "B"

Brian Gorlick, "Common burdens and standards: legal elements in assessing claims to refugee status" (October 2002), online: United Nations High Commissioner for Refugees (UNHCR) http://www.unhcr.org/research/RESEARCH/3db7c5a94.pdf ;

Office of the United Nations High Commissioner For Refugees, "Note on Burden and Standard of Proof in Refugee Claims" (16 December 1998), online: Refugee Law Reader, www.refugeelawreader.org/294/Note_on_Burden_and_Standard_of_Proof_in_Refugee_Claims.pdf)