Federal Court  Cour fédérale

Date: 20110510

Docket: IMM-5264-10

Citation: 2011 FC 538

Ottawa, Ontario, May 10, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

SANDRA MARIA DE JESUS LIMA CAMBRON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Immigration and Refugee Board of Canada, Refugee Protection Division (the Board), pursuant to section 72 of the *Immigration and Refugee Protection Act* [*IRPA*], of a decision rendered on August 11, 2010, dismissing the Applicant's claim for refugee status.

1. Facts

[2] The Applicant is a citizen of Mexico, allegedly fearing her ex-boyfriend Roberto. She began a romantic relationship with Roberto in 2005. About one year after the beginning of their relationship, he told her that he worked for the Procuraduria General but did not provide any other information. In February 2008, Roberto became verbally violent with the Applicant and was physically violent in April 2008. The Applicant ended the relationship in August 2008. Later, Roberto threatened the Applicant with a gun while she was sitting at a bar, which resulted in Roberto's arrest. The Applicant and her friend gave a statement. Roberto was released and continued to harass the Applicant.

[3] On September 5, 2008, the Applicant moved to Guanajuato. In December 2008, she was physically assaulted by Roberto. She reported the incident to the police in Guanajuato.

[4] In February 2009, the Applicant moved back to Mexico City. On February 28, 2009, she was abducted and raped by Roberto and two other men. Roberto threatened to kill the Applicant if she reported the incident to the police.

[5] She fled from Mexico on March 9, 2009, and filed a refugee claim on May 6, 2009.

II. Decision of the review tribunal

[6] In its decision, the Board analyses the issue of state protection and states that Mexico is in effective control of its territory and has in place a functioning security force to uphold the laws and constitution of the country. After analysing the general principles, the Board concludes that the Applicant has not provided clear and convincing evidence that, on a balance of probabilities, state protection in Mexico is inadequate.

[7] The Board notes that the Applicant made minimal efforts to seek protection in Mexico. She only reported Roberto once to the authorities. She followed up on the denunciation and was told that news would be sent by mail. However, the Board states that there is no evidence to indicate that the police in Guanajuato were not investigating the claimant's allegations. The Applicant testified that she did not denounce Roberto's action after the August 2008 attack in the bar, as she did not think the police would do anything. She gave the same reasons to explain why she did not report the rape in 2009 but also added that she feared Roberto. The Board also mentions its doubt about the connections between Roberto and the police.

[8] The Board concludes that the Applicant did not take all reasonable steps to seek state protection in Mexico before seeking international protection in Canada. The Board adds that the Applicant is speculating that Roberto was a police officer, as this information was never confirmed. Regarding documentary evidence, the Board recognizes that Mexico has some difficulties addressing the criminality and corruption that exists within the security forces in Mexico. However, those deficiencies are systemic and many government legislative frameworks have been

implemented to resolve the issue. Particularly, the Board mentions that Mexico has enacted civil, administrative and criminal legislation which prohibits domestic violence and many sanctions, such as detention or fines, are in place. New legislation allows victims to seek protection or restraining orders, and provides various remedies to the victim.

III. Questions in issue

[9] The issues are as follows:

(1) What is the applicable standard of review?

(2) Did the Board err in concluding that the Applicant was able to receive appropriate state protection in Mexico and failed to take all reasonable steps to access that protection?

IV. Analysis

A. Standard of review

(1) What is the applicable standard of review?

[10] In *Dunsmuir v New Brunswick*, 2008 SCC 9, 372 NR 1 [*Dunsmuir*], the Supreme Court of Canada held, at paragraph 62, that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question": see also *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*], per Justice Binnie, at paragraph 53.

[11] It is clear that, as a result of *Dunsmuir* and *Khosa*, the Refugee Protection Division's determinations with respect to state protection are to be reviewed on a standard of reasonableness: *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, para 38.

[12] In reviewing the Board's decision, using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at para 47; and *Khosa*, above, at para 59.

(2) Did the Board err in concluding that the Applicant was able to receive appropriate state protection in Mexico and failed to take all reasonable steps to access that protection?

B. <u>Applicant's arguments</u>

[13] The Applicant argues that there is no basis to the Board's conclusion that it was merely speculative that her former boyfriend was a police officer, as this was the information given to the applicant by her former boyfriend. She cites the decision of *Valtchev v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 1131, with respect to plausibility findings and adds that this conclusion of the Board is essential to the state protection finding it reached.

[14] The Applicant argues that she did not take any steps to report the incidents to the police because of the threat to her life and safety. Furthermore, the Board did not take into account the

effects of the rapes on the Applicant's emotional and psychological condition. She cites *Garcia v Canada (Minister of Citizenship and Immigration)*, 2007 FC 79, to support her argument that the effects of such traumatic experience should be addressed by the Board.

[15] The Applicant also notes that it is perverse for the Board to suggest that she should have filed a claim in Mexico City for an assault that happened in Guanajuato because Roberto was living there. Furthermore, she states that the Board found that the police authorities could be investigating the complaint, even though she did not hear from them in the three months she was in Mexico. Based on her experience and documentary evidence, it was reasonable for the Applicant to believe that state protection would not be forthcoming and therefore, she had no further obligation to approach the authorities *(Canada (Attorney General) v Ward*, [1993] 2 SCR 689).

[16] The Applicant argues that the fact that Mexico adopted laws that, in theory, would protect the women, is not sufficient for a finding that state protection is available if the claimant was to return to Mexico. She cites *Skelly v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1244, to support her argument that state protection for victims of domestic violence is ineffective.

[17] Finally, the Applicant refers to several documents that were not mentioned by the Board in its decision, these documents support her position that state protection is not available to women suffering from domestic abuse.

C. Respondent's arguments

[18] The Respondent argues that the Board, after a thorough assessment of the documentary evidence, concluded that there was adequate state protection for the Applicant, in Mexico, and reviews the evidence considered by the Board in its analysis. The Respondent mentions that the Board acknowledges that there remain problems with domestic violence in Mexico and argues that this information was taken into account by the Board when it rendered its decision.

[19] The Respondent also argues that the Board's finding with regards to the investigation was reasonable, as the Applicant did not adduce any evidence to demonstrate that the authorities were not investigating her complaint.

[20] As their second argument, the Respondent states that the Applicant failed to take all reasonable steps, in the circumstances, to seek state protection. The Respondent adds that the Board did not find fault with the Applicant for reporting the incident in Guanajuato, but it noted that she had not reported the incident that happened in Mexico City, where she and Roberto lived. The Applicant did not submit any evidence explaining how the rape prevented her from reporting the situation to the police.

[21] Finally, the Respondent claims that the Applicant failed to rebut the presumption of state protection, with clear and convincing evidence, as she did not have any knowledge about Roberto 's occupation nor where he worked. Even if he were a police officer, the Applicant did not adduce convincing evidence that the authorities would not be able to protect her.

[22] A decision raising such an issue was rendered by Justice Near in *Martinez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1200, [2010] FCJ No 1495 (QL). In that case, the Applicant was a woman from Mexico who feared her abusive husband, who was a member of the police force. With regards to state protection, Justice Near wrote, at paragraphs 29 to 32, that :

> In my view, the Applicant has confused where the onus lies in the matter of state protection. The Board is not obliged to prove that Mexico can offer the Applicant effective state protection, rather, the Applicant bears the legal burden of rebutting the presumption that effective state protection exists by adducing clear and convincing evidence which satisfies the Board on a balance of probabilities (*Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, 69 Imm. L.R. (3d) 309 at para. 30). The quality of the evidence will be proportional to the level of democracy of the state (*Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 F.T.R. 35 at para.30). And, as Justice Russell Zinn noted in *Sandoval v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 868, [2008] F.C.J. No. 1084 (QL) at para. 16: Where, as in this case, protection was sought and provided, an applicant will have a challenge to show that it was an aberration unless there has been some material change in personal or state circumstances.
>
> Here the Board found that Mexico is a functioning democracy. This Court has recently held that Mexico is a democracy with the willingness and ability to protect its citizens (*Alvarez v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 197, at para.20) The Board also found that the Applicant had successfully sought protection from the Mexican authorities. If anything has changed in the decade plus since the Applicant fled Mexico, the documentary evidence before the Board suggests that the awareness level and ability of the government to appropriately handle the issues surrounding domestic violence have improved.
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> Although one needs to keep in mind that the Federal Court of Appeal decided *Villafranca*, above, before the Supreme Court reached their decision in Ward, above, the proposition that state protection need not be perfect is still a correct one. The Federal Court of Appeal confirmed in *Carillo*, above, that the test for a finding of state protection is whether that protection is adequate, rather than whether it is effective, per se (*Carillo*, above, at para. 32).

> In the present case, the Board determined that the Applicant failed to adduce persuasive evidence that protection would be less forthcoming in the future than it was the three times she sought aid from the authorities in the past. In this case, absent any failure by the Board to appreciate the totality of the evidence, it was reasonable and open to the Board to conclude that the Applicant failed to rebut the presumption of state protection. The Board did not err in applying the test.

[23] In that case, Justice Near dismissed the application. However, it is important to note that the police had intervened three times after the Applicant's denunciation of the situation to the authorities.

[24] Furthermore, as mentioned by Justice Pinard in *Fuentes v Canada (Minister of Citizenship and Immigration)*, 2010 FC 457, [2010] FCJ No 659 (QL), at para 14:

> [T]he applicant is required to seek protection from protective agencies other than police because those agencies are set up to protect women in the position of the applicant. The law is now settled that local failures to provide effective policing do not amount to a lack of state protection, and that an applicant may seek redress and protection from protection agencies other than police. In *The Minister of Citizenship and Immigration v. Maria Del Rosario Flores Carrillo*, 2008 FCA 94, the Federal Court of Appeal, applying the proper principles to the case before it, stated as follows:
>
> > [31] The Board acknowledged the prevalence of domestic abuse in Mexico. It then reviewed the various steps taken by the authorities to address the issue: see the Board's reasons at pages 43 to 49 of the appeal book.
> >
> > [32] It proceeded to review the law governing the presumption of state protection. It stated that local failures to provide effective policing do not amount to a lack of state protection. Relying upon the findings of this Court in *Kadenko v. Canada (Solicitor General)* (1996), 143 D.L.R. (4th) 532, leave to appeal to the Supreme Court of Canada refused on May 8, 1997, it stated that "the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her". It

> found that Mexico is a fledgling democracy governed by the rule of law.
>
> [33] The Board found that the respondent had failed to make determined efforts to seek protection. She reported to police only once during more than four years of alleged abuse.
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> [34] In addition, the Board concluded based on the evidence before it that the respondent did not make additional effort to seek protection from the authorities when the local police officers allegedly did not provide the protection she was seeking. She could have sought redress through National or State Human Rights Commissions, the Secretariat of Public Administration, the Program against Impunity, the General Comptroller's Assistance Directorate and the complaints procedure at the office of the Federal Attorney General.
>
> [35] Finally, the Board noted the respondent's omission to make a complaint about the involvement of the abuser's brother, who allegedly is a federal judicial police officer, when the evidence indicates that substantial, meaningful and often successful efforts have been made at the federal level to combat crime and corruption.
>
> [36] Considering the principles relating to the burden of proof, the standard of proof and the quality of the evidence needed to meet that standard defined as a balance of probabilities against the factual context, I cannot say that it is an error or unreasonable for the Board to have concluded that the respondent has failed to establish that the state protection is inadequate.

See also *Florea v. Minister of Employment and Immigration*, [1993] F.C.J. No. 598 (C.A.) (QL); *Ortiz v. Minister of Citizenship and Immigration*, [2002] F.C.J. No. 1558 (T.D.) (QL); *Pal v. Minister of Citizenship and Immigration*, [2003] F.C.J. No. 894 (T.D.) (QL); *Nagy v. Minister of Citizenship and Immigration*, [2002] F.C.J. No. 370 (T.D.) (QL); *Zsuzsanna v. Minister of Citizenship and Immigration*, [2002] F.C.J. No. 1642 (T.D.) (QL), and *Szucs v. Minister of Citizenship and Immigration*, [2000] F.C.J. No. 1614 (T.D.) (QL).

[25] Justice Pinard dismissed the application for judicial review.

[26] The Applicant, in the present case, has also relied on the following cases *Bautista v Canada (Minister of Citizenship and Immigration)*, 2010 FC 126 [*Bautista*], and *Lopez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1176, in support of her position that the Board erred, firstly in not addressing why it considered the contradictory evidence to be irrelevant, and secondly in support of the weigh that should had been assigned to Professor Hellman's report. I cannot agree with this proposition because the facts in the present case are quite different from the facts in *Bautista* cited above. Secondly, while I find the Board's remarks with respect to Professor Hellman's report to be somewhat questionable that, in itself, is not sufficient to render the Board's decision unreasonable. I find that the Board did weigh the totality of the evidence submitted.

[27] In the present case, the Applicant only contacted the authorities once with regards to attacks and intimidation from her ex-boyfriend. She did not contact the authorities for the other more serious incidents, nor did she discuss her situation with a protective agency. As such, it was therefore open and reasonable for the Board to conclude that she had not sought the protection of the state before requesting the protection of Canada.

[28] The application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"André F.J. Scott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5264-10
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