

Federal Court



Cour fédérale

Date: 20090609

Docket: IMM-5380-08

Citation: 2009 FC 604

Ottawa, Ontario, June 9, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

VERONICA MENESES ARIAS

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[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 (the Act) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated November 7, 2008, where the Board found the Applicant is not a Convention refugee or a person in need of protection.

Issues

[2] Although the Applicant raises two more questions, the following is determinative:

- 1) Did the Board err in finding that it would be reasonable for the Applicant to re-locate in Guadalajara?
- 2) The application for judicial review shall be allowed for the following reasons.

Factual Background

[3] The Applicant is a 32 year old woman from Mexico City. She came to Canada to escape her abusive common law spouse, Juan Manuel Mendoza Arguelles (Mr. Mendoza), a federal anti-drug judicial police officer she met in May 2003. The Applicant said that the relationship soon became very abusive and violent and she alleges she was frequently a victim of his physical, emotional and sexual abuse. Mr. Mendoza was often drunk and he used cocaine. He beat her frequently, he raped her and she had bruises to her face and body. At times, Mr. Mendoza threatened the Applicant with a gun. He also targeted the Applicant's father, brother and sister when they intervened to protect her.

[4] Police officers were involved in a few incidents. On one occasion in August 2004, following an argument, Mr. Mendoza arranged to have another police officer take her in a police car on the pretence of going to file a complaint against him, but the officer drove to a location where she was given to Mr. Mendoza instead.

[5] In July 2005, the Applicant left her home to stay with her sister in La Paz, Baja California, Mexico. However, two weeks later, Mr. Mendoza appeared outside a supermarket where the Applicant was shopping and forced her to return to Mexico City to live with him.

[6] In August 2006, Mr. Mendoza violently assaulted the Applicant, causing a spontaneously aborted pregnancy. She reported the incident to the Public Ministry who sent her for medical attention and reported the matter back to police. The Applicant stayed at a hotel until she made arrangements to come to Canada on September 9, 2006.

[7] The Applicant returned to Mexico on February 28, 2007 thinking that Mr. Mendoza would not bother her any longer because he had stopped calling her parents' house to find out where she was. However, immediately following her arrival, Mr. Mendoza started calling the Applicant and threatening her and her family. The Applicant decided to return to Canada. She arrived on April 16, 2007 and made a claim for refugee protection on April 24, 2007.

Impugned Decision

[8] The Board did not make a negative credibility finding with respect to the Applicant. However, the Board found that the documentary evidence indicated that an Internal Flight Alternative (IFA) existed for the Applicant in Guadalajara, Jalisco state. State protection would be available to the Applicant there and she could safely live without a serious possibility of being persecuted.

Analysis

Standard of Review

[9] Prior to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the standard of review of an IFA was patent unreasonableness (*Khan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 44, 136 A.C.W.S. (3d) 912 and *Chorny v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 999, 238 F.T.R. 289).

[10] Following *Dunsmuir*, the decision on an IFA is reviewable on the standard of reasonableness. As a result, this Court will only intervene if the decision does not fall “within a range of acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, above at para. 47). For a decision to be reasonable there must be justification, transparency and intelligibility within the decision making process.

Did the Board err in finding that it would be reasonable for the Applicant to re-locate in Guadalajara?

[11] One of the Board’s reasons for finding that Guadalajara is a viable IFA for the Applicant is that Guadalajara, with a population of 1.8 million people, is an international destination for tourists, has a diverse atmosphere where many different lifestyles exist and is relatively more western in its profile than other rural areas of Mexico. The Applicant submits that these are irrelevant considerations which have no relevance to whether the Applicant, who hails from Mexico City, the biggest urban metropolis in Mexico, would be safe from Mr. Mendoza in Guadalajara. On the contrary, the population of Guadalajara militates against the protection system.

[12] The Board analyzed the protective legislation for domestic violence in Jalisco state, where Guadalajara is the capital city. The Board stated that Jalisco’s state Congress passed its own law in order to comply with the new February 2007 federal legislation on women’s access to a life free of violence.

[13] The Applicant makes the following comments in relation to the objective evidence:

- a. Jalisco state did not comply with its 1999 legal obligation to create a care centre for victims of crime;

- b. the new Jalisco domestic violence legislation will only be enforceable in December 2008;
- c. the new legislation provides for only relatively weak deterrence of 72 hours detention for the violation of restraining orders;
- d. the police do not receive the appropriate training and public prosecutors discourage women from filing complaints;
- e. access to the only relatively secure “official” shelter for abused women is not easy and may be primarily for minors;
- f. even “temporary” non-secret private shelters are full;
- g. women tend not to report abuse, and
- h. the number of women who have died as a result of violence in Jalisco has increased substantially in the last two years (57% killed by their partners).

[14] The Applicant alleges that it is perverse for the Board to conclude that adequate protection would be forthcoming given Mr. Mendoza’s proven propensity for extreme violence including the use of firearms and abduction in broad daylight in public outside a supermarket in La Paz.

[15] The Board concluded that although he is a federal police officer, Mr. Mendoza would not have influence in Guadalajara. The Applicant argues that this is an irrelevant consideration when considering her personal inability, given her fragile psychological state (as described in the psychological report, Tribunal’s record pages 146 to 150), to access a limited protection regime which is already difficult to access. Furthermore, to conclude that Mr. Mendoza’s influence as a federal police officer would not be consequential, given the uncontradicted evidence of how Mr.

Mendoza had colluded with local police in Mexico City to force the Applicant back to him, is perverse.

[16] The Applicant adds that there is no evidence that the new legislation in Jalisco state, which would come into force in December 2008, provides greater protection for women at risk than before. On the contrary, the evidence shows that the protection regime in Jalisco increasingly fails to provide actual protection, as evidenced by the increase in the number of women murdered by their former spouses (*Martinez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 399, 166 A.C.W.S. (3d) 325). The Applicant submits that the Board failed to properly weigh all the relevant evidence (*Ballesteros v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1246, 75 Imm. L.R. (3d) 221 at para. 14).

[17] The Applicant alleges that the Board had no basis on which to conclude that Mr. Mendoza would not likely follow the Applicant's family members to Guadalajara. It would be unreasonable to require her to live alone, without visits or communication with her family members in Guadalajara, as it would amount to requiring the Applicant to go into hiding (*Huerta v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 586, 167 A.C.W.S. (3d) 968 at para. 29). The Board's IFA finding is flawed as it does not address the psychological evidence. It is based on a selective regard for the documentary evidence and the Applicant's testimony.

[18] The Respondent argues that the legal determination of whether a reasonable IFA is available to a refugee claimant is a question within the special expertise of the tribunal and should be accorded significant deference. An IFA finding must be unreasonable in order to be reviewable and

in the case at bar, the Applicant has not shown this (*Sivasambo v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 741 (T.D.) at para. 26; *Chorny*, above).

[19] The Applicant submitted that the Board failed to consider the risk issues in her case but based upon a thorough review of the Applicant's testimony and the documentary evidence, the Board did consider the Applicant's personal circumstances, including the fact that Mr. Mendoza had sought her out when she went to stay with her sister in La Paz. The Board acknowledged this fact in its reasons but found, based on a review of the documentary evidence, that protection and assistance were available to the Applicant in that city. This finding was reasonable given the Board's careful examination of the documentary evidence.

[20] The principle that state protection needs to be adequate, not perfect, is well established in law. The Board must be satisfied that there is actual adequate protection, not perfect protection (*Blanco v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1487, 143 A.C.W.S. (3d) 904 at para. 10; *Canada (Minister of Employment and Immigration) v. Villafranca* (1991), 150 N.R. 232, 37 A.C.W.S. (3d) 1259 (F.C.A.)). The onus is on the Applicant to provide evidence to rebut the presumption that state protection exists. The test is an objective one and it is not sufficient for the Applicant to simply believe that she could not avail herself of state protection (*Judge v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1089, 133 A.C.W.S. (3d) 157). In the present case, the Board noted that there was no evidence that Mr. Mendoza had located the Applicant near her sister's home by using any federal databases. The Board made no error in its formulation and application of the test for state protection (*N.K. c. Canada (Minister of Citizenship and Immigration)* (1996), 206 N.R. 272, 143 D.L.R. (4th) 532 (F.C.A.) at para. 5).

[21] The Board's reasons demonstrate that it considered not only the efforts made by the government in addressing violence against women in its review of the documentary evidence, but also the result of those efforts, including the actual resources that now exist for abused women in Mexico. After noting that the documentary evidence was mixed, it was open to the Board to find that the evidence demonstrating the serious and concerted efforts in Jalisco state to protect women against violence was more persuasive. The excerpts from the documentary evidence reproduced by the Applicant amount to a disagreement about the manner in which the Board weighed this evidence and this does not afford a basis for judicial review (*Brar v. Canada (Minister of Employment and Immigration)*), [1986] F.C.J. No. 346 (F.C.A.) (QL)).

[22] Contrary to the Applicant's submissions, the Board did not fail to consider that the Applicant had attempted to file a complaint with police on one occasion and she filed a complaint with police on another occasion before leaving Mexico. The Board noted these facts in the decision but found that current country conditions in Jalisco were such that the Applicant would be able to access state protection in Guadalajara. The Respondent notes that the Board is entitled to rely on documentary evidence in preference to the testimony provided by an Applicant, even if it finds the Applicant trustworthy and credible (*Zhou v. Canada (Minister of Employment and Immigration)*), (1994), 49 A.C.W.S. (3d) 558, [1994] F.C.J. No. 1087 (F.C.A.) (QL)).

[23] In the present case, the Applicant attempted to move with her sister in La Paz, which is situated more than 4000 kilometres from Mexico City but Mr. Mendoza still managed to find her. He was able to abduct her and fly her back to Mexico City to force her to live with him.

[24] The suggested IFA of Guadalajara is situated more than 500 kilometres from Mexico City. Although the population of Guadalajara is over five times that of La Paz, the Board should have further considered the resources available to Mr. Mendoza as a federal police officer in concluding whether the IFA was reasonable.

[25] Furthermore, the Applicant did attempt to seek protection from the state, and she did so more than once. On one occasion, the police officers even brought the Applicant back to Mr. Mendoza. This does not constitute adequate state protection. The Applicant has thus rebutted the presumption of state protection in the circumstances surrounding her situation.

[26] Although the Board can give more weight to the documentary evidence, in the case at bar, considering the Applicant's credibility was not in doubt and considering the particular circumstances of the Applicant's situation, the Board's conclusion was unreasonable.

[27] No questions of general importance were proposed and none arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be granted. The decision is set aside and remitted for redetermination by a differently constituted Board. No question is certified.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-5380-08

STYLE OF CAUSE: **VERONICA MENESES ARIAS
and
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 20, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** Beaudry J.

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