Federal Court Cour fédérale

Date: 20110131

Docket: IMM-3072-10

Citation: 2011 FC 98

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 31, 2011

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

DORA AGUDIN SOTO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Immigration and Refugee Board (IRB), dated May 10, 2010, that the applicant is not a Convention refugee or a person in need of protection.

[2] The application for judicial review will be dismissed for the following reasons.

Facts

[3] The applicant is a citizen of Cuba and Spain. She is 79 years old and suffers from an advanced stage of Alzheimer's disease. During her hearing before the IRB, she testified only briefly and a designated representative ensured her interests. Her son-in-law also testified.

[4] The applicant was persecuted in Cuba because of her membership in the family social group. Her son-in-law is a political activist opposed to the Castro regime. He left Cuba and was found to be a refugee in Canada in 2002. Since then, the applicant, who stayed in Cuba, continued to be harassed, discriminated against, threatened and assaulted; she and her daughter were publicly identified as traitors to the nation.

[5] The applicant left Cuba in February 2007 to claim refugee protection in Canada.

[6] The IRB accepted the evidence on her fear of persecution in Cuba.

[7] The determinative issue was therefore whether the applicant had established a well-founded fear of persecution or a fear under section 97 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 (IRPA) in Spain.

[8] The Board member replied no to this question. The Board member primarily emphasized that the applicant had not indicated any fear of persecution or danger mentioned in section 97 in relation to this country. Her son-in-law had testified that the applicant had no fear in Spain that would be related to her fear in Cuba. Instead, her fear is the possibility of experiencing

psychological and physical deterioration upon returning to this country that she does not know and in which she has no family.

[9] According to the decision-maker, the fact that the applicant could not receive social benefits because she has never lived in Spain does not constitute persecution but the application of a general law.

[10] The Board member did not accept the claimant's counsel's argument that sections 98 and 99 of the *Handbook on Procedures and Criteria for Determining Refugee Status* could apply to her because she could not avail herself of protection in Spain because of her condition. Instead, the IRB believed that even though her illness is a circumstance beyond her will, the applicant could be represented, likening her situation to that of minor children for whom we expect their parents to ask for protection in their name.

[11] In stating that the protection sought must be in connection with a fear mentioned in sections 96 and 97 of the IRPA, the Board member considered that she did not have the power to take humanitarian and compassionate considerations into account in this file.

[12] Finally, the IRB stated that people who are citizens of several countries must demonstrate a well-founded fear of persecution or a risk under section 97.

[13] The applicant is of the opinion that questions of law are being raised here and consequently the standard of review should be that of correctness. However, the respondent believes that these are questions of mixed fact and law and that the standard should be that of reasonableness. In any case, whether the Court chooses the correctness or the reasonableness standard, the reasons at the basis of the IRB's decision meet the two standards in question.

[14] The relevant provisions can be found in the annex.

[15] The applicant emphasizes that she met her burden of proof concerning her fear of persecution in Cuba and the IRB recognized this at paragraph five of its decision (Tribunal Record, page 2).

[16] Therefore, the issue that remains to be determined is whether she met the provisions of sections 96 and 97 of the IRPA concerning Spain.

[17] Firstly, she submits that she met her burden of proof concerning paragraph 96(*a*) as she "is unable" to claim protection from Spain due to her health condition. The fact that the Board member, at paragraph 11 of her decision, likened the applicant's situation to that of minor children is an error of law. In fact, according to the applicant, anticipating that a legal representative would claim protection for her is an addition to the text of paragraph 96(*a*) of the IRPA.

[18] Secondly, based on *Canada (Attorney General) v Ward,* [1993] 2 SCR 689, she considers that requiring her to prove a fear of persecution with respect to Spain is the second error of law. According to her, in *Ward*, Justice La Forest decided the following at page 751:

> In considering the claim of a refugee who enjoys nationality in more than one country, the Board must investigate whether the claimant is unable or unwilling to avail him- or herself of the protection of each and every country of nationality. (Emphasis added.)

[19] Justice La Forest therefore emphasized the word "protection" and also specified that certain Convention provisions were not repeated in the legislation at that time, namely with respect to dual nationality: paragraph 2 of Article 1(A)(2) of the 1951 Convention was never incorporated into the *Immigration Act* and is thus not strictly binding; however, it infuses suitable content into the meaning of "Convention Refugee" on the point (*Ward,* page 751).

[20] Paragraph 2 of Article 1(A)(2) of the Convention reads as follows:

> In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on a well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national. (Emphasis added.)

[21] The applicant also refers to section 98 of the *Handbook on Procedures and Criteria for Determining Refugee Status*, which stipulates the following, among other things, "Being unable to avail himself of such protection implies circumstances that are beyond the will of the person concerned . . ." to indicate that she cannot receive protection from Spain as this country does not

offer effective protection because of its law on social benefits for people who have not resided on its soil for a minimum period of five years.

[22] The applicant also argues that Schedule I of the Convention recommends that governments take the necessary measures for the protection of the family of refugees and in particular for "ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country".

[23] Finally, the applicant submits that the IRB's restrictive interpretation of section 97 does not take into account "all the circumstances, including the particular circumstances of the claimant" as is done for assessing an internal flight alternative.

[24] The respondent argues that the applicant had to demonstrate, under section 96 of the IRPA, a well-founded fear of persecution in all of her countries of citizenship before claiming international protection.

[25] He cites *Williams v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 126, [2005] 3 FCR 429, in which the Court stated the following:

> [19] It is common ground between counsel that refugee protection will be denied where it is shown that an applicant, at the time of the hearing, is entitled to acquire by mere formalities the citizenship (or nationality, both words being used interchangeably in this context) of a particular country with respect to which he has no well-founded fear of persecution.
>
> [20] This principle flows from a long line of jurisprudence starting with the decisions of our Court in *Canada (Attorney General) v. Ward*, [1990] 2 F.C. 667 (C.A.), and in *Canada (Minister of*

> *Employment and Immigration) v. Akl* (1990), 140 N.R. 323 (F.C.A.), where it was held that, if an applicant has citizenship in more than one country, he must demonstrate a well-founded fear of persecution in relation to each country of citizenship before he can seek asylum in a country of which he is not a national. Our ruling in *Ward* was confirmed by the Supreme Court of Canada (at paragraph 12 of these reasons) and the principle eventually made its way into the IRPA, section 96 referring to "each of their countries of nationality".

[26] The same can be said for section 97 of the IRPA; the applicant had to demonstrate a personalized risk with respect to Spain, which was not done here as she never alleged a fear of persecution or a risk according to the two sections, that is, 96 or 97.

[27] The respondent also refers to *Covarrubias v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365, [2007] 3 FCR 169, at para 41, in which the Court ruled on the following exception set out in subparagraph 97(1)(*b)*(iv): "not caused by the inability of that country to provide adequate health or medical care". The applicant cannot claim protection in Canada because of her concerns about the lack of social benefits for her in Spain. This does not constitute persecution under section 96 or 97 of the IRPA.

[28] The applicant's arguments are very clever but unfortunately neither the provisions nor the case law support them.

[29] When the IRB used the analogy of children who can be represented by a legal representative to claim refugee protection when referring to a legal representative to represent the applicant, I am not of the opinion that the Board member supplemented the text in section 96 of the IRPA. In fact, when a person is unable or considered unable, a legal representative must be appointed.

[30] With respect to the argument put forward by the applicant concerning the distinction between the words "protection" and "persecution", I believe that *Williams* of the Federal Court of Appeal must be followed. The applicant is suggesting that I not consider this case and instead retain *Ward.*

[31] *Williams* was rendered after the IRPA came into force. Justice Décary was very clear about applicants with several nationalities: "A well-founded fear of persecution must be established in relation to each country of citizenship before asylum can be sought in another country." (Emphasis added.)

[32] That case is the state of the law today and I do not see how I can depart from this *obiter*. Furthermore, I must say that this judicial interpretation is consistent with the scheme and the object of the IRPA in all respects.

[33] This is why it is impossible to find the IRB's decision incorrect or unreasonable. There is no reviewable error in the Board member's interpretation of the relevant sections of the IRPA and the *Handbook*.

[34] The findings and reasons used to reach it are supported by the evidence. Intervention by the Court is therefore not appropriate.

[35] However, I believe that this file should be treated from the perspective of humanitarian and compassionate considerations. I am persuaded and even convinced that if an application like this had been made to the competent authorities, there would have been no hesitation in accepting it because of the particular circumstances presented here.

[36] The applicant proposes the following questions for certification:

[TRANSLATION]

a. When a person has dual nationality and it is accepted that this person has a fear of persecution in one of their countries:

  i) Must this person demonstrate a fear of persecution in their other country of nationality?

  ii) When it is accepted that the person cannot claim protection in their other country and that a return to their country could sentence them to begging <u>or</u> a fast and marked deterioration of health <u>or</u> a premature death, must this person nevertheless claim protection in their other country of nationality on their own, or, if unable to, with a representative?

[37] The respondent rightly objects to these two questions. Firstly, the case law (*Williams)* answered the first question. As for the second question, he notes that nothing as such has been admitted. I share these observations.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

Certified true translation
Janine Anderson, Translator

ANNEX

Immigration and Refugee Protection Act (2001, c. 27)

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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