Federal Court  Cour fédérale

Date: 20101222

Docket: IMM-2194-10

[UNREVISED ENGLISH CERTIFIED TRANSLATION] **Citation: 2010 FC 1320**

Ottawa, Ontario, December 22, 2010

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

CYNTHIA GUADALUPE HERNANDEZ GUTIERREZ

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 of the Refugee Protection Division of the Immigration and Refugee Board (the panel) dated March 29, 2010, determining that the applicant is not a Convention refugee or a person in need of protection under the Act.

Facts

[2] The applicant is a Mexican citizen who was living in the city of Zacatecas in the state of Zacatecas and was working there as a journalist for an online newspaper.

[3] She claims to fear for her life as a result of the investigative work she began in the month of August 2006 on drug trafficking in the state of Zacatecas on behalf of Santiago Gonzalez, an officer from the Federal Investigation Agency. During the investigation, she allegedly learned that the drug trade in the state was controlled by certain members of the state government of Zacatecas and by the heads of the Zetas gang.

[4] In October 2006, when she tried to contact Mr. Gonzalez, a friend told her over the telephone that he had been murdered. She left Zacatecas right away and went into hiding in the village of Tlachichila, where she remained in hiding until December 2006.

[5] In January 2007 she went to Guadalajara, and in June of that year she started working at a local radio station. Her name was mentioned on the air as a contributor.

[6] In January 2008 she returned to Zacatecas to obtain a copy of her birth certificate, which is required for a passport to be issued. On February 1, 2008, she received an anonymous telephone call mentioning Mr. Gonzalez and warning her that there was a present waiting for her at her hotel. She went to the hotel and noticed that a fire had broken out but had been contained by firefighters.

[7] On February 10, 2008, she left Mexico to visit a friend who lived in Montréal.

[8] On April 10, 2008, she filed a claim for refugee protection.

Impugned decision

[9] The panel determined that the applicant had failed to rebut the presumption of state protection, because she had not adduced evidence corroborating the essential facts in her narrative or provided satisfactory explanations as to why she had failed to do so, nor had she filed any complaints with the authorities.

[10] The panel also determined that, in the circumstances of this case, the applicant had not discharged her burden of showing that there was no internal flight alternative (IFA) available to her.

Issues

[11] This application for judicial review raises the following issues:

1. Did the panel err in criticizing the applicant for not having adduced external evidence corroborating her version of the facts, particularly with regard to the availability of state protection to the applicant?

2. Did the panel err in determining that the applicant had failed to discharge her burden of showing that there was no IFA available to her?

Analysis

A. *Standard of review*

[12] The assessment of credibility and weighing of evidence fall within the jurisdiction of the administrative tribunal assessing a refugee claimant's allegation of subjective fear (see *Cepeda-Gutierrez v Canada* (*Minister of Citizenship and Immigration*) (1998), 157 FTR 35, 83 ACWS(3d) 264 at paragraph 14 and *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, 42 ACWS (3d) 886 at paragraph 4). As the Supreme Court stated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, questions of fact and questions of mixed fact and law are reviewable on a standard of reasonableness (prior to that the standard of review had been patent unreasonableness).

[13] The standard of review applicable to questions of state protection is reasonableness (*Dunsmuir*, above, at paragraphs 55, 57, 62 and 64). The Federal Court of Appeal, in *Hinzman v Canada (Minister of Citizenship and Immigration); Hughey v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 282 DLR (4th) 413, at paragraph 38, stated that "questions as to the adequacy of state protection are questions of mixed fact and law ordinarily reviewable against a standard of reasonableness".

[14] The IFA issue is also reviewable on a standard of reasonableness. To this effect, Justice Beaudry wrote, at paragraph 9 in *Gutierrez v Canada* (*Minister of Citizenship and Immigration*), 2009 FC 487, [2009] FCJ No. 617 (QL):

> The appropriate standard of review for IFA issues 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). Following *Dunsmuir*, [above], the Court must continue to show deference when determining an IFA and this decision is reviewed according to the new standard of reasonableness. Consequently, the Court will intervene only if the

> decision does not fall within the range "of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, paragraph 47). The reasonableness of a decision is concerned with the existence of justification, transparency and intelligibility within the decision-making process.

B. *External evidence adduced*

[15] The case law from this Court is consistent. Questions of credibility and assessment of the facts and of the evidence are wholly within the discretion of the panel, as the trier of fact. Justice Beaudry, in *Gutierrez*, above, stated at paragraph 14:

> The panel is in the best position to assess the explanations provided by the applicant with respect to the perceived contradictions and implausibilities. It is not up to the Court to substitute its judgment for the findings of fact drawn by the panel concerning the applicant's credibility (*Singh v. Canada (Minister of Citizenship and Immigration*), 2006 FC 181, 146 A.C.W.S. (3d) 325 at paragraph 36. . .).

[16] In her memorandum, the applicant complains that the panel tribunal failed to consider certain elements of documentary evidence, in particular Exhibit P-6, or the case law of this Court that she filed in the record. In *Cepeda-Gutierrez*, above, and again in *Gill v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 656, 35 Imm LR (3d) 202, this Court reiterated that the obligation to comment on a specific piece of documentary evidence depends on the importance of that piece of evidence. The applicant claims that the evidence that was disregarded goes to the very heart of her claim; thus, the panel's decision is tainted by a palpable error and is therefore unreasonable.

[17] At the hearing, counsel for the applicant cited Justice Mainville's decision in *Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 503, [2010] FCJ No 607 (QL), in

particular paragraphs 30 to 33, when he complained that the panel had failed to analyze “the issue of subjective fear of persecution, or, in other words, should make a finding as to the refugee claimant’s credibility and the plausibility of his or her account, before addressing the objective fear component, which includes an analysis of the availability of state protection.”

[18] However, the Court notes that the panel found several omissions in the applicant’s record. For example, the applicant claimed that the fire at the hotel had been caused by a bomb, but this crucial element is absent from her revised Personal Information Form. The panel also noted the absence of evidence to corroborate most of the facts on which the applicant’s claim of subjective fear is based, such as a copy of the draft of the two-page article she had written after her investigation or evidence of the existence of Mr. Gonzalez and of his murder.

[19] Although the applicant explained her fear of the Zetas and of the state authorities in Zacatecas who, according to her, colluded with each other, no tangible evidence was provided to support this fundamental element. Furthermore, the Court finds that the applicant did not reasonably explain why she was unable to provide any evidence corroborating at least one of the essential facts in her narrative.

[20] Was the panel entitled to draw a negative inference, on the one hand with regard to the applicant’s credibility based on the absence of evidence corroborating her narrative and, on the other, with regard to the lack of reasonable or credible explanations for her failure to take any steps to obtain such evidence? The case law of this Court allows for such a negative inference to be

drawn where there is an absence of effort to obtain corroborating documents (*Muthiyansa v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 17, 103 ACWS (3d) 809.

[21] The panel is in the best position to assess the credibility of the explanations provided by the applicant, which is what it did in this case. Therefore, it is not the role of this Court to substitute its judgment for the findings of fact made by the panel regarding the applicant's credibility (*Mavi v Canada* (*Minister of Citizenship and Immigration)* (2001), 104 ACWS (3d) 925, [2001] FCJ No 1 (QL)). In the case at bar, the explanations provided by the applicant with regard to the absence of evidence corroborating her version of the facts do not seem reasonable.

C. *State protection*

[22] The panel then proceeded to analyze the ability of Mexico to provide adequate state protection to the applicant. She complains that the panel failed to consider the criteria set out in *Hinzman*, above. The applicant is relying on this decision in order to claim that she could not have been expected to put herself in any danger by filing complaints with municipal, state or even federal authorities. Consequently, she argues that the panel erred by using the lack of a complaint as a basis to discredit her and to conclude from this fact that she had failed to discharge her burden of proving that state protection was unavailable to her.

[23] The Court notes that the panel carefully analyzed the *International Narcotics Control Strategy Report* from February 27, 2009. The report found that Mexico was making efforts to protect its citizens and fight corruption and that these efforts were producing concrete results.

[24] The case law of this Court is consistent and clearly states that the applicant needed to provide clear evidence that Mexico was incapable of providing her with adequate protection. This is an essential element under sections 96 and 97 of the Act in determining whether someone is a person in need of protection (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at pages 724 and 725).

[25] As for the level of state protection Mexico must provide, it must at least be adequate (*Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 FCR 636). The applicant therefore had to adduce evidence that Mexico could not offer her adequate state protection having regard to the circumstances of her narrative.

[26] The *Hinzman* decision, above, to which both the applicant and the respondent refer, sets out that a claimant coming from a democratic country will have a heavy burden when attempting to show that he or she should not have been required to exhaust all of the recourses available to him or her domestically before claiming international protection. The applicant made no attempt to obtain protection from Mexico. In this regard, it is very interesting to look at *Cordova v Canada* (*Minister of Citizenship and Immigration)*, 2009 FC 309, 178 ACWS (3d) 203. In that case, the applicant was a journalist who sought refugee protection because of the publication of his political cartoons in Mexico. The Court found that adequate state protection was available to the applicant. In this regard, Justice Snider wrote at paragraph 23 of the decision:

> In my opinion, this conclusion was available to the Board based on evidence before it. Ultimately, the Applicant failed to provide clear and convincing proof that he could not obtain state protection in Mexico because he simply did not bother to attempt to seek any state protection. As a result, the Board reasonably concluded that the Applicant had failed to rebut the presumption of state protection. Its

> finding is therefore well "within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47).

[27] Lastly, the applicant complains that the panel did not consider the reason she cited in support of her alleged fear of persecution. The Court noted that the panel considered all of the evidence in the record in its decision. The applicant needed to rebut the presumption of state protection in Mexico and provide evidence that the state was unable to protect her in her particular case. By noting her failure to seek the help of the Mexican authorities, the panel did not commit any error in its assessment of the facts and its finding was reasonable under the circumstances.

[28] The Court is of the opinion that in these circumstances the applicant could have availed herself of the protection of the state and finds that the panel's decision was reasonable in this regard.

D. *Internal flight alternative*

[29] The case law of this Court is clear. In *Gutierrez*, above, Justice Beaudry sums up the general applicable principles and states, at paragraph 21:

> Regarding the internal flight alternative, the Court held that a claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling to and staying in a region. In *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.), the Court held that two criteria applied in establishing an IFA: 1) there is no serious risk of the claimant being persecuted in the part of the country where there is a flight alternative; and 2) the situation in the part of the country identified as an IFA must be such that it is not unreasonable for the claimant to seek refuge there, given all of the circumstances.

[30] Therefore, the panel had to consider two criteria. First, the panel had to determine whether the applicant was at risk of being persecuted elsewhere than in the state of Zacatecas. Second, it had

to establish whether it was reasonable for the applicant to move to one of the cities that were identified as being safe.

[31] In her memorandum, the applicant is essentially challenging the panel's assessment of whether her fear of persecution was warranted under the circumstances, without having adduced any evidence establishing that she was liable to be persecuted everywhere in Mexico and that she risked being persecuted even in cities such as Monterey, Mexico City, Acapulco or Cancun, which had been mentioned as IFAs.

[32] The Court ruled as follows in *Ranganathan v Canada* (*Minister of Citizenship and Immigration*), [2001] 2 FC 164, [2000] FCJ No 2118 (QL), at paragraph 15:

> It requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized.

[33] The findings of fact made by the panel appear reasonable to this Court, given the evidence in the record and the panel's assessment of that evidence.

[34] For these reasons, the application for judicial review is dismissed. The parties proposed no questions for certification and this matter contains no such question.

JUDGMENT

THE COURT ORDERS that the application for judicial review is dismissed and no question is certified.

"André F.J. Scott"
Judge

Certified true translation

Sebastian Desbarats, Translator