Date: 20091030

Docket: IMM-1794-09

Citation: 2009 FC 1098

Ottawa, Ontario, October 30, 2009

PRESENT: The Honourable Mr. Jusice Pinard

BETWEEN:

SANCHEZ JIMENEZ, Yolanda

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. (2001), c. 27, of a decision dated March 16, 2009, by the Refugee Protection Division (RPD) of the Immigration and Refugee Board, that the applicant is not a Convention refugee.

[2] Yolanda Sanchez Jimenez (the applicant) is a Mexican citizen and mother of two daughters. She claimed refugee protection on grounds of membership in a specific social group, namely, women who are victims of conjugal violence. She alleges that she is being persecuted by her former spouse, Mariano Castillo Robles.

[3] The decision is based essentially on the applicant's lack of credibility. The RPD found that she did not discharge her burden of proof, and therefore did not establish her fear of persecution under a Convention ground. The panel also found that she had failed to show, on a balance of probabilities, that if she returned to Mexico, she would be subjected to a risk of cruel and unusual treatment or punishment.

[4] The RPD found the applicant's testimony to be vague and imprecise, riddled with inconsistencies, and that it also contained omissions and implausibilities. The panel therefore found her not to be credible.

[5] Later, in a letter dated August 14, 2009, the panel wrote:

> [TRANSLATION]
> Unfortunately, due to reasons beyond our control, it is impossible for us to send you a copy of the transcript of the hearing of February 13, 2009, in this record.

[6] Relying mainly on *Likele v. Canada (M.C.I.)*, [1999] F.C.J No. 1693 (F.C.T.D.) (QL), the applicant contends, first, that there was a breach of natural justice due to the fact that a transcript of the hearing before the panel was not available. As a result, the applicant claims she cannot present all of her arguments regarding this application for judicial review. I do not agree. Paragraph 17(*d*) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, imposes no obligation on the panel to prepare a transcript:

17. Upon receipt of an order under Rule 15, a	**17.** Dès réception de l'ordonnance visée à la

tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order:

> (*d*) a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review,

and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.

règle 15, le tribunal administratif constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement :

> *d*) la transcription, s'il y a lieu, de tout témoignage donné de vive voix à l'audition qui a abouti à la décision, à l'ordonnance, à la mesure ou à la question visée par la demande de contrôle judiciaire,

dont il envoie à chacune des parties une copie certifiée conforme par un fonctionnaire compétent et au greffe deux copies de ces documents.

[7] Madam Justice L'Heureux-Dubé acknowledged, on behalf of the Supreme Court of Canada in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, that the unavailability of a transcript could, under certain circumstances, injure the applicant with respect to his or her capacity to make an application for judicial review, and that this injury was a breach of natural justice when the decision facing the Court could not be made on the basis of evidence established through other means. In this respect, the Supreme Court wrote the following at page 842:

> In the absence of a statutory right to a recording, courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice. Where the statute does mandate a recording, however, natural justice may require a transcript. As such a recording need not be perfect to ensure the fairness of the proceedings, defects or gaps in the transcript must be shown to raise a ''serious possibility'' of the denial of a ground of appeal or review before a new hearing will be ordered. These principles ensure the fairness of the administrative decision-making process while recognizing the need for flexibility in applying these concepts in the administrative context.

(Emphasis added.)

See also: *Goodman v. Canada (M.C.I.)*, [2000] F.C.J. No. 342 (F.C.T.D.) (QL), at paragraphs 67 to 71, and the recent ruling by my colleague Justice Richard Boivin in *Navjot Singh v. The Minister of Citizenship and Immigration*, 2009 FC 911.

[8] Courts must therefore determine ‘‘whether the record before it allows it to properly dispose of the application for appeal or review’’. If so, the absence of a transcript ‘‘will not violate the rules of natural justice’’ (*Canadian Union of Public Employees, Local 301*, above).

[9] In this case I note that the RPD’s reasons often consist of a summary of the applicant’s testimony. Moreover, she herself never stated in her affidavit that the panel had not accurately reported her testimony in its reasons and had, as a result, erred regarding its negative credibility finding.

[10] I therefore conclude that the absence of a transcript, under the circumstances, is not a barrier and that there has been no breach of natural justice.

[11] The applicant then disputes the RPD’s assessment of her credibility. With respect to credibility and the assessment of the facts, a proper analysis of the panel’s decision will show ‘‘the existence of justification, transparency and intelligibility within the decision-making process [and] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law’’ (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 47).

The Supreme Court stated in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at paragraph 58: ‘‘The IAD had the advantage of conducting the hearings and assessing the evidence presented, including the evidence of the respondent himself.’’ Consequently, the applicable standard of review is reasonableness.

[12] A heavy burden lies on the applicant to rebut the panel’s finding that she lacks credibility (*Aguebor v. Canada (M.E.I.)* (1993), 160 N.R. 315 (F.C.A.)). The panel is entitled to make reasonable findings based on implausibilities, common sense and rationality.

[13] In the case at bar, after reviewing the evidence and hearing counsel for the parties, I am not satisfied, in light of all these principles and analytical criteria, that the intervention of the Court is warranted. While in some respects my conclusion may have been different, it is not for this Court to substitute itself for a specialized tribunal such as the RPD in the assessment of credibility and of the facts, when, as in this case, the applicant has failed to show that the panel made its decision based on an erroneous finding of fact, made in a perverse or capricious manner or without regard for the material before it (see *Khosa*, above).

[14] For all of these reasons, the application for judicial review is dismissed.

JUDGMENT

The application for judicial review of the decision dated March 16, 2009, by the Refugee Protection Division of the Immigration and Refugee Board is dismissed.

''Yvon Pinard''

Judge

Certified true translation,

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1794-09
STYLE OF CAUSE:	SANCHEZ JIMENEZ, Yolanda v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION OF CANADA
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 15, 2009
REASONS FOR JUDGMENT AND JUDGMENT :	PINARD J.
DATED:	October 30, 2009

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