Federal Court  Cour fédérale

Date: 20110325

Docket: IMM-3665-10

Citation: 2011 FC 369

Ottawa, Ontario, March 25, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

ZOILA ANGELICA MARTINEZ DE ARGUETA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*) for judicial review of a June 8, 2010 decision of the Refugee Protection Division of the Immigration Refugee Board (the Board) in which the Board found the applicant to be neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *IRPA*. For the reasons that follow, the application for judicial review is dismissed.

Background

[2] This application for judicial review arises from a claim for protection by the applicant, a citizen of both El Salvador and Guatemala, based on a fear of violence by her former partner. The Board rejected her claim on the basis of available state protection and an Internal Flight Alternative (IFA) in Quetzaltenango.

[3] The applicant was born in Guatemala and moved to El Salvador when she was five years old. She married a citizen of El Salvador and became a nationalized citizen there. She is a citizen of both countries.

[4] The applicant's former partner was a police officer who later served in the military. The Board accepted that there had been abusive conduct during the marriage. In 2003, the applicant left her husband to stay with her father. In 2004, she left El Salvador for the United States, and then came to Canada in 2008 where she has relatives. There she claimed refugee status. In her updated Personal Information Form (PIF), the applicant wrote that her former partner visited her father's house in January and June 2009 to look for her, threatening that she would never be able to leave him and that she would regret her decision to leave.

Decision Under Review

[5] As noted, the Board found that the applicant was not a person in need of protection.

[6] In coming to this decision, the Board considered the availability of state protection in El Salvador. The Board noted that El Salvador is a constitutional democracy which holds generally

free and fair elections and is in effective control of its territory. Although the judiciary suffers from inefficiency, corruption and insufficient resources, the Board found that there was nothing in the documentary evidence before the panel to suggest that El Salvador is in a state of civil disorder.

[7] The Board acknowledged that documentation suggests that violence and discrimination against women continues to be a real problem, and that spousal rape was not yet recognized as a crime; however, the Board also noted that El Salvador has introduced national laws and programs aimed at protecting women from discrimination, domestic violence, and sexual harassment. This includes the establishment of the Salvadoran Institute for the Development of Women.

[8] With regard to Guatemala, the Board noted that the country was a multi-party democratic republic ensuring free and fair elections, and that it had laws criminalizing rape, as well as physical, economic, and psychological violence. The Board acknowledged that there are issues with executing these programs and laws. The Board concluded that despite some inconsistencies in the sources, the preponderance of the objective evidence suggests that there is adequate state protection in El Salvador and Guatemala and that the police are both willing and able to protect victims of gender violence.

[9] The Board observed that the applicant had only once made a police report which had nothing to do with the alleged domestic abuse, and found that the applicant had not taken all reasonable steps in the circumstances to seek protection. Although the applicant testified that she feared her former partner’s connection with the authorities as a former police officer, the Board

stated that "[t]he adequacy of state protection cannot rest on the subjective fear of the claimant." As such, the Board found that the applicant had failed to rebut the presumption of state protection.

[10] The Board also examined the issue of an IFA, and found that the applicant could live in the city of Quezaltenango, Guatemala without a serious possibility of being persecuted. The Board was satisfied that it would be reasonable for the applicant to relocate there. The Board considered the large population and the applicant's ability to find work there. The Board found that her former partner would not be likely to venture that far from his home state to find the applicant. Although the applicant stated that she was afraid her former partner would not give up until he found her, she was unable to provide credible evidence as to why relocation to Quezaltenango would not be an option, given that her former partner has not located her in the last seven years. The Board rejected the applicant's argument that her former partner could bribe people through his connection with the military and the police (in El Salvador) to find her. The Board also noted that the applicant had a sister who also lived in Guatemala, in Guatemala City. The Board concluded that it would not be unduly harsh for the applicant to relocate there.

[11] Because of the availability of adequate state protection as well as a viable IFA, the Board found that the applicant was neither a Convention refugee nor a person at risk of harm. The applicant's claim was therefore rejected.

Issues

[12] There are two points in issue. The applicant submits that the Board made a reviewable error in its findings regarding both the availability of state protection and the availability of an IFA.

Submissions of the Parties

Standard of Review

[13] Counsel for the applicant agreed that in order to succeed, the applicant had to overcome significant factual and legal hurdles. As a citizen of both El Salvador and Guatemala, she had to establish a failure of state protection in both countries and that there was no viable IFA within either. Moreover, it was undisputed that the Board's findings of available state protection and the existence of an IFA are to be reviewed on a standard of reasonableness: *Montalvo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 716 at paras 9-12. This means that deference should be given to the Board's decision, so long as the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

State Protection

[14] The applicant argues that the Board's findings on state protection were unreasonable. The applicant identified a number of documents in the record which contradicted the Board's finding of adequate state protection in El Salvador and Guatemala. The applicant also referred at length to other evidence that was before the Board but not mentioned by the Board, describing the problems of violence that women face in El Salvador and Guatemala.

[15] The applicant submits that based on the country condition evidence before it, the Board's conclusion of adequate state protection was unreasonable. The applicant takes issue with the fact that the Board mainly relied on the existence of laws and institutions established to protect women, rather than the effectiveness of these protective measures. The applicant submits that it is insufficient for a state to possess institutions designed to provide protection if those institutions do not provide actual and adequate protection. The applicant cites a number of cases to support this proposition: *Razo v Canada (Minister of Citizenship and Immigration*), 2007 FC 1265; and *Avila v Canada (Minister of Citizenship and Immigration*), 2006 FC 359 at para 34.

[16] The applicant argues that the Board failed to acknowledge the extent of the concerns about the lack of protection in these countries, and the applicant points out that the Board did not explain, for example, how the applicant could obtain protection from spousal rape, given that it is not recognized as a crime in El Salvador. The Board also did not explain how protection would be adequate if custodial sentences are not available in Guatemala for domestic abusers. The applicant cites *Mendoza v Canada (Minister of Citizenship and Immigration),* 2010 FC 119 at para 33 where the Court outlined the principle that "evidence of the state's willingness to protect cannot be imputed as evidence of adequate state protection."

[17] The respondent submits that the onus is on the applicant to rebut the presumption that a state is capable of protecting its own citizens: *Canada (Attorney General) v Ward*, 2002 SCC 17; *Canada (Minister of Citizenship and Immigration) v Carillo*, 2008 FCA 94 at paras 18-19. It is also accepted in jurisprudence that the applicants are typically required to seek protection from their state more than once, and show more than local failures of the authorities: *Canada (Minister of*

Employment and Immigration) *v Villafranca*, [1992] 99 DLR (4th) 334; *Kadenko v Canada (Minister of Employment and Immigration)*, [1996] 143 DLR (4th) 532 at para 5. The respondent submits that it was therefore reasonable for the Board to find that the applicant had not taken all reasonable steps to seek state protection, given that she had only made one report to the police. According to the respondent it was reasonable to reject the applicant's explanation for making only one report, because an applicant cannot rebut the presumption of state protection based on subjective reluctance alone: *Martinez v Canada (Minister of Citizenship and Immigration*), 2005 FC 1050 at para 9; *Mejia v Canada (Minister of Citizenship and Immigration*), 2009 FC 354 at para 70.

[18] Furthermore, the respondent also submits that the Board is presumed to have considered all the evidence, and the existence of general documentary evidence pointing in an opposite direction is not enough to rebut this presumption: *Florea v Canada (Minister of Employment and Immigration*), [1993] FCJ No 598 (FCA); *Quinatzin v Canada (Minister of Citizenship and Immigration*), 2008 FC 937 at para 20.

Internal Flight Alternative

[19] The applicant advanced a number of reasons why the Board's finding of an IFA was unreasonable, including:

- The applicant has never lived in Quetzaltenango, has no relatives there, and knows no one there;
- The applicant has not been in Guatemala since the age of five (she is now forty-eight years old);
- The Board did not explain why the presence of the applicant's sister in Guatemala City, who is widowed, sick, and poor, would make Quetzaltenango a reasonable IFA;

- The evidence does not support a conclusion that work would be reasonably available to her in Guatemala, given the applicant's testimony that it is very difficult to find work if one does not know anyone there; and

- The Board looked at the applicant's ability to adjust to new life in the United States and Canada and concluded that she would be able to adapt to living in Quetzaltenango. However, the applicant points out that she had relatives to support her in the United States and Canada, unlike in Quetzaltenango.

[20] In response, the respondent submits that the onus is on the applicant to show a reasonable chance of persecution in the entire country, and specifically in the potential IFA area: *Thirunavukkarasu v Canada (Minister of Employment and Immigration*), [1994] 1 FC 589 (FCA) at para 5. The respondent argues that it is not enough for the applicant to show she has no friends or relatives in the IFA, or that she may not be able to find suitable work. Instead, the applicant must provide actual and concrete evidence of conditions that would jeopardize her life and safety in traveling to that area and relocating there. The respondent also notes that the applicant's three children live in El Salvador.

Analysis

[21] In *Farias v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1035, Justice Kelen provided a checklist for the key principles guiding the assessment of whether a viable IFA exists, which can be summarized as follows:

- The applicant bears the burden of proof in demonstrating that an IFA either does not exist or is unreasonable in the circumstances: *Mwaura v Canada (Minister of Citizenship and Immigration)*, 2008 FC 748 at para 13; *Kumar v Canada (Minister of Citizenship and Immigration)*, 2004 FC 601, at para 17;

- The threshold is high for what makes an IFA unreasonable in the circumstances of the refugee claimant: *Khokhar v Canada (Minister of Citizenship and Immigration)*, 2008 FC 449 at para. 41;

- Whether an IFA is unreasonable is a flexible test taking into account the particular situation of the claimant. It is an objective test: *Mwaura*, above at para 16; and *Thirunavukkarasu*, above at para 12;

- The IFA must be realistically accessible to the claimant, i.e. the claimant is not expected to risk physical danger or undue hardship in traveling or staying in that IFA. Claimants are not compelled to hide out in an isolated region like a cave or a desert or a jungle: *Thirunavukkarasu*, above, para 14;

- The fact that the refugee claimant has no friends or relatives in the proposed IFA does not make the proposed IFA unreasonable; and

- The fact that the refugee claimant may not be able to find suitable employment in his or her field of expertise may or may not make the IFA unreasonable.

[22] The Board's analysis of the IFA is consistent with these principles and is also reasonable having regard to the facts. The factors noted by counsel for the applicant indeed constitute personal challenges, but this does not amount to a finding that the proposed IFA is unreasonable. The applicant is a citizen of Guatemala and has a relative there. Quetzaltenango is a large city where she might find employment. As noted by the Federal Court of Appeal in *Montalvo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 716 at para 17 the threshold for the unreasonableness of an IFA is a very high one which 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 and actual and concrete evidence of such conditions. There was no evidence before the Board that would have met the test.

[23] The Board did not accept as credible the argument that the applicant's former partner would travel to Guatemala and track her down in Quezaltenango, and there is no basis on the evidence to intervene in that finding. Quezaltenango is a large city, removed from the boarder with El Salvador. Moreover, the applicant has been living outside of El Salvador since 2004. The Board looked at the

question of an IFA through the lens of the criteria noted and came to the conclusion that Quezaltongo was a viable IFA. The Court finds this conclusion to be reasonable.

[24] The burden on the claimant is to establish a well-founded fear of persecution. That burden is not met if the claimant can live safely elsewhere and it is reasonable to expect the claimant to move to that place. The issue of state protection and the existence of the IFA are, in this case, discreet. In these circumstances it is not necessary to consider any error in the state protection analysis.

[25] Accordingly, the application for judicial review is dismissed.

[26] No question for certification has been proposed and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3665-10
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