

Federal Court



Cour fédérale

Date: 20100805

Docket: IMM-6536-09

Citation: 2010 FC 804

Unrevised certified translation

Ottawa, Ontario, August 5, 2010

PRESENT: The Honourable Madam Justice Marie-Josée Bédard

BETWEEN:

MARIA DEL CARMEN ORTIZ GARCIA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision rendered on June 30, 2009, by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) and dated November 30, 2009, determining that Ms. Ortiz Garcia is not a person in need of protection within the meaning of section 97 of the Act.

[2] The Board rejected the applicant's claim for refugee protection on the ground that she had failed to credibly establish the essential elements in support of her claim.

Background of the Claim for Refugee Protection

[3] Ms. Ortiz Garcia is a citizen of Mexico. In support of her claim for refugee protection, she is citing a fear for her life after having received threats from a former employee of her spouse, Yvan Guillermo Toledo, and after having been sexually assaulted by two individuals sent by Mr. Toledo.

[4] The applicant's claim for refugee protection relies in part on her spouse's claim. The factual context that led to the claims for refugee protection was laid out as follows: the applicant's spouse ran a small mini-bus company that employed two drivers, one of whom was Mr. Toledo. On August 24, 2006, Mr. Toledo was allegedly involved in an accident with one of the mini-buses, after which he was imprisoned and indicted at a trial for damages. Unhappy about what had unfolded as a result of his involvement in the accident, Mr. Toledo allegedly uttered death threats against the applicant's spouse, who subsequently decided to leave Mexico.

[5] The applicant maintained that, after her spouse left, she and her children received threats from individuals who wanted to know the whereabouts of her spouse. She also claimed to have been threatened and sexually assaulted on June 19, 2007, by two men who had been sent by Mr. Toledo. She allegedly filed a complaint with the authorities on June 25, 2007, which was supposedly not acted upon owing to a lack of evidence. Fearing for her life, she and her children left Mexico for Canada on September 19, 2007, and she claimed refugee protection that same day.

The Board's Decision

[6] The Board found that the applicant's narrative at the hearing contained significant omissions and contradictions and that, in many respects, it was contradicted by the evidence in the record. The Board did not believe the allegations that were central to the claim, namely, the threats and the sexual assault in June 2007.

Issue

[7] The applicant argues that she proved that she had a well-founded fear for her safety and for her life and that the Board committed an error in its assessment of the evidence, and specifically, of her credibility. In her memorandum, the applicant complained that the Board committed a number of errors in its assessment of the evidence and of the applicant's credibility.

[8] At the hearing, counsel for the applicant modified her approach and cited two errors allegedly committed by the Board. First, the applicant complained that the Board failed to take into account the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (the Guidelines) in two respects: by refusing her request to have the hearing postponed, given her psychological condition, and by not showing compassion and sensitivity toward her. Second, the applicant complained that the Board failed to consider her psychological condition in its assessment of her credibility.

Standard of Review

[9] It is well established in the case law that the Court owes deference to the administrative tribunal's assessment of the evidence and credibility and that the applicable standard of review with regard to these findings is unreasonableness. It is not for the Court to substitute its own assessment of the evidence or credibility of witnesses for that of the administrative tribunal. The Court will intervene only where the administrative tribunal's findings are based on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the evidence. (*Dunsmuir v. New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12; *Martinez v. Canada (Citizenship and Immigration)*, 2009 FC 798; *Smith v. Canada (Citizenship and Immigration)*, 2010 FC 545.

[10] The argument cited by the applicant with regard to the Board's refusal to postpone the hearing seems to speak to a breach of procedural fairness and natural justice. The applicable standard of review for questions of this nature is correctness. *Malveda v. Canada (Citizenship and Immigration)*, 2008 FC 447; *Adu v. Canada (Citizenship and Immigration)*, 2005 FC 565.

Analysis

(1) Applying the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution.

[11] The applicant maintains that the Board failed to take the Guidelines into account. I do not share this view. First, the Board specifically mentioned having considered the Guidelines in its decision. Moreover, upon reading both the transcript of the hearing and the decision, it is clear that the Board member committed no error in her decision to proceed with the hearing, and that the way she conducted the hearing and her attitude toward the applicant were completely consistent with the Guidelines.

[12] I will first address the request for postponement.

[13] Counsel for the applicant argued that the Board should have allowed the hearing to be postponed because the applicant clearly indicated that she did not feel that she could proceed, specifically because her social worker, whose presence would have reassured her, was unable to attend. Counsel for the applicant emphasized the latter's medical condition, which was diagnosed as major depression and post-traumatic shock stemming from the assault she had been victim of, and argued that this affected her ability to testify.

[14] After having read the transcript of the hearing and reviewed all of the medical evidence in the record and the Board's decision, I am of the opinion that the Board neither erred nor breached the rules of procedural fairness when it refused the request to postpone the hearing.

[15] First of all, both the Board's decision and the transcript of the hearing show that the Board duly noted the nature of the applicant's medical condition and its possible impact on her testimony. The Board took the applicant's medical condition into consideration but also noted that a postponement of the hearing had been granted in February 2008. The Board found that the applicant's medical condition did not prevent her from testifying and this finding is completely reasonable in light of the evidence in the record.

[16] The medical evidence filed in the record dates back to February 2008 and had been filed in support of the request to postpone the hearing originally scheduled for February 2008. No medical evidence dating from the time of the hearing in October 2009 was adduced. The medical evidence dating from February 2008 mentions the need to make the appropriate adjustments during the hearing so as to avoid causing the applicant's condition to worsen as a result of her appearance at the hearing. According to the medical evidence, there was a possibility that the applicant's condition could raise her anxiety level during her testimony, that she might have memory gaps and trouble concentrating, and that she might become emotional and have difficulty providing coherent testimony. However, there is nothing in the medical evidence to suggest that the applicant was not able to testify or that her perception of reality was altered by her condition.

[17] A reading of the decision and hearing transcript shows that the Board member did make the appropriate adjustments to assist the applicant in her testimony. While the Board member did refuse

to postpone the hearing after determining that the absence of the social worker would not compromise the applicant's ability to testify, she did allow the applicant to be accompanied by her psychologist.

[18] The Board member also told the applicant that she would not be questioned about her sexual assault, that she would limit the number of questions she would ask and that she would give her breaks if needed.

[19] The Board's attitude shows that it was appropriately sensitive with regard to the applicant's state. In fact, a reading of the hearing transcript shows that the applicant testified with aplomb and in a completely coherent manner, that she fully understood the questions she was asked and that she was given the opportunity to provide all of the answers and explanations she wished. It is of interest to note that, at the hearing before the Board, counsel for the applicant stated that her client's testimony had gone very well.

[TRANSLATION]

The first thing I would like to say, and it is rare to say this, but I must say that, frankly, everything went really well at that hearing for her, compared to the times I met her at my office. I am really happy because that was probably one of her best days since, yes. And I think, we talked about it with Ms. Giraldo and she agreed with me. We were honestly impressed, the two (2) of us ...

A. Well, when things are calm, then that helps the situation.

That's it but...well, that's it, but at the same time it goes to show you that it's not always like that, but that hearing went very, very well.

[20] I am therefore satisfied that the Board's decision to proceed with the hearing was completely reasonable under the circumstances and that this decision in no way breached the applicant's rights or her ability to provide a full account in her testimony.

[21] I am equally satisfied that the Board member did not lack sensitivity and compassion toward the applicant, and that both her attitude toward the applicant and the way she conducted the hearing were consistent with the Guidelines.

(2) The impact of the applicant's medical condition on her credibility

[22] The applicant's second argument is that the Board failed to consider her psychological state when it assessed her credibility and that her credibility should have been examined through the prism of her medical condition, which would have influenced the Board's credibility findings.

[23] With respect, I find that there is nothing in the medical evidence that would raise doubts as to the applicant's perception of reality or her ability to testify. Moreover, a reading of the hearing transcript shows that the applicant's testimony was articulate and coherent, that she was calm and that she had not suffered memory loss.

[24] Therefore, I find the applicant's complaint is unjustified and the Board's findings with regard to her credibility are reasonable, well articulated and supported by the evidence.

[25] The present application for judicial review must therefore be dismissed.

[26] Counsel proposed no questions of general importance for certification.

JUDGMENT

THE COURT dismisses the application for judicial review. No question is certified.

“Marie-Josée Bédard”

Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6536-09

STYLE OF CAUSE: MARIA DEL CARMEN ORTIZ GARCIA v. MCI

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: June 21, 2010

REASONS FOR JUDGMENT: BÉDARD J.

DATED: August 5, 2010

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