Date: 20080225

Docket: IMM-752-07

Citation: 2008 FC 247

Ottawa, Ontario, February 25, 2008

PRESENT: The Honourable Orville Frenette

BETWEEN:

GRACIELA ORTIZ SANTIAGO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated December 13, 2006, in which the Board found that the applicant is neither a Convention refugee nor a person in need of protection.

I. Issues

[2] The applicant raises three issues in the present application:

A. Did the Board err in its application of the law relating to state protection?

B. Did the Board err by failing to consider the particular circumstances of the applicant in the assessment of whether an internal flight alternative (IFA) was available to the applicant?

C. Did the Board err in such a way as to deny the applicant's right to natural justice by failing to address the central argument relating to the applicant's psychological state?

II. Factual background

[3] The applicant is a citizen of Mexico, who was 33 years old at the time of the Board hearing. She is a bank professional with a good education. She claims that she was abused by her mother's common-law partner, Mr. Bartolo San Juan. The applicant lived with her mother and sister in Mexico City when Mr. San Juan moved into their home and her problems with him began when she opposed any transfer of family property to him. She was threatened and harassed by him, and finally on March 30, 2004, he raped her or attempted to, depending on what version of the PIF is believed.

[4] The applicant reported the rape at the police station, and was informed that she required witnesses and medical evidence in order to press charges. According to her account, the police contacted Mr. San Juan to alert him to the allegations. As a result of the incident, the applicant moved out of the family home and went to live with her aunt, elsewhere in Mexico City.

[5] She did not seek medical attention or testing and did not report the names of potential witnesses. She did not return to the police afterwards.

[6] The applicant continued to receive threats and continued to be harassed by Mr. San Juan. She therefore decided to take a trip to Canada on May 1, 2004, in the hope that the tension would dissipate in her absence. Meanwhile, her mother and Mr. San Juan moved from Mexico City to Oaxaca, where he and his family are involved in illegal activity.

[7] The applicant testified at the Board hearing that Mr. San Juan is involved with a group involved in smuggling people across the boarder between Mexico and the United States. She stated that she learned through her sister that, in her absence, Mr. San Juan distributed a picture of her to other members of the smuggling group, with the intention of having her killed.

[8] The applicant claimed refugee protection on December 1, 2004, as a result of this new information.

III. Decision under review

[9] The Board found that there were inconsistencies in the applicant's account, but determined that most, if not all, were not central to the claim, and she was therefore given the benefit of the doubt with regard to credibility. In her PIF, the applicant described the sexual assault as an attempted rape, but she amended her PIF to describe the incident as "a complete rape" prior to the hearing.

[10] The claim was rejected by the Board for two reasons. First the Board determined that the applicant did not have a well founded fear because state protection was available to her for the following reasons:

A. While the documentary evidence acknowledges crime, corruption and widespread domestic abuse in Mexico, the Board found that the government has taken steps to address the problem. There are legislative, enforcements and correctional institutions in the various levels of government to protect victims of domestic abuse. The Board relied on the existence of criminal and civil laws dealing with family-related matters, as well as several public and private programs and institutions in place to assist women and victims of violence.

B. Mexico is a functioning democracy, and therefore the presumption of state protection applies. Mexico has national and local police forces, and an independent judiciary.

C. The applicant did not exhaust all reasonable courses of action available to her. Local failures to provide effective policing do not amount to an absence of state protection. The Board did not find it reasonable for the applicant to report the abuse to the police only once, given her level of education and her professional standing. The Board noted that she did not seek medical attention, or secure witnesses in order to substantiate her rape. She also failed to seek legal advice.

[11] Second the Board concluded that the applicant had an IFA in Mexico. The Board stated that the Gender Guidelines as well as the psychological report submitted by the applicant were considered. It was found that there was no serious possibility of the applicant being persecuted in another location in Mexico, and that it was not unreasonable in the circumstances for the claimant to seek refuge within Mexico. The Board offered the following reasons in support of this conclusion:

A. The Board found that it would not be unreasonable for the applicant to live in a large city such as Mexico City if she avoided contact with her family, and thus Mr. San Juan.

B. The Board found it would not be unduly harsh for the claimant to move to another part of the country. Given that the claimed is a well educated professional she could find employment in any major city.

C. The Board noted that Mr. San Juan no longer lives in Mexico City.

[12] For the above mentioned reasons, the Board concluded that there was no more than a mere possibility that the applicant would be persecuted if she returned to Mexico.

IV. Analysis

A. Did the Board err in its application of the law relating to state protection?

[13] The Board's determination with regard to the availability of state protection is reviewable on the basis of patent unreasonableness. It is entitled to great deference and will only be set aside if patently unreasonable, *Quijano v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1706. Once these findings are made, they are assessed as a question of mixed fact and law, i.e. a

standard of reasonableness *simpliciter*, see *Chavez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193 at para 11; *Monte Rey Nunez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1661.

[14] The applicant submits that the Board erred in its assessment of state protection by failing to mention or address negative evidence pointing to the lack of state protection for abused women in Mexico. The Board listed various measures in place to assist women and victims of violence; however, the only acknowledgement of contradictory evidence is as follows:

> Documentary evidence acknowledges crime, corruption and a prevalence of domestic abuse in Mexico, but it also states that the government is taking steps to address these issues. As Mexico is a democracy, the presumption of state protection applies.3
>
> …
>
> The panel recognizes that domestic abuse of women is a serious problem in Mexico. The documentary evidence, however, shows that Mexico is making serious efforts to address this problem.

[15] The applicant argues that the Board merely made a blanket statement without specifically addressing the evidence that suggests that protection for abused women in Mexico can be less than forthcoming. In particular, the applicant submits that evidence in the National Documentation Package indicates that the mechanisms in place to assist women seeking protection are not effective. The applicant submits that by ignoring an article from Human Rights Watch in 2006, the Board's error is twofold: the Board failed to give reasons as to why the evidence that state protection is available to the applicant was preferred to contradictory sources, and the Board failed to engage in an analysis of the effectiveness of the mechanisms of state protection available abused women.

[16] The particular article from Human Rights Watch (see Application Record pp. 143-144) states the following:

> At the Core of this issue is a generalized failure of the Mexican justice system to provide a solution for rampant domestic and sexual violence, including incest and marital rape. Many of the girls and women Human Rights Watch Interviewed had not even attempted to report the abuse they endured, seeing the impunity for rape in the justice system…
>
> …
>
> But even the existing inadequate protections were not properly implemented. Police, public prosecutors, and health officials treat many rape victims dismissively and disrespectfully, regularly accusing girls and women of fabricating rape. Specialized public prosecutor's offices on sexual violence, where they exist, are often in practice the only place to report sexual violence, further impeding the access to justice for rape victims in more remote locations. Many victims of violence fear retribution from the perpetrator, especially if he is a family member. As a consequence, the vast majority of rape victims do not file a report at all…

[17] This Court has established that the Board has an obligation to explain why it certain documentary evidence was preferred to contrary sources. In *Jean v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1768, 2006 FC 1414, Layden-Stevenson J. reaffirmed this principle:

> [11] The documentation also contained negative comments. The RPD did not refer to, or acknowledge, the statements of the representative of the crisis centre. Those accounts were to the effect that "most complaints of domestic violence received by the police were not taken very seriously and were placed on the 'back burner.' The prevailing attitudes of the police and the population in general are that the man of the household is the chief and that he can impose discipline in the home by violent means." There were also declarations that the "entire justice system needs to be modernized to

> reflect the seriousness of domestic violence". Additionally, the documentation contains an admonition that, despite years of promises from the government, there are no legal aid clinics in the country.
>
> [12] None of the negative information regarding the availability of state protection was addressed. While it is clearly open to the RPD to ultimately prefer the statements of one spokesperson over those of another, in so doing it must first deal with both and provide its reasons for choosing one position over the other. It is not open to it to adopt only the positive statements and totally disregard the negative statements without providing an explanation as to why it has done so. It is settled law that evidence that directly contradicts the findings of the board must be acknowledged: *Ragunathan v. Canada (Minister of Employment and Immigration)* (1993), 154 N.R. 229 (F.C.A.); *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 (T.D.).
>
> [Emphasis added]

[18] This principle was most recently reaffirmed by Simpson J. in *Cejudo Lopez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1341 at paragraph 24, released December 21, 2007:

> [24] Moreover, the Board failed to address contradictory evidence that was critical to the reasonableness of the applicant's failure to seek state protection. In *Simpson v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 970, [2006] F.C.J. No. 1224 (QL), at para. 44, Russell J. asserted that:
>
> While it is true that there is a presumption that the Board considered all the evidence, and there is no need to mention all the documentary evidence that was before it, where there is important material evidence on the record that contradicts the factual finding of the Board, [it] must provide reasons why the contradictory evidence was not considered relevant or trustworthy […]
>
> Thus, a Court may infer that an erroneous finding of fact was made from a failure of an administrative board to "mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency." *(Cepeda-*

> *Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL), at para. 15).
>
> [25] As Layden-Stevenson J. indicated in *Castillo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 56, [2004] F.C.J. No. 43 (QL), at para. 9:
>
> > The question of effective state protection was identified as the central issue. Where evidence that relates to a central issue is submitted, the burden of explanation increases for the board when it assigns little or no weight to that evidence or when it prefers specific documentary evidence over other documentary evidence.
>
> Thus, <u>in the context of the central issue of state protection, the Board is required to explain its preference for certain documentary evidence over other relevant sources.</u>
>
> [Emphasis added]

[19] *Lopez* also states that it is the effectiveness of the mechanisms of state protection must be evaluated:

> [19] Further, country conditions must also be taken into account in the objective analysis. While an analysis of country conditions includes determining the existence of mechanisms of state protection, it also involves an analysis of the effectiveness of those mechanisms.
>
> [20] While I recognize that in the present case, the Board did consider the existence of state protection in Mexico, it failed to consider the effectiveness of that protection. My finding is bolstered by the fact that the Board ignored contradictory evidence in this regard.

[20] The Respondent argues that the state protection findings of the Board were reasonable. The onus is on the Applicant to rebut the presumption of state protection in Mexico, a democracy of the middle range.

[21] State protection does not have to be perfect. Even in countries where adequate state protection exists, authorities cannot guarantee protection of all of citizens at all times. The respondent submits that the Board was entitled to find that the Applicant had not rebutted the presumption of state protection. See *Kadenko v. Canada (Minister of Citizenship and Immigration)*, 143 D.L.R. (4th) 532 (F.C.A.).

[22] This principle is particularly crucial in a case such as this one where the alleged persecution is not by the authorities or heads of the state but by an individual.

[23] Furthermore, in this case, the Applicant only sought assistance from the police on one occasion. She did not follow their advice by obtaining medical testing or providing names of witnesses. She did not follow-up on her complaint to the police. Without names of witnesses or medical evidence, the ability of the police to effectively investigate the complaint is limited.

[24] The determination of state protection must be based upon the evidence. In this case, the Board analyzed the documentation, which illustrated the serious problems of domestic abuse of women, and family violence, as well as the efforts of Mexico to address these problems.

[25] The Board specifically referred to the “Country Reports on Human Rights practices for 2005: Mexico, of the United States Department of State, 8 March, 2006. The Board describes these findings and the action taken by Mexican authorities, over 2 pages (pages 6 and 7) of its decision.

[26] The Board is presumed to have considered all of the evidence, and is not obliged to refer to every detail of such evidence unless, of course, the contrary is shown.

> *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.) (QL);
> *Zhou v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1087 (QL);
> *Hassan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946 (F.C.A.) (QL).

[27] In this case, based upon the evidence before it, I believe the Board was entitled to find that the Applicant had not rebutted the presumption of state protection.

Re: Carrillo v. Canada (Minister of Citizenship and Immigration), 2007 FC 320

[28] The parties' counsels have referred to the recent *Carrillo* case, supra, where Justice O'Reilly granted a judicial review from a decision of the Refugee Protection Division Board which denied the applicant's claim because she had not rebutted the presumption of state protection.

[29] The applicant, Ms. Carrillo, a Mexican citizen claimed that she was afraid of being murdered by her former common-law spouse in Mexico. Her complaint to the Mexican police made matters worse. Her former common-law spouse was the brother of a police officer.

[30] Justice O'Reilly discussed the presumption of state protection that had to be rebutted and the applicable cases, particularly in *Canada (Attorney General) v. Ward*, [1993] S.C.J. No. 74 (QL), in which the "the presumption that Justice La Forest had in mind was clearly a legal presumption, not a factual one".

[31] In Justice O'Reilly's view "Justice La Forest contemplated a burden merely to adduce reliable evidence on the point….in other words, merely an evidentiary burden." (Para 17) (this decision is under appeal).

[32] The applicant relied heavily on the *Lopez* decision which is very well substantiated in the matter of effective state protection. It is perhaps necessary to repeat that each case must be decided upon its particular facts.

[33] In the case of Mexico, on the matter of state protection and effective state protection, three recent court decisions have granted judicial reviews of negative rulings of the Refugee Protection Division; here are a few:

> *Soberanis v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 985;
> *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1211;
> *Lopez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1341.

[34] On the other hand, many decisions have dismissed judicial review applications because Mexico has a functioning system of state protection, even if imperfect.

> *Santos v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 793;
> *Lazcano c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2007 CF 1242 ;
> *Baldomino c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2007 CF 1270.

B. Did the Board err in it's assessment of the availability of an IFA?

[35] The standard of review applicable to a determination of whether an IFA exists is patent unreasonableness. (*Singh v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 100, 2007 FC 67 at paragraphs 8-9.) The issue of existence of IFA is namely a factual one, *Ramirez c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2007 CF 1191.

[36] The applicant submits that the Board failed to consider the evidence of Mr. San Juan's links to organized crime, and of his circles of influence around the northern border of Mexico, both of which would increase his chances of locating the applicant regardless of her location in Mexico. There was no evidence presented on this point except for the applicant's deposition.

[37] A review of the transcripts from the hearing before the Board indicates that Mr. San Juan's ties to organized crime were an important topic of discussion. However, counsel's submissions before the Board do not make a link between Mr. San Juan's ties to organized crime, and the applicant's inability to avail herself of an IFA. By raising this argument before the Court, the applicant is asking the Court to make factual determinations on the basis of arguments which were not before the Board. This does not amount to an error on the part of the Board.

[38] The applicant further submits that the Board made no mention of the applicant's psychological state in the context of the IFA. I do not accept this argument. While an extensive analysis of her psychological state was not performed, the Board clearly stated that the psychological report was considered. The Board also stated that it did not consider that it would be

unduly harsh to require the applicant to relocate. For these reasons I do not believe that the Board committed a reviewable error.

C. Did the Board deny the applicant's right to natural justice?

[39] A violation of natural justice is reviewed on a standard of correctness.

[40] The applicant submits that by failing to address a central argument, the Board violated the applicant's right to natural justice.

[41] The applicant submits that psychological harm may constitute persecution under section 96 of the Act, and cruel or unusual treatment under section 97. This argument has no basis in law. As stated by Russell J. in *Nadjat v. Canada (minister of Citizenship and Immigration)*, [2006] F.C.J. No. 478, 2006 FC 302 at paragraphs 60-61:

> This would mean that, under 97(1)(b), subjective fear could, even if groundless on an objective basis, constitute objective fear if the Applicant is so fearful of non-objective risks that his health is deteriorating.
>
> I do not believe this is the purpose of, or intent behind, section 97(1)(b). The Applicant's position is that the removal itself can trigger the application of 97(1)(b) irrespective of the objective risks that he faces in Iran. <u>In effect this would mean that the Applicant could qualify under section 97(1)(b) if he is at risk from himself and his own fears, no matter how lacking in objectivity those fears actually are. I do not believe that the scheme of the Act, the intention of section 97(1)(b), or the jurisprudence concerning the need for objective risk when considering section 97 allow for such a conclusion.</u> I believe the Officer handled the medical evidence appropriately and assessed the risk under section 97(1)(b) in accordance with the jurisprudence of this Court.

It has also been decided in *Nadjat* at paras 60-61, that risk of traumatisation is not sufficient to constitute an objective basis of risk.

[42] The Board performed the correctly analysed the applicant's claim under sections 96 and 97 of the Act. While it is preferable to address the submissions of the parties more thoroughly, even if they might not be legally sound, the Board did not make a reviewable error.

V. Conclusion

[43] For the above reasons, the application must be dismissed. The parties' counsels asked for time to produce questions for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. The parties' counsels have 7 days from the date of this order to submit appropriate questions for certification.

"Orville Frenette"

Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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