Date: 20081006

Docket: IMM-467-08

Citation: 2008 FC 1126

Ottawa, Ontario, October 6, 2008

PRESENT: The Honourable Mr. Justice Louis S. Tannenbaum

BETWEEN:

Norma FUENTES HERNANDEZ

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] I have before me an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated November 29, 2007, that the applicant was not a Convention refugee or a person in need of protection in accordance with sections 96 and 97 of the Act.

[2] The applicant is a citizen of Mexico. Her claim is based on the domestic violence she suffered during 39 years of marriage.

[3] In October 2006, the applicant obtained a divorce from her ex-husband. Nevertheless, she claims that her ex-husband is pursuing her and continues to threaten her. Allegedly, he threatened to kill her on five occasions and his threats intensified beginning in 1999.

[4] Despite these multiple threats and her ex-husband's alcoholism, the applicant never sought the protection of the authorities and never followed up on the written complaint that she lodged in 1998 with a court in trial division.

[5] Further, the applicant, an educated women working in education for many years, did not make any serious effort to relocate in another large city in Mexico, whether it be Mexico City, F.D., Monterrey, Guadalajara or Veracruz.

[6] The applicant alleges that she fears for her safety because she had received death threats from her ex-husband from whom she had no protection in a chauvinistic country like Mexico. The rights she asserted were put off and were not even mentioned when the applicant raised as grounds persecution from her ex-husband and her extreme stress caused by his harassment (applicant's memorandum, applicant's record at page 147).

[7] She claims that the Board forgot to focus its analysis on the substance of the matter, namely the fact that due to her state of stress she could not find peace unless she left the country. Accordingly, the applicant alleges that the fact that the Board did not decide the ground raised in support of her fear of persecution amounts to an error justifying the intervention of this Court.

[8] The respondent argues that the Board clearly set out in its reasons the very difficult domestic violence situation experienced by the applicant and that the Board never questioned the merits of her history of persecution. Therefore there cannot be an inference that the Board ignored the applicant's fear of persecution.

[9] Further, insofar as the Board's decision is based on the existence of state protection and an internal flight alternative, the applicant had to establish that the Board erred on each of these aspects of its reasons to justify this Court's intervention, which was not at all done in this case.

[10] The Board determined that the applicant was not a "person in need of protection" and that she had an internal flight alternative. Accordingly, it dismissed her refugee claim.

[11] The Board noted that despite the fact the applicant's story could be true, it could not accept her refugee claim because she did not rebut the presumption that her country was able to protect her.

[12] Indeed, the Board determined that, considering the applicant's education and her experience in the field of teaching, the applicant could relocate in another of the four large Mexican cities and that such a move would be reasonable.

[13] The issues are as follows:

1. Did the Board err in finding that state protection was available?

2. Did the Board err in determining that there was an internal flight alternative?

[14] Mr. Justice Martineau points out the appropriate standard for determining whether the presumption of state protection has been rebutted:

> **3** Prior to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (*Dunsmuir*), a finding of the Board regarding state protection was reviewable against a standard of reasonableness *simpliciter*: see *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, [2005] F.C.J. No. 232 (QL) and *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, at paragraph 38 (*Hinzman*). Taking into account the fact that the reasonableness *simpliciter* standard has been consolidated with the patently unreasonable standard into a single standard, but with a variable spectrum, I do not believe that the Court's review of the legality of a finding by the Board on state protection is really any different today; the Court's analysis is concerned essentially with the "existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir*, at paragraph 47).
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> (*Chagoya v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C. 721 at paragraph 3)

[15] In this case, I do not see why the Court should adopt a different standard.

[16] In regard to the issue of the internal flight alternative, Mr. Justice Montigny points out the following:

> **11** It is now trite law that the applicable standard of review for decisions regarding state protection is reasonableness *simpliciter* (see *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 F.C. 193).

12 With regard to internal flight alternative, it has been common practice to apply the standard of patent unreasonableness given the highly fact-driven nature of such decisions: see, for example, *Ali v. Canada (Minister of Citizenship and Immigration)*, 2001 F.C.T. 193; *Ezemba v. Canada (Minister of Citizenship and Immigration)*, 2005 F.C. 1023. However, the Supreme Court of Canada recently determined in *Dunsmuir v. New Brunswick*, 2008 S.C.C. 9 [*Dunsmuir*] that the two reasonableness standards should be merged into a single standard, given the problems that arise in trying to apply the two standards and the incongruity of parties being required to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear enough.

13 Does this mean that the application of a single standard of reasonableness invites greater judicial intervention? I do not think that this is the intended meaning and scope of the *Dunsmuir* judgment. On the contrary, Bastarache and LeBel JJ. emphasize the deference courts must show when lawmakers decide to entrust an administrative body with the responsibility of making certain decisions when enforcing its enabling legislation. Here is what they have to say about the matter:

> [48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-Southam formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Mossop*, at p. 596, per L'Heureux-Dubé J., dissenting). . . .
>
> [49] . . . In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the

> different roles of the courts and administrative bodies within the Canadian constitutional system.
>
> **14** What can be learnt from these considerations? It would seem that courts of law will have to continue to show a high degree of deference when there is more than one right answer to issues decided by administrative tribunals. This would be the case, for example, where a question is essentially one of fact or involves the discretion of the administrative body or policy it is tasked with enforcing (*Dunsmuir, supra*, paragraph 53). In such cases, courts must ask whether the decision under review is reasonable in terms of its "justification, transparency and intelligibility within the decision-making process" and in terms of "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir, supra*, paragraph 47).
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> (*Navarro v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C. 358 at paragraphs 11-14)

[17] Accordingly, the standard of review appropriate to the issue of internal flight alternative is that of reasonableness.

1. Did the Board err in finding that state protection was available?

[18] First, there is a presumption to the effect that the state is able to protect its citizens and it is the responsibility of the refugee claimants to reverse this presumption with clear and convincing evidence. First, in the absence of a complete breakdown of the state, there must be a presumption from the outset that the state is able to protect its nationals: (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (QL), at paragraph 50, *Canada (Minister of Employment and Immigration) v. Villafranca)*, [1992] F.C.J. No. 1189, at paragraph 7 (QL)). The protection offered by the state need not be perfect (*Villafranca, supra*, at paragraph 7) yet refugee claimants have the responsibility to exhaust all courses of action available in their country before seeking international protection

(*Kadenko v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1376 (QL), at paragraph 5).

[19] The applicant in her memorandum barely touches on the findings bearing on the existence of state protection.

[20] Yet, the applicant testified before the Board that she had received death threats from her ex-husband on five occasions and that the seriousness of these threats intensified in 1999. In an attempt to protect herself, the applicant allegedly lodged a written complaint on October 13, 1998, with a court in trial division. This complaint, according to the applicant, bore on her ex-husband's behaviour.

[21] The Board points out however that the applicant never followed up on the written complaint that she lodged in 1998. Further, she never addressed the police to request their protection.

[22] Mr. Justice Décary points out in *Kadenko v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1376 (QL), at paragraph 5:

> … The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her.

[23] The Board refers to the steps taken by the applicant in regard to the protection she was seeking:

> [The claimant] refers to the one written complaint to the authorities that she made on October 13, 1998. This is a report for first instance in which the claimant came to complain about her husband's behaviour. […]
>
> ... The claimant did not follow-up this procedure. When asked what she expected, she answered that she expected the authorities to arrest her ex-husband. She added "I do not know how these things are done. I made two phone calls, the last one being in 2003 not knowing to whom I spoke"
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> This same first tribunal referred to exhibit P-19. She did not ask who was speaking or what position they held, nor did she refer to her file number. She never went to ask for protection from the police. Asked if she asked for protection from any other government agencies, she said that she did not know how to do that. Subsequently, she was asked if she considered going to the police after having received a threat in 2001, her answer was: "I did think about it but I was terribly frightened that if I complained, he would carry on his threats". The claimant subsequently changed her last complaint from 2003 to 2004, but this would have been the last time she ever asked for any protection. Again, it was the same people that she called in 2001 who are the same people as in the first instance of judicial proceedings referred to in P-19. But again, she did not know or ask who she was speaking to.

[24] This Court pointed out that the applicant never filed a police report and did not follow up on the report she had filed in 1998 before a Mexican court in trial division before requesting international protection in Canada.

[25] In attempting to explain her reason for not going to the police, the applicant alleged before the Board that Mexico was corrupt.

[26] This Court must however point out:

> To rebut this presumption [that the State is capable of protecting the claimant], it would not be sufficient to allege that the police are corrupt or that a police officer did not follow up on a complaint. From this point of

> view, I, like many of my colleagues, am willing to admit that Mexico is able to protect its citizens even though this protection is far from perfect …
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> (*Espinosa v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1393 at paragraph 7, 153 A.C.W.S. (3d) 184)

[27] This Court is of the opinion that the applicant did not take the necessary steps to obtain the protection of the Mexican authorities and that she did not establish the objective reasonableness of this omission.

[28] As the applicant did not exhaust all of her recourse in Mexico before coming to Canada, she did not establish the lack of state protection and did not rebut the presumption that protection was available.

[29] Accordingly, the applicant did not raise any serious ground that would serve as a basis for the intervention of this Court.

2. Did the Board err in determining that there was an internal flight alternative?

[30] In addition to its finding regarding the existence of state protection in Mexico, the Board determined that the applicant could, if need be, avail herself of an internal flight alternative, *inter alia* in Mexico City, F.D., Monterrey, Guadalajara and Veracruz.

[31] The very definition of “Convention refugee” and “person in need of protection” necessarily implies that it is impossible for the claimants to seek the protection of their country anywhere in that country’s territory. The internal flight alternative is inherent to the very notion of “refugee” and

"person in need of protection." The Federal Court of Appeal has repeatedly determined that a refugee claimant must establish that there is a well-founded fear of persecution everywhere in the claimant's country for the claimant to be recognized as a refugee.

[32] Subsection 97(1) of the Act requires that refugee claimants establish that there is a danger of torture everywhere in their country for them to be recognized as "persons in need of protection." This requirement is based on the wording of subparagraph 97(1)(*b*)(ii) of the Act, according to which there is a removal to "country or countries" ("*tout pays*"). This section reads as follows:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
…	[…]
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
…	[…]
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

[33] Based on the evidence filed before it, the Board determined that there was no serious possibility of persecution for the applicant in large cities like Mexico City, F.D., Monterrey, Guadalajara and Veracruz, with populations exceeding one million habitants. In making this determination, the Board relied on the fact that the applicant is now divorced and that the fact that her ex-husband was able to find her when she was living with her brother does not reasonably suggest that he could not locate her if she chose not to live with her family members.

[34] In countering these submissions, the applicant was able to do little more than offer vague allegations of the risks of being located arising from the state's inability to protect her; however, she did not avail herself of this protection before leaving her country to seek protection in Canada. In addition, she did not file any genuine, concrete evidence of existing conditions preventing her from relocating in her country. Under these circumstances, the Board could reasonable find that there was an internal flight alternative in Mexico.

[35] Further, expecting the applicant to move to another region of the country to live elsewhere with a family member cannot be considered undue hardship or even be qualified as unreasonable.

[36] Accordingly, it was reasonable for the Board to find that the applicant had an internal flight alternative.

[37] Notwithstanding the emotional problems experienced by the applicant, this Court is of the opinion, as the Board determined, that there is no reason to believe that the applicant could not get whatever protection she may have needed in Mexico.

[38] It is reasonable if not required that refugee claimants exhaust all recourse in their country before requesting international protection. In this case, the Court is of the opinion that the applicant could easily, based on her education and work experience, relocate to another part of her country without undue hardship. The application for judicial review must therefore be dismissed.

[39] There was no question of general importance formulated by the parties for certification.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that, for the reasons given above, the application for judicial review be dismissed.

"Louis S. Tannenbaum"
Deputy Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

Authorities consulted by the Court

1. *Javaid v. MCI*, (1998) F.C.J. No. 1730 (F.C.T.D.)
2. *Attakora v. MEI*, (1989) N.R. 168
3. *Djama v. MEI*, Federal Court of Appeal, 1992
4. *Gracielome v. MEI*, 9 Imm. Law Report, (2d) 238
5. *Garcia v. MCI*, [2007] F.C.J. No. 118 (QL)
6. *Rasaratnam v. MEI*, [1992] 1 F.C. 706, 710 (C.A.)
7. *Thirunavukkarasu v. MEI*, [1994] 1 F.C. 589, 592 and 593 (C.A.)
8. *Espinosa v. MCI*, 2005 FC 1393
9. *Ortiz v. MCI*, 2006 FC 1365 (CanLII)

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