Federal Court  Cour fédérale

Date: 20120319

Docket: IMM-5751-11

Citation: 2012 FC 325

Ottawa, Ontario, March 19, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

LISSETH NOEMI HERNANDEZ CORNEJO
PABLO HERNANDEZ GARCIA
(A.K.A. HERNANDEZ GARCIA, PABLO)
MARIA JULIA CORNEJO DE HERNANDEZ
EDUARDO MORALES AYALA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated August 5, 2011, finding that the applicants were neither Convention (United Nations' *Convention Relating to the Status of Refugees*, [1969] Can TS No 6) refugees nor persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

[2] The Court informed the parties at the hearing that the application was granted, with reasons to follow. The Board's decision in this case was indefensible when assessed against the legal principles governing judicial review. The arguments advanced in its support walked a thin line between those that could be made and those that should never be made. Four grounds of review were advanced, any one of which would be sufficient to set the decision aside.

Facts

[3] The principal applicant, Lisseth Noemi Hernandez Cornejo (applicant), is a citizen of El Salvador. Joined to her claim were claims by her husband, Eduardo Morales Ayala (the male applicant), and her parents, Pablo Hernandez Garcia and Maria Julia Cornejo De Hernandez.

[4] The applicant's claim was based on her fear of her ex-boyfriend, Hugo Chavez (Chavez). He was a police officer. The applicant started dating Chavez in high school but ended the relationship due to his abusive and controlling treatment. The applicant subsequently began her relationship with Eduardo. One day the applicant and Eduardo encountered Chavez while he was on duty as a police officer. Chavez took Lisseth away and asked if she had forgotten their time together, while other officers surrounded Eduardo. Chavez assaulted Eduardo and told him to leave the Lisseth, and told Lisseth and return to him (Chavez).

[5] Chavez continued to harass the couple. Chavez would appear at their workplaces, to the point that both the applicant and the male applicant lost jobs due to his harassment. On one

occasion, the male applicant was beaten severely and held at a police station. The applicant states that they were afraid to go to the police because they are corrupt and protect their fellow officers.

[6] Chavez also began to harass the applicant's parents and threatened them if they did not tell him where the applicant was. The applicant and her parents came to Canada in late 2009, and claimed protection on February 22, 2010. The male applicant followed later and made his claim on January 6, 2011.

Analysis

[7] As mentioned above, there were at least four reviewable errors in the Board's decision, rendering it unreasonable per *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[8] First, the Board erred by applying a largely irrelevant analysis of state protection to the claims. The better part of the Board's reasons relate to the problem of gang violence in El Salvador and the state's response to that problem. The respondent's assertion that Chavez could be reasonably characterized as a gang member (Hugo Chavez and his gang of police officers), because he often harassed the applicants in concert with his fellow police officers, is an argument unworthy of serious consideration. A claim based on threats and harassment by a jealous, abusive ex-boyfriend who is also a police officer bears absolutely no analogy, in fact or in law, to a claim based on gang violence.

[9] A review of the Board's reasons makes it clear that the references to gang violence have nothing to do with the applicants' claims. The majority of the reasons was cut and pasted from

another decision related to El Salvador. This kind of boilerplate approach to refugee decisions undermines the seriousness of the requirement to give reasons.

[10] Second, the Board failed to consider the availability of state protection from the perspective of the applicants' specific situation. As Justice Russel Zinn emphasized in *Torres v Canada (Minister of Citizenship and Immigration)*, 2010 FC 234 at para 37, state protection cannot be assessed in a vacuum and the Board must consider the nature of the persecution and the profile of the persecutor.

[11] In this case, the female applicant was harassed and threatened by Chavez in an effort to coerce the her to resume their relationship, and Eduardo was intimidated to dissuade him from continuing in his relationship with the female applicant. Chavez, the central agent of persecution, was the ex-boyfriend of the applicant and a police officer. The Board's consideration of the evidence of state protection makes no mention of the state's ability to protect people in these circumstances; rather, it focuses on El Salvador's "Mano Dura" campaign to combat the relationship between drugs and crime.

[12] The respondent submits that the Board did not need to consider the availability of state protection for victims of gender-based violence because there was no evidence that the police failed to protect the applicant because she was a woman, and furthermore, because two of the victims of persecution are men. This argument was not, as a matter of law or common sense, open to the Attorney General.

[13] A man's relentless pursuit of his ex-girlfriend does not cease to be gender-based persecution simply because that man also harasses her male relatives in an effort to get her back. Furthermore, the fact that the police did not tell the applicant they were ignoring her complaint because she was a woman is hardly fatal; there was evidence before the Board that the police did ignore her complaints and there was documentary evidence on the general police failure to respond to gender-based persecution.

[14] The third error lies in the Board's treatment of the applicants' attempts to seek state protection. The Board found that their delay in going to the police undermined their claim of subjective fear. However, this analysis again failed to take into account that the persecutor is a police officer. The Board appeared to accept, for example, that on one occasion the male applicant was arrested, beaten and detained without cause by Chavez and his fellow officers yet, the Board finds it unreasonable for the applicants to delay between their attempts to file police reports, of which they filed four.

[15] As the applicants submit, the Board could only rely on a delay or failure to seek protection if such protection might reasonably have been forthcoming: *Canada (Attorney General) v Ward*, [1993] SCJ No 74 at para 49. The applicants explained that they delayed because they knew the police protect their own, nothing would happen to Chavez as a result, and they were afraid of the police (understandably so, since the agents of persecution were themselves police officers). Without a consideration of these circumstances the Board's subjective fear findings are unreasonable.

[16] Finally, the Board engaged in speculation to explain away the failure of the police to respond to the applicants' complaints. The Board states that the police may not have taken the applicant's denunciation seriously because it was the first one filed against Chavez. The Board similarly hypothesized that the police may have had some good reason not to take seriously the complaint about Chavez and other officers detaining and beating the male applicant. These statements amount to conjecture, which "is of no legal value, for its essence is that it is a mere guess": *Jones v Great Western Railway Co.* (1930), 47 TLR 39 at 45 (HL), cited in *Canada (Minister of Employment and Immigration) v Satiacum*, [1989] FCJ No 505 (CA). Contrary to the respondent's submission, this speculation was clearly relied upon to discount the evidence that the police failed to protect the applicants even after they filed denunciations.

[17] Thus, for all these reasons, the application is granted, the Board's decision is set aside, and the matter is referred back for re-determination by a different panel.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is referred back to the Immigration Refugee Board for reconsideration by a different panel.

No question for certification has been proposed and the Court finds that none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5751-11
STYLE OF CAUSE:	LISSETH NOEMI HERNANDEZ CORNEJO et al v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto
DATE OF HEARING:	February 29, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
DATED:	March 19, 2012

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