

Date: 20050121

Docket: IMM-3912-04

Citation: 2005 FC 89

Ottawa, Ontario, January 21, 2005

PRESENT: THE HONOURABLE MR. JUSTICE BEAUDRY

BETWEEN:

OLGA CADENAS MUNOZ

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c.27 (Act) of a decision by the Refugee Protection Division of the Immigration and Refugee Board (panel) dated March 24, 2004. In that decision, the panel determined that the applicant was not a Convention refugee as defined in section 96 or a “person in need of protection” under section 97.

ISSUE

[2] Did the panel make a patently unreasonable error in determining that the applicant was not credible?

[3] For the reasons that follow, I must answer this question in the affirmative. Accordingly, the application for judicial review must be allowed.

BACKGROUND

[4] The applicant is 34 years old and a citizen of Mexico. She alleges that her refugee claim is based on a well-founded fear of persecution because of her membership in a particular social group, i.e. that of women victims of conjugal violence in Mexico. The applicant says that there is a risk to her life or to a risk of cruel and unusual treatment or punishment if she were to return to her country of origin.

[5] The applicant states that she was persecuted in her country by Luis Hernandez, a judicial police officer in Mexico, who was her boyfriend. In January 2002, the applicant told him that she wanted to end their relationship because of his possessive and controlling behaviour. He promised to change and asked her to marry him. She refused. On March 7, 2002, she decided to meet Luis Hernandez to tell him how she felt about one of her friends, Anna Garcia. He was furious and insulted her.

[6] On March 9, 2002, Luis Hernandez began to harass and persecute her. After he caught the applicant and her friend Anna kissing, he insulted her again, attacked her and threatened to kill her. He repeated his threats during a telephone conversation on March 17.

[7] The next day, she went to work. It was then that she learned that someone had accessed her e-mail, including the list of all of her clients and suppliers, and had sent them a series of photos of herself posed naked and in compromising positions. The applicant is convinced that this was the work of Luis Hernandez, who as a police officer used his contacts in order to pull off this wrongful act.

[8] Three days after that incident, she was asked to resign. When she refused, she was dismissed by her employer without a letter of reference. She was then afflicted by serious depression. She claims that Luis Hernandez still continues to harass her with phone calls.

[9] Fearful of her persecutor, no complaint was filed with the police. The applicant claims that her mother became seriously ill because of this situation.

[10] In May 2002, the claimant changed her telephone number in order to put an end to the endless calls from Luis Hernandez. A few days later, he reached her and continued to threaten her.

[11] In October 2002, the applicant made a trip to Canada but had to return to her country because her mother was threatened by Hernandez. She hid at her father's home in the Chiapas region. When she contacted her mother again, her mother told her that the persecutor's threats were still ongoing.

[12] During the month of March 2003, she was kidnapped for four to five hours by Hernandez's men. Fearing for her life, she decided to leave the country on March 17 to head for the United States, where she stayed for six months. During that time, she was admitted to emergency at the hospital following a nervous breakdown. After consulting counsel in New York, she arrived in Montréal where she asked for Canadian protection.

IMPUGNED DECISION

[13] The panel determined that the applicant did not qualify as a "Convention refugee" or as a "person in need of protection" based on her lack of credibility. The decision-maker criticized her for failing to provide the e-mail message accompanying the photos sent to her co-workers and to her clients. He also noted the exaggerated role attributed to Hernandez. He did not believe that there was a reasonable subjective fear of persecution because the claimant ended her trip to Canada to go back to find her mother. He did not assign any probative value to the psychological report filed by the applicant or to the letters from her co-workers corroborating the intrusion on her computer and that compromising photos had been sent.

ANALYSIS

1. Did the panel make a patently unreasonable error in determining that the applicant was not credible?

[14] The standard of review for credibility issues is that of patent unreasonableness (*Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.) (QL) at paragraph 4).

[15] The panel criticizes the applicant in particular for failing to file the e-mail message to which the compromising photos were attached. It is true that this document could have been additional evidence adding weight to the applicant's claim. However, the Court considers it patently unreasonable that the co-workers' letters confirming receipt of the message with the photos were excluded or set aside. The same can be said of the letter from her mother corroborating the claimant's story on that point. The photos in question were sent to the applicant's clients and suppliers, thereby violating her dignity and her expectation of privacy.

[16] The panel emphasized that the employer's dismissal letter is completely silent on the subject of the e-mail in question dated March 18, 2002. To the contrary, the Court is not at all surprised that the employer, Panasonic of Mexico, did not want to make such a reference in its letter. It is absolutely normal that such a large company, with a human resources director in its employ, would have decided not to refer to that e-mail.

[17] The Court considers unwarranted and inappropriate the following paragraph from the decision (page 4, last paragraph)

At another point in the hearing, she added that . . . she had never had a sexual relationship with Ms Garcia, that they had merely kissed and that she had not seen her again since March 2002. Without making a judgment, the panel nevertheless finds it surprising that the intimacy with Ms Garcia of the claimant, who also testified that she had had urges or had felt attracted to a classmate while in secondary school, should be limited to one kiss.

[18] After a careful review of the passage in the stenographer's notes on this subject, the Court cannot see any basis for this extrapolation by the panel. The applicant categorically denies that she had sexual relations with that woman.

[19] Finally, relying on the claimant's behaviour at the hearing, the panel considered the psychological report filed was largely exaggerated. Her counsel pointed out that there was a break after his questions for the applicant and those asked by the decision-maker. This could very well explain the change in the applicant's decision.

[20] The statements by Martineau J. in *R.K.L. v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 162 (F.C.T.D.) (QL) at paragraph 25, are applicable in this case:

. . . Furthermore, in its zealous pursuit of inconsistencies, the Board placed too much importance on peripheral elements and failed to focus on the real issues that were before it: the applicant's subjective fear of persecution and the objective basis for such fear. The Board seems to have ignored a great amount of highly relevant evidence that appears on record. The psychological report, which was admitted into evidence and remained uncontroverted, finds the applicant credible and fully supports her story. . . .

[21] After taking into consideration the evidence filed before the panel as well as the stenographer's notes, it is my opinion that the patently unreasonable errors raised warrant the intervention of the Court.

[22] The applicant's counsel stated that he wanted to submit a question for certification. The Court had told him that he had to submit it no later than January 19 at noon. With respect to the opposing party, it should have made its submissions known no later than January 20 at noon. The Registry received the submissions by the applicant's counsel, Mr. Istvanffy, at 4:30 p.m. on January 19, and I refused them. When a time limit is set by the Court, it must be respected unless there are particular circumstances which must be explained, which was not the case here. This matter does not raise any serious question of general importance, therefore no question will be certified.

ORDER

THE COURT ORDERS that the application for judicial review be allowed. The applicant's claim is referred to a differently constituted panel of the Immigration and Refugee Board for reconsideration. No question is certified.

"Michel Beaudry"

Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3912-04

STYLE OF CAUSE: **OLGA CADENAS MUNOZ v.
MINISTER OF CITIZENSHIP
AND IMMIGRATION**

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: January 18, 2005

**REASONS FOR ORDER
AND ORDER:** **THE HONOURABLE MR. JUSTICE BEAUDRY**

DATE OF REASONS: January 21, 2005

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