Federal Court  Cour fédérale

Date: 20090611

Docket: IMM-638-08

Citation: 2009 FC 598

Ottawa, Ontario, June 11, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

GEYCEL ARELI TORIZ GILVAJA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of the Immigration and Refugee Board's Refugee Protection Division (RPD or Board), dated January 31, 2008, wherein the applicant was determined to be neither a Convention refugee nor a person in need of protection.

[2] The applicant seeks an order pursuant to subsection 18.1(3) of the *Federal Court Act*, setting aside the decision of the member, rejecting the applicant's claim and referring the matter back to a differently constituted panel for determination in accordance with such directions as the Court considers appropriate.

Background

[3] Geycel Areli Toriz Gilvaja (the applicant) is a citizen of Mexico who arrived in Canada on August 8, 2006. Her claim is based on her fear that she will be killed by Jonathan Cipres, a man who believes he has fallen in love with her and has been stalking her. When she was 13 years old, Jonathan Cipres began following her. His father was a person of influence in the government and his mother was a lawyer, so when the applicant filed a police complaint, nothing was ever done.

[4] Mr. Cipres approached the applicant in an empty parking lot on her walk home from school. He tried to force her to kiss him. She pulled away and he hit her in the face and kicked her. She fell to the ground and he tried to rape her. A passerby intervened and prevented the rape. Mr. Cipres ran away but yelled that the applicant was going to be his.

[5] The applicant reported the incident to her mother because she was bleeding. They went to the offices of the Public Ministry and filed a complaint about the attack. She later told them about the attempted rape but they said that they could not proceed with that allegation because it was not written in the doctor's report.

[6] After she filed the complaint, the applicant and her family began receiving death threats. The applicant believes that the threats were a direct result of having filed the complaint. The applicant and her family felt forced to move. The applicant was under severe stress and could not attend school for one year. The applicant sought psychological assistance to deal with the trauma.

[7] In May 2006, the applicant began receiving threatening anonymous phone calls where the caller would say, “You see how much I love you? No matter where you go and what you tried to do to avoid me I will chase you and track you down until the day I make you mine.” The applicant began having panic attacks.

[8] In July 2006 on her way home, the applicant saw Mr. Cipres in a car by her house. Her mother heard her screams and witnessed Mr. Cipres trying to kiss the applicant. Her mother and neighbours managed to help the applicant escape Mr. Cipres’ grasp. He ran away and threatened that he was going to come back for the applicant.

[9] The applicant fled Mexico out of fear of Mr. Cipres. She believes that he is well-connected and that she would not be protected by the state if she stayed there. She left Mexico on August 8, 2006, arriving in Toronto. A few weeks later, she made a claim for refugee protection. She keeps in contact with her family who says that they continue to see Mr. Cipres in their neighbourhood and that he continues to call their home. If she returns to Mexico, she fears that Mr. Cipres will find and kill her.

Board's Decision

[10] The Board determined that the applicant did not rebut the presumption of state protection in Mexico. The applicant filed a police complaint after the first incident, but chose not to after the second incident because she believed that the authorities would not do anything to protect her. She testified that the police may take a denunciation but not do anything about it, based on her family's experiences with the police. As examples, she testified that the murders of several of her family members were never resolved.

[11] The Board concluded that on a review of the documentary evidence, "generally, civilian authorities maintained effective control of the security forces" (decision page 3). However, the Board also acknowledged that a "culture of impunity and corruption persisted, particularly at the state and local level" (decision page 3). The state is taking measures to try to deal with these persisting issues.

[12] In addition, the Board found that the state of Mexico is taking steps to change the culture of non-reporting of crime. Mexico has established branches of the public service to encourage victims to report crimes and to increase public confidence in state authorities. The Board notes several initiatives that are underway that assist victims with psychological, legal, and medical services.

[13] As a result, the Board found as follows at page 5:

> If the claimant believes that the abuser's family, being government employees, have some sort of influence then there are mechanisms in place, as indicated in the analysis of the documentary evidence, that the claimant has not even begun to pursue to order to have her complaint dealt with.

[14] Therefore, the applicant did not rebut with clear and convincing evidence, the presumption that the state of Mexico would provide her with adequate, although not necessarily perfect, protection.

Issues

[15] The applicant raises the following issues:

1. Was the Board's decision with respect to state protection unreasonable?
2. Did the Board fail to have regard to, and did the Board fail to, analyze evidence supportive of the applicant's position that state protection would not be forthcoming?
3. Did the Board err in law with respect to state protection?

[16] I would rephrase the issues as follows:

1. What is the standard of review?
2. Did the Board err in finding that state protection was available to the applicant?

Applicant's Submissions

[17] The applicant submits that state protection is not available to the applicant in Mexico. According to the documentary evidence, corruption is a widespread problem in the Mexican government. Miscarriages of justice and distrust of the police are extremely common in Mexico, and most citizens avoid using the police complaint system completely.

[18] The applicant submits that the Board failed to consider documentary evidence that confirms that the government of Mexico is incapable of providing effective protection to its citizens.

[19] The Board failed to appreciate that when the applicant sought state protection, the situation became worse.

[20] The Board failed to appreciate the gravity of the applicant's suffering. The applicant testified that she still has scars on her face after Mr. Cipres attacked her and tried to rape her. The police told her that they could not proceed with the attempted rape complaint. She and her family started receiving death threats for filing a complaint with the police. The applicant testified that Mr. Cipres' parents gave the police false identity documents to lead them to believe that he was younger than he was so he would qualify as a young offender.

[21] The applicant submits that it would be objectively unreasonable for the applicant to approach the state for protection in the particular circumstances of her case. The presumption of state protection fails where it is "objectively unreasonable for the claimant not to have sought the protection of his home authorities" (see *Canada v. Ward*, [1993] 2 S.C.R. 689, paragraphs 48 and

49). The applicant testified about previous occasions where her family has been denied state protection. There is substantial documentary evidence that supports her contention that state protection has not been available to persons similarly situated in Mexico.

[22] The applicant submits that the Board failed to analyze the documentary evidence that supported her position. According to *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425, the Federal Court held that "the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts". The applicant argues that key evidence that was central to her claim for protection was neither mentioned nor analyzed in the Board's reasons; thus, the Board made an erroneous finding of fact without regard to the evidence.

[23] The applicant submits that the Board failed to appreciate the documentary evidence that demonstrates the Mexican state's lack of capacity to provide protection to female victims of abuse. The Board therefore erred with respect to its analysis of state protection by only looking at the legislative framework, rather than its implementation.

[24] The Board failed to analyze evidence that contradicted its conclusion (see *Low v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 326). The applicant submits that despite the efforts of the Mexican government, widespread impunity and corruption persists. The decision is completely devoid of any analysis of this fact. Mexico routinely fails to protect female

victims of abuse. The efforts that Mexico is undertaking to combat this problem, while commendable, do not equate with adequate state protection.

[25] Further, the Board failed to analyze the evidence according to the actual level of democracy in Mexico. In *De Leon v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1684, Mr. Justice Frenette made the following comment on the level of democracy in Mexico:

> In the case of a country considered a true democracy, as the United States of America as determined in *Hinzman* above, the presumption of state protection is difficult to overturn, but in a country like Mexico, considered more as a developing democracy, where corruption, drug trafficking is prevalent, involving some government officials, police and security forces, the presumption can be more easily overturned, see: *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 320 [2007] F.C.J. No. 439.

[26] In *Tapia Villa v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 1540, the Court held that "… Mexico is an emerging, not a full fledged democracy and that regard must be given to what is actually happening and not what the state is proposing or endeavouring to put in place".

Respondent's Submissions

[27] The respondent submits that the RPD did not err in its finding that the applicant failed to rebut the presumption of innocence with clear and convincing evidence. The Board determined that there are many levels of aid available to the applicant that she could pursue. While the applicant did make a denunciation after the first assault, she was obliged to do more than show that she went to see the police force on one occasion.

[28] Absent the complete breakdown of the state apparatus, it is presumed that a state is able to protect its citizens. In the present case, the Board analyzed the documentary evidence before it, citing many examples of groups and organizations that promote the protection of Mexican citizens, including the Ministry of the Public Service, the Office of the Attorney General, the National Registry of Public Security Personnel, the Ministry of Public Security, and the Citizens' Information and Service Network. The state of Mexico is undertaking to combat the culture of police impunity and corruption.

[29] The applicant testified that members of her family were murdered and that no justice was achieved, but the applicant failed to provide documentary evidence to substantiate this claim.

[30] The respondent submits that Mexico is a democracy with effective political and judicial systems; therefore, the failure of particular members of the police to provide protection is insufficient to demonstrate a lack of state protection. The respondent emphasizes that the more democratic the state's institutions, the more the claimant must have done to exhaust "all the courses of action open to her" (see *N.K v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1376 from *Canada (Minister of Employment and Immigration) v. Satiacum*, [1989] F.C.J. No. 505). Apart from making one denunciation to the police, the applicant did not seek protection from a higher level.

[31] The respondent denies that the tribunal failed to consider the totality of the evidence. The Board outlined the numerous avenues of state protection available to the applicant in Mexico. The respondent submits that the applicant's memorandum of argument is "replete with bald assertions and general propositions of law which are unsupported by any specific evidence".

Analysis and Decision

[32] **Issue 1**

What is the standard of review?

The applicant submits that findings on state protection are reviewed on the standard of reasonableness: *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 at paragraph 47) states that reasonableness is described as concerning "…qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" and having "…justification, transparency, and intelligibility within the decision making process…falling within a range of possible, acceptable outcomes which are defensible in respects of facts and law" (see *Dunsmuir* above).

[33] *Dunsmuir* above, decided that if previous jurisprudence had determined the standard of review to be applied then a further analysis is not necessary.

[34] In *Hinzman v. Canada (Minister of Citizenship and Immigration)*, [2007], F.C.J. No. 584, the Federal Court of Appeal affirmed at paragraph 38 that questions as to the adequacy of state

protection are “questions of mixed fact and law ordinarily reviewable against a standard of reasonableness”. This standard has been applied to a number of decision post-*Dunsmuir* above decisions including: *Quinatzin v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 1168, *Farias v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 1292, *Lozada v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 492.

[35] I therefore conclude that the appropriate standard to apply to the Board’s decision in this case is that of reasonableness.

[36] **Issue 2**

Did the Board err in finding that state protection was available to the applicant?

In assessing the applicant’s claim as her credibility was not questioned in the impugned decision, we must accept the particular facts leading to her departure from Mexico (see *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302, at paragraph 5 (F.C.A.)).

[37] The Board erred by failing to consider the explanation as to why the applicant did not seek further protection from the state after her first attempt failed. She and her family consulted a lawyer after they began receiving threats for filing a police complaint. The lawyer wrote the following letter dated January 16, 2008 and found in the tribunal record at page 160:

> In my character of Lawyer Representative, of Ms. Geycel Areli Toriz Gilvaja, make of your knowledge the following:
>
> The undersigned advices the above mentioned person in the denunciation made for the rape attentive crime, on April 12, 2000 and in which it was not possible to integrate the before said, due to

> my client received in many occasions threats, intimidations and coercion from the probably responsible Jonathan Cipres Chavarria and his family, to avoid continuing the referred denunciation, therefore, I advised my client to desist, for the mother of the accused was highly influential and besides lawyer, for this last one, and due to this situation did not want to continue the process, stopping all the procedures, which could harm her professional life as influential, therefore the Judicial Report was not followed up, unknowing then the loss of documents, ignoring my client, every procedure that had been done after, this for not being more affected; where it is informed that the Birth Certificate, obtained from the Public Ministry, which is visibly modified, these documents were presented by the family of the accused, were not reviewed being stopped all the paper work and being out standing the whole process and advised the family should not proceed with the accusation, for it will be useless any procedure.
>
> Kind regards,
>
> Amelia Rikelme P., lawyer

[38] Further, there is evidence on the record that contradicts the Board's decision that state protection would be available to the applicant. The Board's role was to make findings of fact and arrive at a reasonable decision based on the evidence, even if conflicting. Certain passages from the documentary evidence appear to show that there is some desire by the present government of Mexico to improve the situation, while other passages suggest that protective measures are ineffective. In this circumstance, the Board had a duty to explain why it preferred the evidence of the efforts the state is taking over the evidence that corruption and impunity continue to be a widespread and pervasive reality in Mexico. Upon reading the documentary evidence and the Board's decision, it is clear that the Board took a selective analysis of the documentary evidence.

[39] Having laws on the books does not equate with actual, experienced state protection for citizens. It has been held that when examining whether a state is making serious efforts to protect its citizens, it is at the operational level that protection must be evaluated particularly in instances of violence against women (see *Garcia v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 118, at paragraph 15).

[40] While Mexico has undertaken to create legislation to combat police corruption, impunity, and the issues faced by victims of violence generally, the implementation of these initiatives has been lacking. It is therefore reasonable to assume that the applicant, who has been terrorized starting at the tender age of 13, would have difficulty receiving effective state protection, particularly when her attacker is well-connected politically and even managed to track her down after her family moved. I find that the Board arbitrarily rejected the applicant's explanations as to why she could not find state protection without taking all the documentary evidence and her testimony into account.

[41] In order to determine whether a refugee protection claimant has discharged her burden of proof, the Board must undertake a proper analysis of the situation in the country and the particular reasons why the protection claimant submits that she is "unable or, because of that risk, unwilling to avail [himself] of the protection" of his country of nationality or habitual residence (paragraphs 96(a) and (b) and subparagraph 97(1)(b)(i) of the Act). In the present case, the Board failed to analyze both whether the state was capable of protecting the applicant and whether it was willing to act. Mr. Justice Martineau stated the following on the issue of state protection in *Avila v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 439:

> …[t]he legislation and procedures which the applicant may use to obtain state protection may reflect the will of the state. However, they do not suffice in themselves to establish the reality of protection unless they are given effect in practice: see *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 1081, [2003] 2 F.C. 339 (F.C.T.D.); *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCTD 429, [2003] 4 F.C. 771 (F.C.T.D.).

[42] While the Board properly identified *Ward* above, as establishing the principle that there is a presumption of state protection, the Board failed in its analysis of case in the present application. *Ward* above, also establishes the important principle that if the claimant must put her life at risk in order to attain state protection, simply in order to establish ineffectiveness, it would violate the very idea of international protection (*Ward* above, at paragraph 48). The applicant testified that after she made a denunciation to the police, she and her family were threatened for going to the police. Her lawyer subsequently advised her that it was not safe to seek state protection again. It was logical for the applicant to assume that if she went to the police again, protection would not be forthcoming and Mr. Cipres could seek revenge again.

The main error in the impugned decision results from a complete lack of analysis of the applicant's personal situation. The Board's omissions in terms of the contradictory evidence make its decision unreasonable in the circumstances. In particular, the Board failed to "… provide reasons why the contradictory evidence was not considered relevant or trustworthy" (see *Floren v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 in the face of the applicant's negative experience in obtaining state protection.

[43] Further, the Board's finding that the claimant should have done more to "exhaust all courses of action open to him or her", as directly proportional to the level of democracy in Mexico, was unreasonable. The widespread and continuing problems of corruption and impunity in Mexico demonstrate that the state is incapable of protecting its citizens. Therefore, it is an error to demand of the claimant that which would be appropriate for a claimant coming from a high level of democracy. Mexico has been unable to protect its most vulnerable citizens and in particular women fleeing violence, such as the applicant.

[44] Madam Justice Gauthier in *Capitaine v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 181, addressed the presumption of state protection in the context of Mexico's democracy:

> 20 Mexico is a democracy to which a presumption of state protection applies, even if its place on the "democracy spectrum" needs to be assessed to determine what credible and reliable evidence will be sufficient to displace that presumption […]
>
> 21 In developed democracies such as the U.S. and Israel, it is clear from *Hinzman* (at paras. 46 and 57) that to rebut the presumption of state protection, this evidence must include proof that an applicant has exhausted all recourses available to her or him. It is also clear that, except in exceptional circumstances, it would be unreasonable in such countries not to seek state protection before seeking it in Canada.
>
> 22 The Court does not understand *Hinzman* to say that this conclusion applies to all countries wherever they stand on the "democracy spectrum" and to relieve the decision-maker of his or her obligation to assess the evidence offered to establish that, in Mexico for example, the state is unable (although willing) to protect its citizens, or that it was reasonable for the claimant to refuse to seek out this protection. […]

[45] In *Bobrik v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1364, Madam Justice Tremblay-Lamer noted:

> [13] . . . [E]ven when the state is willing to protect its citizens, a claimant will meet the criteria for refugee status if the protection being offered is ineffective. A state must actually provide protection, and not merely indicate a willingness to help. Where the evidence reveals that a claimant has experienced many incidents of harassment and/or discrimination without being effectively defended by the state, the presumption operates and it can be concluded that the state may be willing but unable to protect the claimant.

[46] In *Medina v. Canada (Citizenship and Immigration)* 2008 FC 728, Madam Justice Layden-Stevenson stated the following:

> Unquestionably, it is open to the RPD to conclude that state protection exists in Mexico. That said, to arrive at such a conclusion, on the basis of a summary of country conditions (such as those that are present in this case), without more, does not constitute a decision that falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It goes without saying that references relied upon from the country conditions documents, to support a finding of state protection, should bear some relevance to the claim. That is not the situation here.

[47] And finally, while the Board claimed to have taken the Gender Guidelines into consideration "*WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION*" Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the *Act* (Guidelines), in my view, the reasons for the decision in this case do not reflect the special situation of an abused woman and particularly one that encountered gender related violence at such a young age. The Gender Guidelines state that the claimant needs to demonstrate that it was objectively unreasonable for the applicant to seek the

protection of her state and that this analysis should consider the “social, cultural, religious and economic context in which the claimant finds herself”. In this case, this young woman was up against an influential family that was sabotaging efforts to protect herself.

[48] While the applicant had the onus to provide “clear and convincing evidence” of the state’s inability to protect because of the influence of this family, the Guidelines state that this evidence might have to be in the form of “past personal incidents where state protection did not materialize”, which is the extent of what the applicant could have been expected to provide given her circumstances.

[49] I would therefore allow the judicial review.

[50] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[51] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The following provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 are pertinent.

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
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 :
(a) to a danger, believed on substantial grounds to exist, of	a) soit au risque, s'il y a des motifs sérieux de le croire,

torture within the meaning of Article 1 of the Convention Against Torture; or	d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(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 :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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