Federal Court  Cour fédérale

**Date: 20110420**

**Docket: IMM-4907-10**

**Citation: 2011 FC 326**

**Ottawa, Ontario, April 20, 2011**

**PRESENT: The Honourable Mr. Justice Rennie**

**BETWEEN:**

**JUANA LOURDES VALENCIA PENA, ERIKA VANESSA FIORENTTINI VALENCIA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## AMENDED REASONS FOR ORDER AND ORDER

[1] The principal applicant is a citizen of Peru who fled to the United States and then to Canada where she and her daughter, Erika Vanessa Fiorenttini Valencia, the minor applicant, claimed refugee protection. The claim was considered by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) which, in a decision dated July 29, 2010 rejected the claim. It is this decision that is the subject of this application for judicial review. For the

reasons that follow, I am granting this application and remitting the matter to the Board for redetermination by a differently constituted panel.

[2] While the applicant raised numerous issues with respect to both the factual findings of, and legal analysis conducted by the Board, it is sufficient for the purposes of this decision to address two issues; the Board's rejection of the explanation tendered by the applicant for not making a claim while in the United States, and secondly, the legal test applied by the Board to assess the adequacy of state protection.

[3] The Board accepted that the applicant was abused by her former husband, but held that her failure to claim protection in the United States undermined her credibility. The applicant testified that she left the United States only because she was afraid of deportation to Peru as a result of increased activity by U.S. immigration officials. She testified that she considered herself safe while in the United States and hence felt no need to make a claim for protection.

[4] The failure to claim elsewhere is not, in and of itself, determinative. However, the Board must carefully consider any explanation provided by the applicant and give reasons for rejecting it. Given that the Board accepted that the applicant was abused, and that her testimony as to why she did not claim while in the U.S. was not challenged, the Board was under an obligation to give considered reasons for rejecting the explanation; *Owusu-Ansa v Canada (Minister of Employment and Immigration)* [1989] FCJ 442; *Bobic v Canada (Minister of Citizenship and Immigration)* 2004 FC 1488. In this case, the explanation before the Board was consistent with the existence of subjective fear, and its unilateral dismissal, was, without more, in error. The Board's rejection of

this explanation informed much of its approach to the balance of the applicant's testimony and cannot be considered immaterial to the outcome.

[5] The Board also erred in its approach to state protection. The Board accepted that on three occasions the applicant sought the protection of the police. It also had before it police reports which corroborated the applicant's testimony. However, the Board asked for production of a copy of a guarantee (an order of a Peruvian state agency which might be considered to be analogous to a peace bond) issued against her former partner. The applicant explained her efforts to obtain a copy of the guarantee and as she could not produce it, including the fact that the document itself was of temporal duration. The inferences drawn from her inability to produce the document, namely that the applicant had not sought state protection with the diligence required, and hence that she had not made all reasonable efforts to seek state protection, were, in light of the whole of the applicant's testimony, unreasonable.

[6] Finally, the Board erred in its determination as to the nature of the state protection that had to be established. The Board found that Peru was making serious efforts to address the issue of domestic violence and held that to be the standard in assessing the availability of state protection. The standard is of course, as expressed by the Supreme Court of Canada (SCC), in *Canada (Attorney General) v Ward* [1993] 2 SCR 689, and as further elucidated and applied by this Court in decisions such as *Lopez v Canada (Citizenship and Immigration)* 2010 FC 1176.

[7] Given my finding that the Board applied the wrong legal test to the issue of state protection, it is not strictly necessary for me to address its findings with respect to state protection. However, it

is my view that the evidence before the Board as to the adequacy and effectiveness of state protection against domestic abuse and violence did not support the conclusions reached by the Board. Indeed, the applicant's evidence and the documentary evidence all pointed in the opposite direction.

[8] The application for judicial review is granted and the decision of the Board dated July 29, 2010 is set aside. The matter is remitted to the Board for determination by a differently constituted panel.

[9] No question arises for certification.

## ORDER

**THIS COURT ORDERS that**:

1. The application for judicial review is granted and the decision of the Board dated July 29, 2010 is set aside. The matter is remitted to the Board for determination by a differently constituted panel.

2. No question arises for certification.

"Donald J. Rennie"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-4907-10 |
| **STYLE OF CAUSE:** | JUANA LOURDES VALENCIA PENA, ERIKA VANESSA FIORENTTINI VALENCIA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MARCH 15, 2011 |
| **AMENDED REASONS FOR ORDER AND ORDER:** | RENNIE J. |
| **DATED:** | APRIL 20, 2011 |

**APPEARANCES:**

| | |
|---|---|
| Richard M. Addinall | FOR THE APPLICANTS |
| Neal Samson | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Richard M. Addinall<br>Barrister and Solicitor<br>Toronto, Ontario | FOR THE APPLICANTS |
| Myles J. Kirvan<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |