Federal Court  Cour fédérale

Date: 20121210

Docket: IMM-3376-12

Citation: 2012 FC 1444

Ottawa, Ontario, December 10, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

DEYCILIA SILVA LOPEZ
FRIDA AYLIN MARTINEZ SILVA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The principal claimant, Ms. Deycilia Silva Lopez [applicant] and her minor daughter, Frida Aylin Martinez Silva, seek judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board [Board] determining that they are neither Convention refugees nor persons in need of protection.

[2] The applicants are citizens of Mexico who arrived in Canada in July 2009 and submitted their claim for refugee protection shortly thereafter. The claim is based on the principal claimant's

fear of persecution at the hands of her ex-husband, Mr. Armando Martinez Padilla, with whom she had a violent and abusive relationship.

[3] After the birth of the minor applicant, the applicant noticed that her husband was using illicit drugs. Late in 2001, he began physically abusing the applicant. The applicant recounts that her ex-husband brought drugs and weapons into their home, and was involved in other criminal activity. He was imprisoned for car theft in 2004, and his friends forced the applicant to visit him conjugally and to bring him various items in prison. The applicant believed that his friends had gang connections and suspected that they bribed officials to arrange for his early release. The applicant apparently attempted to flee from her husband on several occasions prior to coming to Canada, including to the United States in 2005; to Sonora, Mexico, a roughly 38-hour car ride from her home town, in 2007; and to Tijuana, Mexico, roughly 8 hours away by car, in 2008. Each time, Mr. Padilla's friends purportedly threatened the applicant, with the goal of having her return to him in Mexico City. The final time the applicant returned to Mexico City – from Tijuana – was to respond to a petition for divorce filed by Mr. Padilla. After deficiencies in the petition were cured, the couple was divorced on March 24, 2009. Mr. Padilla retained access rights with respect to the couple's daughter, though he purportedly did not exercise them.

[4] Since the applicant brought the minor applicant to Canada without the knowledge or consent of Mr. Padilla, the hearing before the Board was adjourned to give the Minister an opportunity to participate. The Minister determined that no missing child report had been filed with Interpol and that, as such, Canada was not in contravention of its Hague Convention obligations. The claim was

eventually dismissed by the Board because there is adequate state protection, while the applicant also lacks subjective fear.

[5] First, the Board concluded that the applicant had not rebutted the presumption of state protection because she had not taken all reasonable steps in the circumstances to avail herself of state protection. The Board further found that the evidence proffered in support of the applicant's sole attempt to seek such protection was not credible. That said, the Board identified contradictions between the applicant's testimony and a letter from the Attorney General's office summoning her to a hearing before a unit specializing in domestic violence, and determined that the applicant only once disclosed her history of domestic violence to a state official – the judge hearing her divorce petition. The Board concluded that the divorce judge had referred her to the domestic violence unit, and that the Attorney General's letter demonstrated immediate action on the part of the Mexican officials, who gave her access both to a social worker and a hearing before a judge whose specialty included domestic violence. The Board thus concluded that the applicant failed to provide any persuasive evidence that the Mexican police, through the Attorney General or the judicial system, were unwilling to protect her and her daughter.

[6] Second, the Board drew an adverse inference with regard to the applicant's subjective fear based on her failure to claim refugee status in the United States and her subsequent re-availment to Mexico, where she returned to live in the same house as her then-husband. The applicant testified that she went to the United States with the "intention to stay," but returned to Mexico after she received threatening phone calls from her ex-husband's friends on local numbers. She recounted that she could not go to the police because she was afraid that she would be deported. The Board

was not satisfied with the applicant's account that she did not make any inquiries as to how to acquire status in the United States, determining that this, along with her cognizance of the risk to which she was subjecting herself and her daughter in returning to Mexico, were inconsistent with a subjective fear of persecution at the hands of her ex-husband.

[7] While they have not necessarily been pleaded by her counsel in the following order, the applicant's contentions in this application are four-fold: first, the Board erred in its consideration of the applicant's subjective fear; second, the member was not sensitive to the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution, issued by the Chairperson of the Board [*Gender Guidelines*]; third, the Board made an erroneous finding of fact with respect to the purported referral by the applicant's divorce judge to a "domestic violence unit"; fourth, the Board erred in failing to consider both the applicant's specific circumstances and the effectiveness of the measures taken in Mexico to protect women who are abused by men in its state protection analysis.

[8] The present application must fail as I find, on the whole, the impugned decision reasonable, and the ultimate conclusion of the Board an acceptable and defensible outcome in light of the facts and the law.

[9] Firstly, I agree with the applicant that the Board erred in determining that her re-availment indicated a lack of subjective fear. This Court has found that persecution subsequent to re-availment "does not preclude a person from making a claim for refugee status without being faced with the re-availment issue" (*Gurusamy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 990 at para 40, [2011] FCJ No 1217; *Prapharan v Canada (Minister of Citizenship and Immigration)*,

2001 FCT 272 at para 17, [2001] FCJ No 481), and there is no dispute that the applicant was not subject to further violence between her return to Mexico from the United States in 2005 and her arrival in Canada in 2009. However, this issue was not determinative of the Board's decision, and this error alone is insufficient to return the decision for re-determination.

[10] Secondly, I am also satisfied that the Board was adequately alert to the *Gender Guidelines* in coming to its decision. The Board made several comments throughout the hearing that demonstrated its sensitivity to the particular issues faced by the victims of domestic abuse, including those faced by the applicant. The Board accepted the applicant's horrific allegations of violence as true, and did not question her on this sensitive and painful topic at the hearing. The fact that the *Gender Guidelines* are not explicitly mentioned throughout the Board's reasons is not sufficient to overturn its decision on the circumstances of this case. The decision of the Board must be read as a whole and the comments made by the Board in the paragraphs indicated by the applicant's counsel are either cited out of context or not demonstrative of any marked insensitivity of the member to the *Gender Guidelines*.

[11] Thirdly, I am unable to accept the applicant's argument with respect to the Board's purported error of fact. The Board's findings of fact are subject to a high level of deference because such questions fall squarely within its specialized expertise, and the record before the Board supports its interpretation of the summoning letter from the Attorney General's office. The applicant's testimony on this point was not particularly clear. More importantly, however, the Board was concerned about the contradiction the letter from the Attorney General's office presented to her earlier statement that she had approached no state official for assistance. Whether the divorce judge

referred her to the domestic violence unit or she approached it of her own accord, this contradiction remains, and speaks to the Board's credibility finding. Again, the decision of the Board must be read as a whole and it cannot be said that the finding made by the Board is not a defensible one in light of the evidence that was before the Board at the hearing.

[12] Fourthly, the applicant bears the onus of rebutting the presumption of state protection with "clear and convincing evidence" (*Canada (Attorney General) v Ward*, [1993] SCJ No 74 at para 50). The primary issue for the Board was that, despite her ex-husband's connections, the applicant failed to take reasonable steps to access the protective services of her state. This Court has already held that an applicant's subjective view of the adequacy of state protection does not constitute "'direct, relevant and compelling evidence' of the inadequacy of state protection" (see *Martinez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1050 at para 7, [2005] FCJ No 1297). While recognizing examples of police failure in Mexico, the Board found that in the applicant's case, she got an immediate response from the Attorney General's office after disclosing her history of domestic violence. Moreover, after analysing the totality of the evidence, the Board notes: "[w]hile there are some inconsistencies among sources, the preponderance of the objective evidence regarding current country conditions suggest that, although not perfect, there is effective and adequate state protection in Mexico and that Mexico is making serious efforts to address the problem of domestic violence and that police are both willing and able to protect such victims". Thus, I find that the Board's conclusion in respect of state protection is reasonable when the decision is considered as a whole.

[13] For these reasons, the present application shall be dismissed. No question of general importance has been proposed for certification and none shall be certified by the Court.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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