

Date: 20080506

Docket: IMM-4020-07

Citation: 2008 FC 578

Ottawa, Ontario, May 6, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

GISELA GALLO FARIAS

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated August 24, 2007 concluding that the applicant, a citizen of Mexico, is not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

FACTS

[2] The applicant, a Mexican citizen, arrived in Canada in July 2005 at the age of 20 seeking refugee protection on account of her relationship with a high ranking and high profile Mexican politician, with whom the applicant was involved from November 2001 until approximately March 2005. The applicant alleges that given this individual's stature, influence, and obsession with her, she will not be able to receive adequate state protection in Mexico.

[3] The applicant first met this individual in November 2001 while he was campaigning at a low income housing project where the applicant lived with her mother. The applicant was 16 years old at the time. She states that the two developed a relationship and that she was provided with clothes, gifts, and was taken to a number of official functions, where she was introduced and perceived as an assistant. The applicant states that their relationship developed to the point where, in June 2003, she moved in with this individual. However, unbeknownst to the applicant, this man, who I will refer to as the applicant's partner for the purposes of this application, was already married to another woman.

[4] The applicant states in her Personal Information Form (PIF) that during their time together, she was subjected to significant abuse at the hands of her partner. These incidents include:

- 1) in November 2004, after visiting her mother, the applicant was threatened and verbally abused for having spoken with her mother's male neighbour. The applicant states that after they returned home, her partner physically abused her for the first time. Later that evening, after her partner left for a meeting, the applicant fled the

home, reported the incident to an officer on duty at the Public Ministry, and travelled by bus to Tlaxcala where she stayed with a friend. The applicant states that her partner arrived at her friend's home about one month later, and that she accepted his apology and returned with him in order to "rebuild" their relationship;

- 2) in January 2005 the applicant states that she was beaten and raped by her partner and his friend when she refused to take her clothes off at a party. The applicant states that she was held hostage for the next 15 days. When she managed to escape, she fled to Tuxtla Gutierrez, about three hours away by airplane, where she stayed with another friend. Once arriving in Tuxtla Gutierrez, the applicant tried to file a complaint at the Public Ministry, but was told that she could only make the complaint in Pachuca, where the assault occurred;
- 3) in February 2005, the applicant's partner tracked her down in Tuxtla Gutierrez and forced her to return with him to Pachuca;
- 4) in March 2005, the applicant discovered that she had become pregnant as a result of the January 2005 rape. When she told her partner about this, he beat her to such a degree that she suffered a miscarriage. Two days after being released from the hospital, the applicant went to stay at the home of her uncle, during which time she saw a psychologist on five occasions; and
- 5) in May 2005, after the applicant returned to her mother's home in Pachuca, her partner confronted her, pushed her mother aside, and slapped the applicant in the face.

[5] Following this last incident, the applicant obtained her passport in Pachuca in June 2005 and moved to Mexico City where she stayed with family until she obtained enough money to leave the country.

Decision under review

[6] On August 24, 2007, the Board concluded that the applicant was not a Convention refugee or a person in need of protection. In reaching its decision, the Board made no adverse findings with respect to the applicant's credibility. Rather, the Board based its decision on the adequacy of state protection in Mexico, concluding that at least within the Federal District of Mexico City, the applicant would receive adequate, if not perfect, state protection.

[7] In reaching its decision, the Board canvassed Mexico's legislative framework, finding that at the federal level there exists an adequate framework "designed to provide victims of domestic violence recourse through the rule of law." The Board recognized, however, that there are vast differences between how the various states implement and support those legislative initiatives. Accordingly, the Board focussed its analysis on the Federal District of Mexico City, which the Board found most effectively implemented all of the relevant initiatives.

[8] After reviewing the evidence before it, the Board concluded at page 5:

Counsel submitted that the claimant's young age and the political and powerful position of the agent of persecution should be considered. I agree. ...Further, when found and physically attacked in front of her mother in Mexico City, the claimant did not contact the authorities.

As a result, I find it is speculation on the part of the claimant as to how the authorities in Mexico City might react, even considering the position of the person she fears.

Since the claimant has lived on her own in Mexico in the past, I am satisfied that moving back to the capital where she has lived in the past and where her mother lives today would not be unreasonable.

The documentary evidence supports that for persons such as this claimant, the state will provide adequate but not perfect protection in Mexico City.

As a result, the claimant has failed to establish she will be at serious risk of persecution or a serious possibility of risk to life, or of cruel and unusual punishment or treatment, or a danger of torture, if she were to return to Mexico City today.

It is this decision that the applicant seeks to have judicially reviewed.

ISSUES

[9] The issues in this case are as follows:

- 1) Did the Board err in failing to assess the psychological evidence, medical evidence, Gender Guidelines and the applicant's psychological risk if returned to Mexico; and
- 2) Did the Board err in finding that state protection was available to the applicant within the Federal District of Mexico City.

STANDARD OF REVIEW

[10] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL), the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to

“ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question.”

[11] In *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 362 N.R. 1, the Federal Court of Appeal affirmed at paragraph 38 that questions as to the adequacy of state protection are “questions of mixed fact and law ordinarily reviewable against a standard of reasonableness.” This standard had been previously applied in a number of decisions of this Court: see *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, 45 Imm. L.R. (3d) 58; *Nunez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1661, 51 Imm. L.R. (3d) 291; and *Franklyn v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1249, [2005] F.C.J. No. 1508 (QL).

[12] I agree with this reasoning and conclude that the appropriate standard to apply to the Board’s decision in this case is that of reasonableness. Accordingly, as long as the Board’s reasons are “tenable in the sense that they can stand up to a somewhat probing examination,” then the decision is reasonable and the Court will not interfere with the Board’s decision: see *Franklyn*, above, at paragraph 17.

ANALYSIS

Issue No. 1: Did the Board err in failing to assess the psychological evidence, medical evidence, Gender Guidelines and the applicant's psychological risk if returned to Mexico?

[13] The applicant argues the Board erred in failing to consider psychological and medical evidence demonstrating that the applicant suffered from post-traumatic stress disorder and would suffer further psychological deterioration if returned to Mexico. Essentially, the applicant argues that her claim should have been decided in light of these factors, and that failure to do so amounts to a reviewable error.

[14] With respect, I cannot agree with the applicant's argument. The evidence proffered by the applicant demonstrates that she has, in fact, suffered both physical and psychological trauma from the abuse and harm inflicted on her by her ex-partner. This was not questioned by the Board and is not at issue in this application. Rather, what is at issue is whether such evidence is relevant to a finding that the applicant could have obtained state protection in the Federal District of Mexico City. In my view, such evidence is not relevant to the Board's finding.

[15] Evidence relating to the psychological and physical harm suffered by a refugee claimant prior to coming to Canada goes to the credibility of an applicant's testimony and whether or not that individual possesses a subjective fear of persecution. Such evidence is not relevant to a determination of whether the Federal District of Mexico City will provide the applicant with adequate protection. A finding of adequate state protection is premised on an objective assessment that must be made independently of whether the applicant possesses a subjective fear of persecution.

[16] In *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 343, [2006] F.C.J. No. 421 (QL), Mr. Justice Noël considered the relevance of a psychological assessment with respect to the issue of state protection, stating at paragraph 16:

¶ 16 In sum, state protection is an objective issue that has to be assessed regardless of the subjective fear of persecution that refugee claimants might experience. The weighting of the material before the RPD is within its purview, and psychologists' opinion have no relevance with respect to the issue of state protection. The RPD rejected the Applicant's refugee claim because they failed to rebut the presumption of state protection, and this conclusion is not affected by the psychological assessments submitted. ...

[17] In *Martinez*, Mr. Justice Noël referenced the 2005 decision of Madam Justice Layden-Stevenson in *J.C.C. v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 534, [2005] F.C.J. No. 660 (QL), wherein she stated at paragraph 18 that psychological evidence provides no assistance in relation to the objective issue of state protection:

¶ 18 I can not conclude, on the basis of the evidence that was before it, that the RPD could not reasonably determine that state protection exists in Costa Rica for these applicants. I also find no error regarding the board's treatment of the psychological report. The report concluded that the applicants would be "at a high risk for retraumatization" should they be forced to return to Costa Rica. However, I agree with the respondent that the report does not deal with the applicants' ability to access state protection in Costa Rica. In my view, the report speaks to the applicants' subjective fear, but it does not assist in relation to the objective issue of state protection.

[18] In the case at bar, the Board did not specifically reference the psychological or medical evidence before it when determining that the applicant was not a Convention refugee or person in need of protection. However, the Board clearly accepted the applicant's testimony that she suffered

abuse at the hands of her ex-partner, and based its determination on the objective issue of state protection.

[19] Accordingly, given that the only determinative issue before the Board was that of state protection, the psychological and medical evidence was not relevant to the Board's determination and need not have been referenced in its decision. Moreover, the Gender Guidelines referred to by the applicant are not relevant to the issue of state protection.

Issue No. 2: Did the Board err in finding that state protection was available to the applicant within the Federal District of Mexico City?

[20] The starting point in any assessment of state protection lies with the Supreme Court of Canada decision in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689. In that case, the Court held that refugee protection is a form of "surrogate protection" intended only in cases where protections from the home state are unavailable.

[21] Further, the Court held that except in situations where there has been a complete breakdown of the state apparatus, there exists a general presumption that a state is capable of protecting its citizens.

[22] While the presumption of state protection may be rebutted, this can only occur where the refugee claimant provides "clear and convincing" evidence confirming the state's inability to provide protection. Such evidence can include testimony of similarly situated individuals let down

by the state protection arrangement, or the refugee claimant's own testimony of past incidents in which state protection was not provided: see *Ward* at pages 724-725.

[23] In *Kadenko v. Canada (Solicitor General)* (1996), 206 N.R. 272 (F.C.A.), the Federal Court of Appeal held that in order to rebut the presumption of state protection, refugee claimants must make "reasonable efforts" at seeking out state protection, and that the burden on the claimant increases where the state in question is democratic.

[24] However, recent Federal Court jurisprudence has held that *Kadenko* cannot be interpreted as requiring refugee claimants to exhaust "every conceivable recourse" available to them in order to rebut the presumption of state protection. This is especially true where the state is alleged to be involved in the persecution. For example, in *Chaves*, above, Madam Justice Tremblay-Lamer held at paragraph 15:

¶ 15 In my view, however, [*Ward*], *supra* and *Kadenko, supra*, cannot be interpreted to suggest that an individual will be required to exhaust all avenues before the presumption of state protection can be rebutted.... Rather, where agents of the state are themselves the source of the persecution in question, and where the applicant's credibility is not undermined, the applicant can successfully rebut the presumption of state protection without exhausting every conceivable recourse in the country. The very fact that the agents of the state are the alleged perpetrators of persecution undercuts the apparent democratic nature of the state's institutions, and correspondingly, the burden of proof. ...

See also *Nunez*, above, at paragraph 15 and *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 731, 36 Imm. L.R. (3d) 283 per Mactavish J. at paragraph 22.

[25] In the case at bar, the Board concluded that the state would be able to provide the applicant with “adequate but not perfect protection” in the Federal District of Mexico City. Effectively, the Board’s conclusion was that the applicant could not be granted refugee protection in Canada because she failed to rebut the presumption of state protection, at least within the context of the Federal District of Mexico City.

[26] However, in reaching such a conclusion, it is important that the Board not merely provide a blanket assessment of whether adequate state protection is available to the applicant in the Federal District of Mexico City. Rather, having accepted that the applicant suffered significant abuse at the hands of a high ranking and high profile Mexican politician, the Board must account for such factors in determining whether such protection will be available to the applicant.

[27] In the case at bar, the applicant argued that the stature and influence of her persecutor would prevent her from receiving adequate and effective protection. In response, the Board held at page 5 of its decision:

Counsel submitted that the claimant’s young age and the political and powerful position of the agent of persecution should be considered. I agree. I would note the claimant moved from her parents’ home in 2001 and lived on her own in Hidalgo until she moved back to her parents’ home in April or May 2005. Further, when found and physically attacked in front of her mother in Mexico City, the claimant did not contact the authorities.

As a result, I find it is speculation on the part of the claimant as to how the authorities in Mexico City might react, even considering the position of the person she fears.

[28] I have concluded that the Board’s decision was unreasonable in two respects:

- 1) the Board misunderstood that the applicant was “physically attacked in front of her mother in Mexico City.” In fact, the applicant’s PIF states in paragraph 10:

... As a result, I returned to the home of my mother in Pachuca where I hid until the end of May, 2005 when [the abuser] found me, pushed my mother aside, slapped my face and told me that he expected me to return to him.

The Board based its decision on the misunderstanding that the assault took place in Mexico City and that the claimant did not contact the authorities in Mexico City, where the Board considered the police would be more effective than in Pachuca. In fact, the assault took place in Pachuca, where the applicant had previously made a complaint against the politician and was told the police would not take a denunciation against such a well-known individual. The Board’s conclusion that “it is speculation on the part of the applicant as to how the authorities ... might react” is clearly unreasonable since the applicant had already reported the abuser to the police in the Pachuca; and

- 2) the decision is unreasonable because the obvious question in this case was not addressed by the Board, namely whether the public authorities including the police will protect the young applicant, the mistress of the politician, and prosecute the politician for assaults.

[29] In my view, the Board’s analysis inadequately addresses the applicant’s circumstances particularly that her alleged persecutor is very powerful within the exact jurisdiction where she was assaulted. Accordingly, the Board’s analysis of state protection is too general and fails to consider

the applicant's particular situation; a fact that becomes even more serious given that the Board did not make any negative credibility assessments, thereby accepting the fact that the applicant has suffered significant trauma at that hands of her alleged persecutor.

[30] As Justice Tremblay-Lamer held in *Chaves*, above, at paragraph 15:

¶ 15 ... where agents of the state are themselves the source of the persecution in question, and where the applicant's credibility is not undermined, the applicant can successfully rebut the presumption of state protection without exhausting every conceivable recourse in the country. ...

As discussed, the Board did not question the credibility of the applicant for the purpose of deciding this refugee claim. The Board recognized the issue, but did not reasonably address whether the young applicant could obtain state protection when the agent of persecution was a powerful, high ranking, high profile politician. This issue was dismissed because the applicant did not report the last assault to the police in Mexico City. This basis for the decision is not reasonable because the Board misunderstood that the assault took place in Mexico City.

[31] For these reasons, this application for judicial review will be allowed and the matter referred back to the Board for redetermination.

[32] Neither party considered that this case raised any serious question of general importance that ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is allowed, the decision of the Board is set aside, and the matter is remitted to another panel of the Board for redetermination.

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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