

Date: 20090126

Docket: IMM-3319-08

Citation: 2009 FC 76

Ottawa, Ontario, January 26, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ITZEL MALINALLI PATRON PEDROZA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is an application for judicial review of the rejection of the Applicant's refugee claim.

The substantive issue is whether the findings of the Immigration and Refugee Board (IRB) on credibility and plausibility, as well as state protection, are reasonable. The Applicant has also raised

the issue of adequacy of reasons. The facts in issue concern an alleged date rape and whether the Applicant sought state protection.

II. BACKGROUND

[2] The Applicant is a 23-year old female citizen of Mexico. Her claim is based on a fear of persecution on the grounds of gender violence at the hands of David Antonio Velasco Chedraui (Antonio) who is currently mayor of the Applicant's home town, though he was not mayor at the time of the rape.

[3] On November 18, 2004, the Applicant and her friend, Alma, met with two men, Antonio being one of them. During the evening, the Applicant felt ill and lost consciousness. Upon recovering consciousness, she found Antonio in the midst of raping her and was unable to secure assistance from either of her two colleagues.

[4] Upon the Applicant's arrival at home that night, the Applicant's mother brought her to their family doctor, who then accompanied the Applicant and her mother to the local hospital adjacent to the police station where she was examined. The Applicant also spoke to a police officer at that time.

[5] The Applicant alleges that when the aggressor's name was mentioned to the police officer, he went to consult with another officer and, at the instructions of the other officer, the interview was terminated.

[6] Subsequently, the Applicant and her family received numerous threatening telephone calls. During this time, they went to the police on several occasions. At one point the Applicant's mother and brother were visiting the police weekly to press for the investigation of the date rape incident.

[7] The Applicant hired a lawyer to investigate what had happened to their complaint and learned that there was no police report. The lawyer had been unable to locate the hospital's medical report as well.

[8] The Applicant's father was kidnapped for a few days in February 2007. After this incident, the Applicant asked her lawyer to stop investigating the matter. In addition, the lawyer left his professional practice and his home because of the difficulties caused to his practice as a result of his acting for the Applicant.

[9] In June of 2007, Antonio called the Applicant and informed her that she was smart not to pursue the charges, that he would be in touch with her, and that he wanted to renew the events of November 18, 2004. From this, the Applicant drew the conclusion that Antonio was obsessed with her and wanted to rape her again. She ultimately left Mexico and sought refugee status in Canada.

[10] The IRB rejected the Applicant's claim because the Member found that the claimant was not credible in recounting core events of her narrative. The Member did not believe that the Applicant had filed a complaint with the police or had even been examined at the hospital. Specifically, the Member noted that the Applicant could not remember the name of the doctor or of the hospital. The

Member also found that the Applicant had sufficient proof to persuade the police to investigate because the Applicant had a witness – Alma – who could have corroborated her story. The Member further did not believe that the Applicant, through her lawyer, had attempted to contact the Attorney General with regard to the absence of any investigation of her complaint.

[11] Lastly, the Member found that there was no likelihood of danger to the Applicant because Antonio knew that the complaint had been withdrawn, and was pleased. The Member based this conclusion on the June 2007 conversation between the Applicant and Antonio, where he expressed continuing interest in her.

III. ANALYSIS

[12] The parties are agreed, and the Court concurs, that post-*Dunsmuir* (*Dunsmuir v. New Brunswick*, 2008 SCC 9), the standard of review in respect of plausibility and credibility findings is reasonableness. The same is true of the standard of review for the state protection issue in this case. The standard of review for the obligation to give adequate reasons is unnecessary to establish here, for reasons discussed below.

[13] As a general rule, the Court is reluctant to overturn credibility findings of the IRB, particularly where they are based on observations of witnesses. Many of the findings of credibility and plausibility in this case, however, are based on the documentary evidence. That being the case, any deference owed is significantly reduced.

[14] There are a number of problems with the IRB decision which makes the conclusions as to credibility and plausibility unreasonable. It is unclear from the decision whether the gist of the decision is based upon a challenge to the Applicant's story of her rape and the events immediately thereafter or whether the IRB decided that the Applicant had not rebutted the presumption of state protection.

[15] The Member's comments on the post-rape circumstances of the medical examinations and reports to the police suggest that the Member may have questioned whether there was in fact "gender violence". If the Member had in fact accepted that rape occurred, one would have expected to see some reference to the Guideline given the nature of the process and decision. Yet there is no reference to the IRB's *Women Refugee Claimants Fearing Gender-Related Persecution* Guideline, despite there being no real finding that the rape did not occur.

[16] There are also a number of problems with the specific findings that were the basis for the non-credibility and implausibility conclusions of the Member. The first of these is the Member's comment that the Applicant had failed to mention the name of the doctor that she had seen at the local hospital.

[17] The Member's reliance on the Applicant's failure to name the doctor is unreasonable because the Applicant was never asked, even once, for the name of the doctor. Yet failure to mention the doctor by name is held against the Applicant as a matter that undermines her credibility.

[18] There is no question that such a doctor existed and that that doctor performed an examination on the Applicant. The evidence indicates that the examining doctor was authorized by the police to perform examinations in sexual violence cases. That fact is established both by reference to the letter of the Applicant's lawyer and to the psychiatric report which was filed before the IRB.

[19] The Member then goes on to find that the failure to give the proper name of the hospital was further evidence of lack of credibility of the Applicant. The Respondent, quite properly, accepts that this finding is "vulnerable". The evidence of the Applicant was that she knew the name of the hospital as it is described locally, in other words as the San Jose Hospital. She also clearly identified the hospital building and its location adjacent to the police station.

[20] Further, it is evident that the Member misunderstood the nature of the discussion between the Applicant and Antonio in June 2007. The Member found the Applicant's credibility undermined because the Member apparently thought that the conversation related principally to the withdrawal of the complaint. However, the complaint had long been withdrawn and the real purport of that conversation is that Antonio wanted to see the Applicant again. It is that intention of the rapist which causes the Applicant to fear a return to Mexico. This is a part of the evidence that the Member clearly missed or misunderstood.

[21] The Member's conclusion that the Applicant is not credible in respect of her police complaints is also seriously flawed. The Member concluded that the Applicant was not truthful

about her difficulty pursuing the police complaints because he found that Alma, as a witness, could prove the Applicant's claim. However, the evidence is that Alma had disavowed herself of the Applicant and any involvement in the incident, possibly because of fear of Antonio. To conclude that the Applicant had Alma available to assist her with a police complaint is entirely inconsistent with the evidence.

[22] Not only is the decision undermined by the findings with respect to credibility and plausibility, the decision is seriously undermined by the failure to consider some of the most important evidence with respect to state protection. The IRB does not discuss the 14-month efforts by the Applicant and her family to cause further investigation by the police. The IRB ignores the role of the Applicant's lawyer in assisting these efforts. The IRB does not discuss the threats to the Applicant's family members which are consistent with the Applicant's story, and the failure of the police to take any action. The issue is not that the IRB did not find these matters credible, it is that the IRB never referred to this critical evidence relied upon by the Applicant to show that state protection was not available to her in these particular circumstances.

[23] The Applicant's arguments with respect to the failure to give reasoned reasons are actually subsumed in the arguments with respect to credibility and plausibility. The Court does not concur with the Applicant's suggestion that the IRB was under a positive obligation to confront the Applicant during the course of the hearing with the Member's concerns about credibility. Credibility is always an issue and the IRB is not required to reach preliminary conclusions on credibility and afford an applicant an opportunity to respond to those concerns before deciding a

matter. However, the IRB must, when it makes its credibility findings, make them on a reasonable and accurate basis. In this case, the IRB failed to do so.

IV. CONCLUSION

[24] For all of these reasons, this application for judicial review will be granted. The decision of the Immigration and Refugee Board will be quashed and the matter is to be referred back to another panel for a new determination. There is no question for certification as this matter turns on the facts of this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted, the decision of the Immigration and Refugee Board in this matter is quashed and the matter is to be referred back to another panel for a new determination.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3319-08

STYLE OF CAUSE: ITZEL MALINALLI PATRON PEDROZA

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 22, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

DATED: January 26, 2009

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