Federal Court  Cour fédérale

Date: 20091116

Docket: IMM-1563-09

Citation: 2009 FC 1163

BETWEEN:

Maria del Carmen RUIZ MARTINEZ
Monica Beatriz FEIJOO RUIZ
Aminta Alejandra FEIJOO RUIZ
Ximena Guadalupe TOVAR FEIJOO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON D.J.

Introduction

[1] These reasons follow the hearing at Toronto, Ontario, on Thursday the 22nd of October, 2009 of an application for judicial review of a decision of the Convention Refugee Determination Division (the "CRDD") of the Immigration and Refugee Board, wherein the RPD determined the Applicants not to be Convention refugees or persons otherwise entitled to protection equivalent to

Convention refugee protection in Canada. The decision under review is dated the 24th of February, 2009.

Background

[2] The Applicant Maria Del Carmen Ruiz Martinez is the mother of Monica Beatriz Feijoo Ruiz. Monica Beatriz Feijoo Ruiz (the "Principal Applicant") is the mother of Aminta Alejandra Feijoo Ruiz and Ximena Guadalupe Tovar Feijoo. Aminta Alejandra Feijoo Ruiz and Ximena Guadalupe Tovar Feijoo are minors.

[3] The Principal Applicant and her daughters fled Mexico for Canada on the 1st of June, 2007, fearing persecution at the hands of the Principal Applicant's male partner, Tovar, against which they had concluded they could not obtain adequate state protection. They arrived in Canada the same day and claimed Convention refugee protection the next day.

[4] Maria Del Carmen Ruiz Martinez, the Principal Applicant's mother, fled Mexico for Canada on the 4th of July, 2007 and arrived in Canada the same day. The next day she too claimed Convention refugee protection citing the same fear as that of her daughter and granddaughters.

[5] In September or October of 2003, the Principal Applicant met Manuel Tovar Rodriguez ("Tovar"). On or about the 24th of November, 2003, the Principal Applicant and her elder daughter, Aminta, started living with Tovar. While the Principal Applicant described Tovar as a "nice person" before she moved in with him, she wrote in her narrative that accompanied her Personal

Information Form that “everything changed” when she moved in with him. He prohibited the Principal Applicant from seeing her mother and members of her extended family, hit her and otherwise treated her roughly. He threatened the Principal Applicant that, if she didn’t do whatever he wanted, he would rape her daughter Aminta. He would not allow the Principal Applicant to go out of their apartment without him. He brought prostitutes to the apartment and had sex with them and forced her to join them.

[6] The Principal Applicant became pregnant.

[7] The Principal Applicant convinced Tovar to allow Aminta to move to her mother’s place of residence.

[8] The Principal Applicant’s second daughter, Ximena, of whom Tovar was apparently the father, was born. When Ximena was seven months old, Tovar forced the Principal Applicant to return to work because he needed money. He would leave the baby Ximena alone in their apartment. On the 5th of October, 2005, the Principal Applicant decided to take Ximena and to leave Tovar. She did so when, according to her narrative, Tovar was so drunk that he became unconscious.

[9] After leaving Tovar with her baby daughter, the Principal Applicant went to the police. They took her declaration and advised her that they would notify Tovar and there would be a “confrontation”. The Principal Applicant and Ximena moved into her uncle’s home. The Principal

Applicant contacted Tovar's ex-wife who by this time was apparently in Canada, having successfully claimed Convention refugee status.

[10] A few days later, the Principal Applicant received a telephone call from an individual she described as Commander Jesus Zarate ("Zarate") who apparently was an officer in the police. He told the Principal Applicant to return to Tovar and that it had been a "bad idea" for her to go to the police because Tovar wanted to kill her.

[11] The Principal Applicant moved to a women's shelter in Veracruz with Ximena. For a while, she did well there. Unfortunately, before too long, the shelter manager advised the Principal Applicant that she had received a call from Zarate indicating that "they" were looking for the Principal Applicant and knew that she was in the shelter. They pressed the shelter manager to evict the Principal Applicant and threatened that if she did not do so, the shelter would be closed and the shelter manager's life would be in danger. In the result, the Principal Applicant and her baby daughter left the shelter and moved into her father's home in another part of Veracruz.

[12] On the 10th of November, 2005, while the Principal Applicant was returning to her father's home from buying food, Tovar confronted her and, according to the Principal Applicant, put a knife to her throat, told her to go pick up Ximena and to go to his home. The Principal Applicant alleges that Tovar threatened that if the Principal Applicant did not comply with his instructions, he would kill the Principal Applicant's older daughter Aminta.

[13] The Principal Applicant returned to Tovar's home. He continued to abuse her and to threaten that he would kill her and her two daughters.

[14] In her narrative, the Principal Applicant advises that Tovar beat her on the 29th of September, 2006 in the presence of Ximena, who started screaming, so that Tovar beat Ximena as well, so badly that the Principal Applicant had to call an ambulance. The Principal Applicant called her family and the police. Ximena remained in hospital for almost a week. The Principal Applicant filed a denunciation and Tovar remained in jail for some eight months. The Principal Applicant returned to her uncle's home.

[15] On the 10th of October, 2006, the Principal Applicant's older daughter moved back in with her mother and younger sister.

[16] On the 20th of May, 2007, Tovar was released from prison subject to certain restrictions. On the 29th of May, 2007, early in the morning, Tovar broke into the Principal Applicant's bedroom. She wrote in her narrative that Tovar was drunk and drugged. Tovar threatened Ximena with a knife. The Principal Applicant escaped with her two daughters. The police were called and arrived promptly. Tovar escaped but was quickly caught by the police and taken to jail. The Principal Applicant filed a denunciation. The next day, Tovar was released. The Principal Applicant concluded that Zarate was helping Tovar and that therefore she and her children could not escape him. In the result, the Principal Applicant and her daughters, with the aid of Tovar's former wife in Canada, fled to Canada.

[17] As early as June, 2004, according to the Principal Applicant's mother's narrative, Tovar had been insulting her, precluding her access to the home where he and the Principal Applicant lived and refusing to let them talk by telephone. In September of 2004, the Principal Applicant's mother nonetheless visited the home shortly after Ximena was born and while Tovar was away. Tovar returned unexpectedly. He threatened the Principal Applicant's mother and older daughter with violence. That same month, the Principal Applicant's mother went to the police and filed a report regarding Tovar's threats. The police indicated they would "look into it and speak with him" but she never heard back from them.

[18] By November or December of 2004, the Principal Applicant's mother writes that she and her daughter had lost contact. That situation apparently prevailed for almost a year until the Principal Applicant re-established contact while she was living with her father.

[19] In October of 2006, when Tovar went to jail, the Principal Applicant's daughter Aminta left her grandmother's home and returned to her mother's home. That situation apparently prevailed until the Principal Applicant and her daughters left for Canada.

[20] Following the flight of the Principal Applicant and her daughters to Canada, the Principal Applicant's mother attests that Tovar began harassing her. He telephoned her and used foul language. He confronted her on the street and threatened to hurt her if she did not tell him where her daughter was. She found her dog dead with a threatening note beside its body indicating that she "... would end up just like the dog." She went to the police who took note of her complaint and

advised that they would call Tovar in for questioning and let her know the result. She never heard back.

[21] The Principal Applicant's mother communicated with her daughter by telephone who recommended that she come to Canada. She applied for a passport. On the 28th of June, 2007, Tovar confronted the Principal Applicant's mother, grabbed her and punched her until she fell and threatened her. She went to the hospital to be checked out for damage to a knee. She began taking precautions in her everyday life. On the 4th of July, 2007, she left Veracruz and Mexico for Canada.

[22] All of the foregoing unfolded in the city of Veracruz or in the State of Veracruz within reasonable proximity to the city.

[23] In addition to the foregoing efforts to access state protection through the police, the Principal Applicant obtained a protection, custody and support order and the terms of Tovar's release from incarceration included a "no contact" provision.

The Reasons for the Decision Under Review

[24] The claims of the four applicants were joined pursuant to Rule 49(1) of the *Refugee Protection Division Rules*[1]. No separate Narratives were filed by or on behalf of the infant claimants and no separate claims were made on their behalf. The infant claimants are now nine and five years of age.

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1 SOR/2002-228.

[25] The RPD accepted the Applicants' identities as citizens of Mexico. The RPD noted that since the claims involved gender-related violence, it took into account the Chairperson's Guidelines on Gender-Related Persecution[2]. With respect to the Convention refugee claims of the Applicants, the RPD found the determinative issue to be whether the Applicants had rebutted the presumption in favour of a state's, in this case Mexico's, ability to protect. It found that they had not. With regard to the presumption, citing extensively from relevant case law, it wrote:

> There is a presumption that a state is capable of protecting its citizens except in situations where the state is in a state of complete breakdown. To rebut the presumption of state protection, a claimant must provide clear and convincing evidence of the state's inability to protect absent an admission by the national's state of its inability to protect that national. While the effectiveness of the protection is a relevant consideration, the test is whether the protection offered is adequate. The evidence that state protection is not adequate must be reliable and probative and it must also satisfy me, on a balance of probabilities, that the state protection is inadequate. Claimants [here the Applicants] must approach the state for protection, providing that state protection might be reasonably forthcoming. Where a state is in effective control of its territory, has military, police and civil authority in place and makes serious efforts to protect its citizens, the mere fact it is not always successful at doing so will not be enough to justify a claim that the victims are unable to avail themselves of protection. The fact that state protection is not perfect does not constitute clear and convincing proof of the state's inability to protect its citizens, since no state can guarantee the protection of all its citizens at all times. Local failures to provide effective policing do not amount to a lack of state protection unless they are part of a broader pattern of the state's inability to provide protection. The burden of proof that rests on the claimant increases with the level of democracy of the state in question. The more democratic a state is, the more the [second] claimant[s] must have done to exhaust all course[s] of action open to them to demonstrate state protection was or would not be forthcoming.
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> [citations omitted, emphasis added]

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[2] IRB, Ottawa, March 9, 1993, updated November, 1996 and continued in effect on June 28, 2002 pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act* SC 2001, c.27.

[26] The RPD engages in an extensive analysis of the evidence before it, particularly the evidence of the Principal Applicant and of her mother, and makes briefer reference to the country conditions documentation before it.

[27] Except for what follows, it does not question the credibility of the Applicants. It writes:

> It is notable that up until the issuance of the custody order, there is documentation to support the second claimant's allegations. However, after that time, none of the claimants were able to provide documentary evidence such as police or medical reports to support their claims. Both the second claimant [here, the Principal Applicant] and the first claimant [here, the Principal Applicant's mother] testified that they were unable to provide police reports because they were lost and that the second claimant's uncle could not find them. This, despite the reports being made at different places, by different people, kept at different locations and at different times. While this is possible, it is not probable considering that other documentation was readily available including documentation that was older, i.e. custody order.
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> However, the second claimant did present a number of hostile electronic mail (e-mail) messages sent to the second claimant by Tovar. They are dated after the second claimant was already in Canada and seem to centre on Tovar's desire to see his daughter which he was entitled to as per the custody order. The messages escalate in hostility as the length of the second claimant's absence increases. Tovar does ultimately threaten the second claimant. While the messages would tend to support some of the claimants' allegations, such as Tovar's abusive behaviour, they remain untested. Further, their value as evidence supporting the events that transpired prior to the second claimant leaving Mexico is limited because there is no reference in the messages to those events.
>
> Further, there were concerns with the second claimant's credibility with respect to events that transpired after she moved to her uncle's home in September 2006. For example, the second claimant testified that in May 2007 while living at her uncle's house, Tovar broke the locks of the home as well broke the window in an attempt to take the minor claimant. The second claimant testified that these were separate events. However, in her uncle's letter this is described as

> one event. Further, the second claimant testified that both she and her uncle were going to the police but then the second event happened so there was no report to the police. In the letter from her uncle he says that he did go to the police. The second claimant explained that these were possibly errors on the part of her uncle. I find this explanation unreasonable. If the events transpired as she describes, and her uncle was there as well, it is reasonable that the number of times harm was caused and whether police were contacted would be consistent in both accounts. I find that the events at her uncle's home did not transpire as she would have me believe. Aside from this, the testimony of the second claimant with respect to abuse suffered prior to her travel to her uncle's home was consistent and generally credible allowing for minor differences that may be due to the circumstances of the claim.

[28] The RPD concludes with regard to state protection:

> I am satisfied that the claimants have rebutted the presumption of state protection. They have not provided some reliable clear and convincing evidence with probative value that would lead me to conclude state protection in Mexico is not adequate.
>
> Therefore, I find that the claimants are not Convention refugees and the claims under section 96 of the *IRPA* fail. ...

[29] The RPD then very briefly disposes of the Applicants' claim to protection equivalent to Convention refugee protection, under section 97 of the *Immigration and Refugee Protection Act*, on precisely the same basis and therefore rejects the Applicants' claims.

The Issues

[30] As earlier noted in these reasons, Tovar's former female partner fled from Mexico to Canada, alleging persecution of somewhat the same nature here alleged by the Applicants, and successfully claimed Convention refugee status in Canada. Counsel for the Applicants urges that

the RPD erred in a reviewable manner in failing to address and analyze what he describes as "the core issue" for these Applicants, that being that they are similarly situated to the former partner of Tovar and should therefore have received the same result on their claims as did that partner.

[31] Secondly, counsel urges that the RPD erred in a reviewable manner in its state protection analysis against the totality of the evidence before it.

[32] Counsel further urges that the RPD erred by failing to specifically identify where in Mexico the Applicants could find a viable internal flight alternative. Finally, the Applicants urge that the RPD erred in a reviewable manner by ignoring the claims of the minor applicants.

[33] In addition to the foregoing issues, the issue of standard of review arises as it does on all applications for judicial review such as this.

Analysis

a) Standard of Review

[34] The standard of review of a decision such as that here under review is, in the case of an error of law not within the special expertise of a tribunal such as the RPD in this case, or in the case of a breach of procedural fairness or of natural justice, is "correctness". In all other cases, the standard of review is "reasonableness". Where the "reasonableness" standard applies, the Court's analysis must be concerned with:

> ... the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision

> falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law ... .[3]

[35] In considering the issues raised on behalf of the Applicants, the foregoing guidance will be applied.

b) The Similarly Situated Former Partner of the Principal Applicant's Alleged Agent of Persecution

[36] While counsel for the Applicant urged that Tovar's former partner who suffered similar treatment at the hands of Tovar to that here experienced by the Principal Applicant was in all respects similarly situated to the Principal Applicant, counsel for the Respondent urged otherwise. Counsel for the Respondent noted that the earlier decision, made in March of 2006, was based upon the decision-maker's conclusion on the facts before him or her that, at the relevant time, state-protection was simply not available to victims of domestic abuse in Mexico. Counsel noted that, in fact, in the earlier matter, Tovar's former partner never sought the protection of authorities which is simply not the case in this matter. Here, the Principal Applicant did seek the protection of authorities and was afforded protection although that protection was far from perfect protection. As noted by the RPD in its analysis of the state of the law on state protection quoted earlier in these reasons, the test is "adequate protection", not "perfect protection". On the facts of this matter, the police did respond to the Principal Applicant's complaints. Tovar was imprisoned for a period of months, though obviously not for so long as the Principal Applicant might have wished. The Principal Applicant was accorded a custody, protection and support order and Tovar was restrained

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[3] *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190 at para. 47.

from contact with the Principal Applicant and her children. While all of the foregoing was far from entirely effective in enabling the Principal Applicant and her children, and ultimately her mother, to live without fear and without further harassment, threats and violence, that is not the test. Absolute safety and protection from harassment and threats in circumstances of spousal abuse cannot be guaranteed or anywhere nearly universally achieved in any nation that this Court is aware of.

[37] The RPD found that, in all of the circumstances of this matter, the Applicants simply did not meet the onus on them to demonstrate that the state protection provided to them, and that would be available to them if they returned to Mexico, would not be adequate. I am satisfied that that conclusion was reasonably open to the RPD on the totality of the evidence before it both with regard to the personal experiences of the Applicants and with regard to country conditions in Mexico.

[38] In *Cius v. Canada* (*Minister of Citizenship and Immigration*)[4], Justice Beaudry wrote at paragraph 35 of his reasons:

> In response, the respondent submits that the Board is not bound by decisions made by another panel. I agree. Although it would have been preferable to distinguish these cases with the present one, I think that it is for each Board member to make its decision based on the evidence before her or him. In the case at bar, the Board assessed the applicant's story and found him not credible due to inconsistencies, implausibilities and incoherence in his claim.

[39] While the RPD here assessed the Applicants' evidence and the country conditions evidence before it and generally found the Applicants' story to be credible, it nonetheless determined their

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4 2008 FC 1, January 7, 2008.

claim against them based on its determination that they had failed to rebut the presumption of state protection. While, as in *Cius*, I am satisfied that it would have been preferable to distinguish the case of Tovar's former partner from that which was here before it, I am satisfied that, as in *Cius*, the RPD here was not bound by the earlier decision in question and was free to arrive at its decision based on the evidence before it.

[40] In the result, I am satisfied that the RPD made no reviewable error simply by failing to distinguish the decision of an earlier panel in the case of Tovar's earlier partner.

c) The RPD's Determination With Respect To Available State Protection

[41] Counsel for the Applicants urged that the RPD erred with respect to available state protection in applying the test for overcoming the presumption in favour of state protection and its application, in excusing slow and inconsistent progress in Mexico in adapting and acting upon legislation meant to protect women because it found "serious efforts" were being made by Mexico, and in finding and that such efforts are sufficient in the face of what counsel urged was overwhelming evidence of corruption, impunity and inefficiency. I disagree.

[42] In the *Flores Carrillo v. Canada* (*Minister of Citizenship and Immigration*)[5] Justice Létourneau, for the Court, wrote at paragraph 30:

> In my respectful view, it is not sufficient that the evidence adduced be reliable. It must have probative value. For example, irrelevant evidence may be reliable, but it would be without probative value.

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5 2008 FCA 94.

> The evidence must not only be reliable and probative, it must also have sufficient probative value to meet the applicable standard of proof. The evidence will have sufficient probative value if it convinces the trier of fact that the state protection is inadequate. In other words, a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence that satisfies the trier of fact on a balance of probabilities that the state protection is inadequate.

[43] I regard the foregoing as the correct test to determine whether or not the RPD, on the facts of any particular case, erred in reviewable manner in determining whether or not the presumption of state protection has been rebutted. On the facts of this matter, and on the terms of the RPD's decision, the RPD effectively evaluated the totality of the evidence before it, whether or not it referred in detail to all elements of that evidence, in determining that the Applicants simply had not rebutted the presumption of state protection in Mexico. It found the evidence adduced by the Applicants that was relevant, reliable and convincing simply not sufficient, on a balance of probabilities, to convince it that the state protection afforded to the Applicants in this matter was inadequate. I am satisfied that that conclusion was reasonably open to the RPD, whether or not it might have been the conclusion that I would have reached on the same evidence.

d) *Failure to Identify an Internal Flight Alternative [IFA] for the Applicants in Mexico*

[44] The issue of an IFA in Mexico for the Applicants simply did not arise on the facts of this matter. The RPD found the Applicants not to have rebutted the presumption of state protection for themselves in Mexico including in Veracruz and in the State of Veracruz. In the circumstances, given that finding, it simply was not incumbent on the RPD to examine the question of whether or not state protection might have been adequate for the Applicants in some other location in Mexico.

The RPD made no reviewable error in failing to address the issue of IFA in the circumstances that were before it and in light of its conclusion regarding state protection in Veracruz and surrounding region.

e) Failure to Assess the Claims of the Minor Applicants

[45] As earlier noted in these reasons, no separate claims were asserted on behalf of the minor applicants. Their claims were entirely comprehended within the claims of their mother and grandmother. The claims of the mother and grandmother were fully addressed by the RPD and I have found that the RPD made no reviewable error in reaching the conclusions that it did with respect to those claims. In the circumstances, the RPD similarly made no reviewable error in failing to address separate claims on behalf of the minor applicants that simply weren't made.

Conclusion

[46] For the foregoing reasons, this application for judicial review will be dismissed.

Certification of a Question

[47] At the close of the hearing of this matter, I advised counsel that I would reserve my decision and that I would prepare and distribute signed reasons at the earliest possible time. I further advised counsel that, once the reasons were distributed, they would be provided an opportunity to make written submissions on certification of a question. These reasons will be distributed. Thereafter, counsel for the Applicants will have seven (7) days to serve and file written submissions on certification of a question. Thereafter, counsel for the Respondent will have seven (7) days to serve

and file any responding submissions. Once again thereafter, counsel for the Applicants will have three (3) days to serve and file any reply submissions. Upon receipt of any submissions served and filed, the Court will issue an order responding to any such submissions and giving effect to its reasons

"Frederick E. Gibson"
Deputy Judge

Ottawa, Ontario
November 16, 2009

FEDERAL COURT

SOLICITORS OF RECORD

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