

Federal Court



Cour fédérale

Date: 20130423

Docket: IMM-4181-12

Citation: 2013 FC 416

Ottawa, Ontario, April 23, 2013

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

EDITH GONZALEZ GARCIA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] Edith Gonzalez Garcia [the Applicant] seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board], dated April 4, 2012, wherein the Board determined that the Applicant is neither a Convention refugee nor a person in need of protection [the Decision].

[2] For the following reasons, the application will be dismissed.

The Facts

[3] The Applicant's allegations arise out of an abusive relationship and a subsequent custody dispute. As a citizen of Mexico, she fears persecution by a man named Martin who is her former partner of ten years and the father of her first child.

[4] During her life with Martin, the Applicant was the victim of long term domestic abuse which included repeated rape, physical assault resulting in broken bones, social isolation and threats by Martin to hire a "hit man" to kill her. The evidence indicated that, together with their son Leonardo, the Applicant tried to leave Martin on numerous occasions. However, he always found them. Each time he would threaten to take Leonardo away from her unless she returned home. Martin followed through on these threats when the Applicant left him in 2008. He found her and took the boy from school without her knowledge. The Applicant had no choice but to return to Mexico City where Martin resided. However, on her return the Applicant discovered that Martin had decided to secure sole custody of the boy. With no legal counsel or guidance of any kind, the Applicant was intimidated and pressured by Martin into signing custody papers.

[5] Shortly thereafter, the Applicant went to a lawyer to inquire about fighting for Leonardo but quickly realized that she did not have the financial resources to do so. She then began to plan to come to Canada to work and make enough money to return to Mexico and hire a lawyer to seek custody. The Applicant also alleges that at about this time men in a black SUV tried to abduct her [the Attempted Abduction]. She claims that when she realized that Martin had hired men to get rid of her for good, she decided to leave Mexico immediately.

[6] The Applicant arrived in Canada on September 18, 2008. She gave birth to a second son in Canada on June 25, 2010 and made her refugee claim on May 6, 2011.

The Decision

[7] The Board did not believe that the Attempted Abduction had occurred because the Applicant provided four different accounts of this event and was unable to explain the inconsistencies in her evidence.

[8] The Board was also troubled by the lengthy delay between the Applicant's arrival in Canada and her refugee claim. The Board found it problematic that the Applicant had not investigated ways in which to stay in Canada legally if she genuinely feared that Martin would kill her in Mexico. According to the evidence, she did not start looking into her options until well after the birth of her second son. The Applicant explained at the hearing that her difficult pregnancy prevented her from acting diligently, but the Board considered that it took the Applicant close to 11 months after the birth of her second son to make her claim. The Board concluded that her explanations for the delay were not credible.

[9] The Board also questioned the well-founded nature of the Applicant's subjective fear. The Board did not believe that Martin would now pose a danger to her in Mexico. This finding was made because the Board did not believe that the Applicant would seek custody of her son and, that being the case, Martin would not be a threat. First, the Board considered the Applicant's behaviour and found that she had "knowingly" signed forms giving up custody of her son and, before she left

Mexico, “voluntarily” provided Martin with the documentation he needed to register Leonardo in school. Furthermore, despite testifying that she came to Canada planning to eventually hire a lawyer to fight for custody of her son, the Board noted that there was no evidence that she had taken any steps towards this end.

Discussion

[10] The Applicant’s principal argument is that, although the Board stated that it had considered the Chairperson’s *Guidelines regarding Women Refugee Claimants Fearing Gender-Related Persecution* [the Guidelines], it failed to actually apply the Guidelines. The Applicant submits that the Guidelines require the Board to be sensitive to issues of gender in order to make supportable findings about events that otherwise might appear to lack credibility or plausibility. According to the Applicant, the Board erred when it drew conclusions about the Applicant’s behaviour without taking into account the abuse she had suffered.

[11] On the other hand, the Respondent submits that the Guidelines cannot shield the Applicant from having her evidence tested nor do they entitle her to have her evidence accepted without inquiry. The Respondent argues that it was entirely open to the Board to test the Applicant’s evidence, to note inconsistencies and draw conclusions from these inconsistencies (*Correa Juarez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 890 at para 17-20; *Karanja v Canada (Minister of Citizenship and Immigration)*, 2006 FC 574).

[12] Notwithstanding this submission, I am not persuaded that the Board properly applied the Guidelines when it addressed the Applicant’s decision to sign over custody of Leonardo. The Board

accepted that she was a victim of long-term domestic abuse yet it showed no sensitivity to this history when it characterized the Applicant's actions as "knowing" and "voluntary" in relation to her son's custody. Another example of the Board's failure to actually apply the Guidelines is evident at paragraph 9 of the Decision, where the Board found that "she signed the custodial documents after it was pointed out to her that Martin had the financial means and stability to care for the child while she did not." Such a characterization of the evidence suggests that the Applicant's actions were a matter of rational calculation rather than the result of pressure the Applicant felt at the hands of her long-time abuser. In my view, the Board did not properly apply the Guidelines to this evidence and therefore failed to fully appreciate the Applicant's circumstances.

[13] However, the Applicant's claim does not depend on her decision to sign custody of Leonardo over to Martin. The Board's Decision indicates that four facts, which have nothing to do with the Board's problematic assessment of the Applicant's actions in Mexico, proved determinative. I will describe them in turn.

[14] First, the Applicant's credibility was impugned on one aspect of her testimony because she gave four versions of the Attempted Abduction and could not reconcile the inconsistencies. I accept that it was reasonable for the Board to expect consistent evidence in relation to such a significant event.

[15] Second, the Board considered the fact that the Applicant waited almost two and a half years before seeking refugee status in Canada. The Board acknowledged her explanations for this lengthy

delay, including her difficult second pregnancy, but it found these explanations inadequate. There are circumstances in which the delay can be so lengthy that it becomes a determinative matter (*Hernandez Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324 at para 16). The Applicant testified at the hearing that she knew that if caught by Canadian authorities, she would be returned to Mexico, yet she did not take any steps to stay in Canada. In my view, it was entirely reasonable for the Board to question the genuineness of the Applicant's fear of her former partner on the basis of this extensive delay.

[16] Third, the Board considered the Applicant's failure to take any steps in Canada to implement her plan to save money and hire a lawyer in Mexico to regain custody of Leonardo.

[17] Finally, the Board noted that Martin has allowed Leonardo to stay in touch with the Applicant's mother in Mexico and that Martin had made no attempt to contact the Applicant in order to threaten or harm her since she left Mexico.

[18] On the basis of these facts, the Board concluded that there was no credible basis for the Applicant's fear. In my view, this conclusion was reasonable and it was not tainted by the Board's failure to apply the Guidelines. Accordingly, the Application will be dismissed.

[19] No question was posed for certification pursuant to section 74(d) of the Act.

ORDER

THIS COURT ORDERS that

The application for judicial review of the Decision is hereby dismissed.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4181-12

STYLE OF CAUSE: EDITH GONZALEZ GARCIA v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 12, 2013

**REASONS FOR ORDER
AND ORDER:** SIMPSON J.

DATED: April 23, 2013

APPEARANCES:

Ms. Patricia Wells FOR THE APPLICANT

Ms. Nicole Padurau FOR THE RESPONDENT

SOLICITORS OF RECORD:

Patricia Wells FOR THE APPLICANT
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario