Federal Court  Cour fédérale

Date: 20111026

Docket: IMM-1497-11

Citation: 2011 FC 1183

Ottawa, Ontario, this 26th day of October 2011

Before: **The Honourable Mr. Justice Pinard**

BETWEEN:

Lilian ROSAS MALDONADO
Martha Andrea GOMEZ ROSAS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of a member of the Refugee Protection Division of the Immigration and Refugee Board (the "Board"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27, (the "Act") by Lilian Rosas Maldonado and Martha Andrea Gomez Rosas (the "applicants"). The Board determined that the applicants were neither Convention refugees nor persons in need of protection under sections 96 and 97 of the Act.

[2] The applicants are a mother and daughter from Mexico. The daughter, Ms. Gomez Rosas (the “applicant”), lived illegally in California for many years and returned to Mexico in July 2006 with her mother, Ms. Rosas Maldonado, to live in Puebla, and then in Aguascalientes as of September 2007. The daughter obtained a job as an English teacher. She later met Mr. Diego Sanchez, who became her boyfriend. When the applicant became pregnant, Mr. Sanchez became violent and denied paternity.

[3] The applicant was kidnapped and sexually assaulted. Two weeks later, she was taken to a “clandestine” abortion clinic, where she managed to escape.

[4] The applicants both returned to Puebla, but saw Mr. Sanchez there. They then went briefly to Mexico DF, where the applicant thinks she saw Mr. Sanchez, although she remains uncertain. Consequently, the applicants obtained passports and traveled to Montreal, where they claimed refugee status. After their arrival in Montréal, the applicant gave birth to a son, who is a Canadian citizen.

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[5] The impugned decision includes the following findings:

- The Board found the claimants credible and believed their story. The determinative issues were whether the applicant is in continuing danger, and whether state protection and an internal flight alternative (“IFA”) are available.

- The Board further found no nexus to a Convention ground. The applicant was targeted for financial gain by a predatory criminal due mainly to her youth.
- The Board found that on the balance of probabilities, the applicants would be of little continuing interest to the aggressor Mr. Sanchez. The applicant refused to work for Mr. Sanchez, and the applicants do not have access to money. Therefore, they are of little use as hostages for ransom. The fact that Mr. Sanchez disputed the paternity of the applicant's child may indicate that he had no continuing interest in her. Otherwise, he could have used his relationship to her child to control her.
- There is no evidence, despite Mr. Sanchez having a friend in the police, that he has the interest or capacity to locate them throughout Mexico. The applicants do not believe Mr. Sanchez is part of a gang. He lives in Aguascalientes, a relatively small city about 300 miles from Mexico City. The evidence suggests that he is a petty local criminal, unaffiliated with Los Zetas, who operate in Aguascalientes.
- The applicants made no effort to contact the police or access state protection. They stated that they "don't believe in the police". However, the documentary evidence attests to efforts to reform and improve policing in Mexico. There is nothing on the facts of this case to suggest that the police would be incapable of aiding. The police in Aguascalientes are actively fighting Los Zetas and the evidence indicates that they are making a "serious effort" to protect their citizens. The applicants do not face a threat as substantial as that posed by Los Zetas.
- It appears unlikely that Mr. Sanchez would attempt to locate the applicants in Mexico DF, or that he would ever run into them accidentally there. It would not be unreasonable for the applicants to live there since they have previously done so.

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[6] Dealing first with the issue of IFA, which is determinative in a refugee claim (*Sarker v. Minister of Citizenship and Immigration*, 2005 FC 353 at para 5), the applicable standard of review is that of reasonableness (see *Lopez Martinez v. Minister of Citizenship and Immigration*, 2010 FC 550 at para 14, and *Navarro v. Minister of Citizenship and Immigration*, 2008 FC 358 at paras 12-14). Therefore, the Board's conclusions on this issue must fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para 47).

[7] In the case at bar, the applicants argue that the Board's conclusion to the effect that Mr. Sanchez is merely a petty criminal rather than a person linked to Mexican gangs is mere conjecture rather than fact-based inference. This would affect the Board's conclusion that Mr. Sanchez would not have the ability to seek out the applicants anywhere in Mexico.

[8] It is to be noted, however, that the applicants had specifically stated before the Board that they did not believe Mr. Sanchez to be a member of a gang. I therefore do not agree that this conclusion falls into the realm of conjecture: the Board was relying on the evidence of the applicants themselves in making this finding.

[9] The applicants further submit that their evidence proved that Mr. Sanchez had networks of people working for him, and that police officers had deferred to him rather than helping the

applicant when she had been kidnapped. The fact that the applicant saw her persecutor in Puebla and possibly in Mexico City illustrated that Mr. Sanchez was looking for her.

[10] Furthermore, the fact that Mr. Sanchez came to Mexico City means that this would not be a reasonable IFA for the applicants; they would live in constant fear of being found. They argue that the Board not only failed to consider this, but also failed to consider the applicant's post-traumatic mental state, which resulted from the abuse she suffered, as shown by the evidence.

[11] However, I agree with the respondent who reiterates the two-pronged IFA test and submits that the subjective fear of relocating within a country is insufficient to overcome an IFA finding (*Kanagaratnam v. Minister of Employment and Immigration* (1996), 194 N.R. 46 (F.C.A.)). The Board had found that the sighting of Mr. Sanchez in Puebla was likely a coincidence, as he made no effort to locate the applicant at her aunt's house. The applicant herself conceded that the alleged sighting in Mexico DF may not have been Mr. Sanchez. The Board acknowledged that the applicant was "clearly traumatized by her ordeal". While the applicant's evidence may establish her subjective fear of returning to Mexico, this would not refute the reasonableness of the proposed IFA (*I.M.P.P. v. Minister of Citizenship and Immigration*, 2010 FC 259 at para 49). The applicants have failed to show that the IFA finding was unreasonable.

[12] The applicants' position on the unreasonableness of Mexico DF as an IFA appears to be based mainly on the possibility that Mr. Sanchez was once spotted there. They themselves acknowledged they may have been mistaken. In my view, this possible sighting several years ago in a large population centre, coupled with the Board's findings that Mr. Sanchez has neither the

wherewithal, nor the desire to find the applicants (which I find to be acceptable fact-based inferences on the circumstances of this case), is insufficient to establish that the Board's finding of an IFA was unreasonable.

[13] The applicants submit that the Board erred in failing to even mention the Chairperson's "Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution" (the "Gender Guidelines"). The Board would have erred in determining that the persecution the applicant faced was the result of "clear predatory criminality" and not the result of her being a woman.

[14] I agree with the respondent that there is no indication that the explicit mention of the Gender Guidelines in the decision would have affected the applicants' claim. The Board found, reasonably, that an IFA exists for the applicants. There is no allegation of insensitivity on the part of the Board with regard to what Ms. Gomez Rosas went through. The Board recognized that the crimes in question were "abhorrent" and it fully believed the applicant's story. Nothing indicates that the Board failed to respect the Gender Guidelines. Rather, the determinative issue was the existence of a reasonable internal flight alternative.

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[15] For the above-mentioned reasons, having found that the Board's analysis of the IFA in Mexico DF was reasonable, the application for judicial review is dismissed.

[16] The applicants proposed the following question for certification:

> L'hypothèse selon laquelle le viol n'est pas un crime fondé sur le sexe et témoignant d'inégalités entre les sexes lorsqu'il est commis par un membre d'une organisation criminelle peut-elle être appliquée alors qu'elle témoigne d'une prise en compte de la qualité de l'agresseur et non de celle de la victime?

[17] I agree with counsel for the respondent that the proposed question does not meet the test set out in *Liyanagamage v. Minister of Citizenship and Immigration* (1994), 176 N.R. 4, wherein the Federal Court of Appeal found that, to be certified, the proposed question must transcend the interests of the parties and contemplate issues of broad significance or general application. The question must also be determinative of the case.

[18] In the case at bar, the question is not relevant, as the Board did not apply the hypothesis described in the question for certification proposed by the applicants, nor did it ever state or conclude that rape is not a gender-based crime when committed by a member of a criminal organization. Instead, it found that, based on the facts of the case, the applicants had not established that there is a nexus to a Convention ground.

[19] Furthermore, the question here is not determinative, as the Board rejected the applicants' claim because they had failed to rebut the presumption of state protection. It also found that an IFA was available to them. It is trite law that these findings are each determinative to an asylum claim, under both sections 96 and 97 of the Act.

[20] Accordingly, the proposed question is not certified.

JUDGMENT

The application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board determining that the applicants were neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1497-11
STYLE OF CAUSE:	Lilian ROSAS MALDONADO, Martha Andrea GOMEZ ROSAS v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
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REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
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APPEARANCES:

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