Federal Court Cour fédérale

Date: 20100825

Docket: IMM-4710-09

Citation: 2010 FC 845

Ottawa, Ontario, August 25, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

BLANCA GARCIA RIVADENEYRA
BLANCA OSIRIS VALENCIA GARCIA
AND CARLOS DALI VALENCIA GARCIA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Principal Applicant, Ms. Garcia Rivadeneyra, and her two children are citizens of Mexico. They arrived in Canada on September 15, 2007 and filed refugee claims on October 9, 2007.

[2] In a decision dated August 19, 2009, a panel of the Refugee Protection Division (RPD) of the Immigration and Refugee Board determined that the Applicants are not Convention refugees or persons in need of protection, as contemplated by sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), respectively.

[3] The Applicants seek to have the RPD's decision set aside on the basis that the RPD:

i. erred by misapprehending or failing to address the evidence relating to the adequacy of state protection in Mexico;

ii. erred in finding that the Applicants could not avail themselves of the exception in subsection 108(4) of the IRPA; and

iii. conducted itself in a manner that gave rise to a reasonable apprehension of bias.

[4] For the reasons that follow, this application is dismissed.

I. <u>Background</u>

[5] The Principal Applicant was the owner of a store that was attached to her home in Mexico. On July 20, 2007, while preparing to close the store, she was robbed by two individuals who entered, held her at gunpoint, and threatened to kill her and her two children if she did not tell them where she kept her jewellery and money. One of the robbers then raped her after threatening to rape her daughter if she did not comply.

[6] Approximately one month later, the Principal Applicant filed a report with the police regarding the robbery. She did not mention that she had been raped. In response, the police went to her house to conduct an investigation. The Principal Applicant alleges that the police mocked her and laughed as she made her complaint.

[7] At some point after the police left her house, the Principal Applicant claims to have received a phone call from her assailants, who threatened to kidnap her children because she had gone to the police. As a result, she went to live with her mother-in-law until she departed for Canada, without reporting those threats to the police. She claims that since arriving in Canada, her mother-in-law and sister-in-law have reported that people have come to their home looking for her in a threatening manner. She further alleges that her stepfather has also reported that men have come looking for her.

[8] The Principal Applicant also claims that police were of little assistance when her stepfather was abducted for approximately 15-20 days, notwithstanding that her family had reported that he had been kidnapped. She also alleges that, when she was a youth, a neighbour told her mother that she had seen a policeman from the neighbourhood raping his own daughter. In addition, she claims that she was sexually assaulted when she was 8 or 9 years old and again by her stepfather's nephew when she was 14 years old. It does not appear that these latter events were reported to the police.

[9] When asked what her intentions were upon her arrival in Canada, the Principal Applicant stated that she came to Canada for a two month vacation to relax and to remove herself from a

stressful situation. However, her circumstances changed after she told her husband that she had been raped back in Mexico and he subsequently abandoned her.

II. <u>The decision under review</u>

[10] After reviewing the Applicants' allegations, the RPD addressed the Applicants' motion for a recusal of the panel member, Roslyn Ahara, who had presided over two hearings with the Applicants that took place in March and June of 2009. That motion alleged that the panel member continuously interrupted counsel during her questioning of the Principal Applicant and that the panel member displayed bias by agreeing with certain statements made by the refugee protection officer (RPO) with respect to the proper interpretation of subsection 108(4) of the IRPA.

[11] The RPD dismissed that motion after finding that (i) counsel should have raised her concerns at the earliest time possible, (ii) the interruptions in question were made for the purpose of clarification or to request the Principal Applicant to respond to questions posed by counsel, (iii) there were no improper comments made which could be construed as harassing, derogatory, sarcastic or impolite, (iv) the panel member had simply concurred with the RPO's interpretation of subsection 108(4) of the IRPA, and (v) no evidence had been submitted in support of counsel's argument that the panel member had reached a decision before all of the evidence had been presented.

[12] In the course of considering the Applicants' motion, the RPD observed that the Principal Applicant had been entirely credible.

[13] The RPD then observed that the determinative issues in the case were "delay in making a claim and state protection."

[14] With respect to the former issue, the RPD found the Applicants' explanations for having waited approximately three weeks before making a refugee claim after their arrival in Canada were reasonable.

[15] With respect to state protection, the RPD concluded that the Principal Applicant had not provided clear and convincing evidence of the inability of authorities in Mexico to protect her. In the course of reaching this conclusion, the RPD appears to have placed significant weight on its finding that the Principal Applicant did not reasonably seek to avail herself of state protection prior to seeking international protection.

[16] The RPD then assessed the evidence of similarly situated individuals who allegedly had not received state protection. It appears that this evidence was given little weight because the incidents in question occurred in the distant past and some of the evidence was hearsay.

[17] Finally, the RPD reviewed the documentary evidence and concluded that adequate, although not perfect, state protection is available to the Applicants in Mexico. In reaching this conclusion, the RPD noted that the evidence was contradictory in certain respects, that corruption continues to be a problem in Mexico, and that there has been some criticism of some of the measures that have been taken to improve state protection.

[18] Based on its conclusion that adequate state protection in Mexico is available to the Applicants, the RPD concluded that (i) there is not a serious possibility that they would face persecution in Mexico, and (ii) their removal to Mexico would not likely subject them to a risk to their lives, a risk of cruel and unusual punishment, or a danger of torture. Accordingly, the RPD rejected the Applicants' claims.

III. The Standard of Review

[19] The issues raised by the Applicants with respect to the RPD's consideration of the evidence regarding the level of state protection afforded by Mexican authorities are reviewable on a standard of reasonableness. In short, the RPD's decision will stand unless it does not fall "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paras. 47 and 51), in so far as those issues are concerned.

[20] The issues raised by the Applicants with respect to bias and the RPD's interpretation of section 108 of the IRPA are reviewable on a standard of correctness (*Dunsmuir*, above, at paras. 54, 79 and 87; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para. 44; and *Decka v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 822, at para. 5.) Review of the substance of that analysis, had it occurred, would have been on a standard of reasonableness (*Decka*, above).

IV. Analysis

A. *Did the RPD misapprehend or ignore the evidence on state protection?*

[21] The Applicants submit that the RPD erred by ignoring or not accepting uncontradicted testimony provided by the Principal Applicant regarding her efforts to obtain state protection from the police in Mexico and regarding similarly situated individuals.

[22] In addition, the Applicants submit that the RPD misapprehended or ignored significant evidence that they adduced regarding (i) the levels of criminality and corruption among the police in Mexico, (ii) the pervasiveness of patriarchal attitudes in that country that constitute a root cause of violence against women, and (iii) the lack of commitment to implementing measures designed to address violence against women.

[23] The Applicants also submit that the RPD erred by focusing its analysis on the government's efforts to provide state protection, rather than by focusing on the adequacy and effectiveness of that protection.

[24] I disagree with these submissions.

[25] The RPD's discussion of the documentary evidence relating to the degree of state protection generally available to women victims of violence, including sexual assaults, in Mexico is not a model for others to follow. However, in this case, there was important evidence from the Principal Applicant's own experience that demonstrated that the police did in fact respond to the only complaint she made to them. They did so notwithstanding that the complaint was made one month after the incident in question.

[26] Far from demonstrating "a persistent failure to take action" (*Zhuravlvev v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 3, at para. 33 (T.D.)), the evidence demonstrated that the police visited the location of the incident and told her that they would attempt to "catch the small-time thieves." Given that the Principal Applicant was unable to identify her assailants, the failure of the police to ultimately apprehend those persons cannot reasonably be relied on as evidence of inadequate state protection. Police in Canada may well have been unable to apprehend unknown assailants in similar circumstances (*Samuel v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 762, at para. 13).

[27] One can only speculate as to whether the police would have allocated additional resources to the case had the Principal Applicant reported that she had also been sexually assaulted, in addition to having been robbed. Her failure to do so, together with her failure to report the subsequent threats that allegedly were made by her assailants and her failure to avail herself of other sources of potential assistance made available by the state, were all inconsistent with her obligation to avail herself of domestic state protection before seeking international protection (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at 724; *Santiago v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 247, at para. 23; *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 66, at paras. 11 to 13; *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 134, at paras. 9-10).

[28] In my view, on the facts of this particular case, it was reasonably open to the RPD to conclude that the Principal Applicant had not been diligent in seeking state protection.

[29] It was also reasonably open to the RPD to accord little weight to the Principal Applicant's assertion that she did not take further steps to avail herself of police protection because she feared that her life would be in danger if she did so. In considering this assertion, the RPD appropriately recognized that certain alleged incidents from the distant past likely had a lasting impact on the Principal Applicant's perception of, and trust in, the police.

[30] After reviewing the extent to which the Principal Applicant had diligently pursued available state protection, the RPD considered the testimony that had been adduced regarding similarly situated individuals. That testimony largely related to the above-noted incidents from the distant past and, to some extent, was based on hearsay evidence. In my view, it was reasonably open to the RPD to have placed little probative value of that testimony.

[31] The RPD then appropriately examined the objective basis for the Principal Applicant's fears. In this regard, it explicitly noted that there was conflicting documentary evidence regarding the present situation for victims of gender abuse, and that there has been some criticism regarding the effectiveness of new legislation that was put in place to improve the level of state protection provided to such victims. In addition, the RPD acknowledged that corruption continues to be a problem in Mexico. However, based on the totality of the evidence adduced, including certain evidence that it specifically addressed in its decision, the RPD concluded that the state protection available to persons who are similarly situated to the Principal Applicant is adequate.

[32] The RPD was not required to "detail every piece of evidence provided and every argument raised", so long as the decision reached was within the bounds of reasonableness (*Rachewiski v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 244, at para. 17).

[33] Considering all of the foregoing, I am unable to conclude that it was unreasonable for the RPD to find that the Applicants had not met their burden of establishing, on a balance of probabilities, and with clear and convincing evidence, that the state protection that is likely to be available to them in Mexico is inadequate (*Ward*, above, at 724-725; *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, at para. 54; *Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, at para. 30).

[34] On the evidence before the RPD, its conclusion that adequate state protection will be available to the Applicants if they return to Mexico was certainly "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above; *Santiago*, above, at para. 34; *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 490, at para. 12). In addition, the RPD's decision was appropriately justified, transparent and intelligible (*Khosa*, above, at para. 59).

[35] The Applicants quite properly submitted that it is not sufficient to demonstrate that various efforts are being made to secure protection for women in Mexico. However, the proper test is whether, as a result of those efforts, adequate protection is now available, not whether that protection is both adequate and effective. (See, for example, *Cosgun v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 400, at paras. 44 to 54; *Espinoza v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 806, at para. 30; *Cueto v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 805, at paras. 27-28; *Flores v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 723, at para. 8; *Samuel*, above, at para. 13; *Mendez v. Canada (Minister of Citizenship and Immigration),* 2008 FC 584, at para. 23; and *Carrillo*, above, at para. 30. See also

Resulaj v. Canada (Minister of Citizenship and Immigration), 2006 FC 269, at para. 20; and *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.), leave to appeal dismissed, [1993] 2 S.C.R. xi.)

B. *Did the RPD err in its interpretation of section 108 of the IRPA?*

[36] The Principal Applicant submits that she meets the requirements of the exception set forth in subsection 108(4) of the IRPA because she was subjected to past persecution, in the form of the sexual abuse that she suffered as a child. She claims that, as a minor, she relied on the adults in her life to protect her and that, as a result of their failure to do so, she was not afforded state protection. She further claims that the evidence of the profound effect of those abuses on her is compelling, within the meaning of subsection 108(4).

[37] The relevant provisions of subsection 108 state:

Immigration and Refugee Protection Act, S.C. 2001, c. 27	*Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, c. 27
<u>Rejection</u>	<u>Rejet</u>
108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	**108.** (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :
(a) the person has voluntarily reavailed themself of the protection of their country of nationality;	a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;
(b) the person has voluntarily reacquired their nationality;	b) il recouvre volontairement sa nationalité;
(c) the person has acquired a new nationality and	c) il acquiert une nouvelle nationalité et jouit de

enjoys the protection of the country of that new nationality;

la protection du pays de sa nouvelle nationalité;

(d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or

d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;

(e) the reasons for which the person sought refugee protection have ceased to exist.

e) les raisons qui lui ont fait demander l'asile n'existent plus.

Cessation of refugee protection

Perte de l'asile

(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

(2) L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).

Effect of decision

Effet de la décision

(3) If the application is allowed, the claim of the person is deemed to be rejected.

(3) Le constat est assimilé au rejet de la demande d'asile.

Exception

Exception

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré. Annulation par la Section de la protection des réfugiés.

[38] I am satisfied that the RPD did not err in concluding that this exception to paragraph 108(1)(e) does not apply in circumstances in which the reasons for which the person sought refugee protection have not ceased to exist (*Hassan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946). The principal basis upon which the Principal Applicant claimed refugee protection was set forth in the amended narrative that was attached to her Personal Information

Form (PIF). That amended narrative focused solely on the robbery and sexual assault that occurred on July 20, 2007, and on the ongoing threats that she alleged are continuing to be made by her unknown assailants. It then concluded by stating that the Principal Applicant left Mexico because she and her children "felt scared for our lives and had a feeling of constantly being watched" and because she "did not believe [she] would be safe anywhere in Mexico" (emphasis added).

[39] In these circumstances, the fact that there may have been other persecution, which the Principal Applicant admits ended when she left her parents' home many years ago, was not a basis for bringing the Applicants within the ambit of subsection 108(4), particularly given that RPD was appropriately reluctant to give significant weight to the evidence adduced in respect of those alleged incidents from the distant past.

[40] In addition, in these circumstances, it was not necessary for the RPD to conduct a substantive assessment under subsection 108(4). In short, subsection 108(4) is an exemption to paragraph 108(1)(e). Since the RPD found that the latter provision did not apply, the precondition for the potential application of subsection 108(4) was not met.

[41] I am satisfied that even if the RPD had conducted such an assessment, it would have been well within the range of possible, acceptable outcomes which are defensible in respect of the facts and law, for the RPD to conclude that the particular facts of this case were not such as to rise to the level of compelling reasons contemplated by that provision, as interpreted by the jurisprudence (see, for example, *Canada (Minister of Employment and Immigration) v. Obstoj*, [1992] 2 F.C. 739, at 748 (C.A.); *Biakona v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 391, at paras. 32 to 43).

[42] Indeed, the Principal Applicant's admission that she had not intended to remain in Canada or to make a refugee claim until after her husband abandoned her (in Canada) is inconsistent with her claim that there are compelling reasons, arising out of previous persecution, why she should not be required to avail herself of the protection of authorities in Mexico, should she require that protection.

C. *Did the RPD conduct itself in a manner that gave rise to a reasonable apprehension of bias?*

[43] The Applicants submit that their right to procedural fairness was breached because the RPD was biased. In support of this submission, they claim that the RPD (i) continuously interrupted their counsel's questioning of the Principal Applicant, (ii) requested that their counsel concede on the issue of nexus before hearing any oral testimony, (iii) agreed, during their hearing, with the RPO's interpretation of subsection 108, and (iv) commented during the Principal Applicant's testimony that her evidence regarding the lack of police response to her stepfather's kidnapping was not relevant.

[44] Based on my review of the transcript of the RPD's hearing, I am satisfied that "an informed person, viewing the matter realistically and practically – and having thought the matter through", would not have a reasonable apprehension that the RPD was biased (*Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394).

[45] Throughout its hearing, the RPD repeatedly displayed a significant degree of sensitivity to the Principal Applicant, and demonstrated a genuine understanding of her situation. While it may

have had to intervene on many occasions, it did so to clarify the Principal Applicant's testimony or to better understand the relevance of that testimony. I am satisfied that the RPD's interventions did not prevent the Applicants from making their case.

[46] Contrary to the Applicants' allegation, the RPD did not ask the Applicants to concede on the nexus issue, but rather asked the Applicants to clarify their position in this regard. Indeed, the RPD itself conceded this issue shortly afterwards.

[47] In addition, the RPD did not display bias by expressing agreement with the refugee protection officer's submission that subsection 108(4) of the IRPA only applies in the circumstances described in paragraph 108(1)(e). The RPD was simply expressing agreement that the plain language of paragraph 108(1)(e), to which subsection 108(4) is an exception, requires that "the reasons for which the person sought refugee protection have ceased to exist." This position was upheld in *Hassan*, above, at paragraph 47.

[48] Moreover, although the RPD did initially suggest that the incident involving the Principal Applicant's stepfather was irrelevant, the RPD immediately clarified its position by stating that the fact that the incident had happened so long ago went to the weight to be given to the evidence, rather than to the relevancy of that evidence.

V. Conclusion

[49] This application is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUGES THAT:

1. The application for judicial review is dismissed; and

2. No question of general importance is certified.

"Paul S. Crampton"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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