Federal Court  Cour fédérale

Date: 20111123

Docket: IMM-2168-11

Citation: 2011 FC 1349

Ottawa, Ontario, November 23, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MARIA ESTHER VILLAVICENCIO LOPEZ,
MAURICIO AGUILAR VILLAVICENCIO,
MARY JOSE AGUILAR VILLAVICENCIO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The principal applicant, Ms. Villavicencio Lopez, and her two minor children, Mary Jose and Maurice, are Mexican citizens. They challenge the legality of a decision rendered by the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated March 17, 2011, concluding that the applicants are neither Convention refugees nor persons in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

BACKGROUND

[2] Ms. Villavicencio Lopez alleges having been a victim of conjugal violence at the hands of her former spouse. She claims that her husband started to develop a drinking problem shortly after their son was born in 1999, and became abusive and violent to a point that she decided to leave him and move back in with her parents when she was pregnant with her second child. The applicant contends that even by that time, her husband continued to harass and threaten her. When their daughter was born in 2001, the applicant moved back in with her husband and decided to give him a second chance.

[3] The applicant states that when her daughter was two or three months, her husband threatened to disappear with the child. She says she constantly feared that her husband would abduct the children so that she would never see them again and that he would kill her. She even consulted the DIF (the Mexican State System for the Comprehensive Development of the Family) to seek help in September 2000. She was offered counselling and received legal advice that she had the possibility to denounce her husband's abusive behaviour.

[4] In 2002, the applicant decided to leave her husband for good. Having nowhere else to go, she moved back in again with her parents. The applicant claims that after the separation she continued to answer her husband's calls and met regularly with him because she feared that he would become more violent or decide to abduct the children.

[5] The applicant alleges that in March 2008 she contacted her husband to ask him to sign passport applications for the children because their uncle wanted to take them to Disneyland in the

USA. She alleges that, accompanied with her lawyer, she met with her husband in a public place and managed to convince him to sign the passport applications, but the harassment intensified again when she later asked him to sign the visa applications and cede his paternal authority over the children, which he refused to do.

[6] On June 15, 2008, her husband showed up at her door and physically assaulted her when she refused to let him see the children. Following this incident, on July 13, 2008, the applicant filed a complaint against her husband before fleeing to Canada with her children on July 19, 2008.

[7] The Board found that Ms. Villavicencio Lopez's story was not credible primarily because of the disparity between her initial declarations in her interview with the immigration authorities and her original Personal Information Form (PIF) on one hand, and her amended PIF on the other. The Board decided that the applicant also failed to rebut the presumption of state protection in the circumstances.

ISSUES

[8] Based on the submissions of the parties, the following issues are raised with regard to the impugned decision:

1. Was the Board's conclusion regarding the principal applicant's credibility unreasonable?
2. Did the Board err by failing to consider and apply the Chairperson's Guidelines on Women Fearing Gender-Related Persecution and on Child Refugee Claimants?

3. Did the Board err by failing to determine whether the principal applicant was a victim of conjugal violence?
4. Was the Board's conclusion regarding state protection unreasonable?

ANALYSIS OF THE DECISION UNDER REVIEW

Was the Board's conclusion regarding the principal applicant's credibility unreasonable?

[9] The applicant has left no stone unturned. She takes issue with all of the Board's credibility findings.

[10] First, the Board was not convinced that the conflicts between the applicant and her former spouse were truly ongoing ever since she left him in 2002, as she alleged in her amended PIF dated January 28, 2011 and testified before the Board. In fact, the applicant made no mention of the problems she had with her husband over those years neither in her refugee claim interview on November 5, 2008, nor in her original PIF dated December 1, 2008. She only indicated the incident that occurred on June 15, 2008 as the triggering point of the problems that brought her to leave her country.

[11] Before the Board, the applicant argued that the problems with her husband were ongoing although the situation had escalated by June 15, 2008, after the incidents that took place with regard to passport and visa applications. The Board rejected this argument considering that had the applicant's problems with her husband been of the duration that she alleges, it would likely have been indicated either in the Point of Entry (POE) notes or in her original PIF.

[12] The applicant takes issue with the Board's reliance on the POE notes and the original PIF. She contends that her amended PIF presents no contradictions but only brings additional information to what she declared before. She notably takes issue with the Board's reading of the POE notes that her former spouse had "suddenly appeared at her door after many years on June 15, 2008" and asked to see the children. It was after a dispute, she claims, and not after many years that her husband reappeared.

[13] The applicant relies on *Zhong v Canada (Minister of Citizenship and Immigration*), 2009 FC 632, to argue that translation problems might have resulted in a misunderstanding of the applicant's statements during the interview. Although the decision does not indicate the facts, *Zhong* is clearly highly fact-specific and cannot be applied to the present case. As the Court mentioned, in that case, advanced notice had been provided to the Board of a "sharp conflict between the statements in the record of proceedings and the applicant's statements in the PIF" and no independent means, such as a recording, was available to verify what was said by the applicant or the interpreter, so that in this particular fact situation, it was unfair for the Board to rely on an unverifiable version of the story to make a negative credibility finding.

[14] Upon careful review of the original and the amended PIF as well as the POE notes, the Court is not satisfied that the Board's negative credibility finding was unreasonable in this case. It goes without saying that questions of credibility, just like questions as to whether an applicant has rebutted the presumption of state protection, are questions of mixed fact and law, to be reviewed on a standard of reasonableness. In reviewing the Board's decision against the standard of reasonableness, the Court considers "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*, 2008 SCC 9 at para 47). In this case, given the uncontested fact that neither the applicant's interview with the immigration authorities (which took place over three months after she arrived in Canada) nor her first PIF (which was completed a month later) point out any incidents prior to that of June 15, 2008, it cannot be said that the Board drew an unreasonable conclusion when deciding that the applicant was not credible. Moreover, contrary to what the applicant suggests, the DIF letter does not help her to demonstrate that the Board made an error of law in concluding that her conjugal problems were not of the duration that she alleged. The DIF letter dates back to September 2000 when the applicant still lived with her husband.

[15] The Board also remained within the boundaries of reasonableness when it rejected the applicant's argument putting the blame on her former counsel and claiming that she did not understand the content of the original PIF, given the fact that the document was translated to the applicant and signed by her. In the Court's view, the Board's overall conclusion that the applicant knew and had made plans to go to Canada at least since April 2008, and that the children's father was aware of her plans, is reasonable and supported by the evidence of this case.

[16] The applicant contends that the Board unreasonably concluded that she had the time to reflect on the events and collect her thoughts before completing her first PIF. She claims that this conclusion is made without regard for the applicant's designation as a vulnerable person on February 8, 2010, as well as the psychological evaluation prepared on January 13, 2011 which indicates that she suffers from Post Traumatic Stress Disorder and has difficulty remembering

certain events. Accordingly, procedural accommodations outlined in paragraph 4.2 of the *Guideline on procedures with respect to vulnerable persons appearing before the Immigration Refugee Board* have been duly followed. The Court notes that the impugned decision mentions and explains the content of both of the above noted documents and nothing indicates that they have not been considered by the Board when assessing the credibility issues in question in this case. In fact, as I read the transcripts of the hearing, the applicant did not demonstrate any memory problems in her testimony and never mentioned that she had difficulty remembering any events.

[17] Second, the applicant takes issue with the Board's implausibility findings, namely that it is "not credible that for more than six years the principal claimant would continue to meet her former spouse, as much as 24 times per year, in order to simply appease him so that he would not try to abduct the children".

[18] Citing *Valtchev v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ 1131 at paras 6-7 [*Valtchev*], the applicant suggests that the Board's findings of plausibility cannot be said to be the only standard of plausibility and that it is not implausible for a woman who is victim of conjugal violence to acquiesce to her former spouse's requests to keep her children and herself safe. It should be reminded that the Board's plausibility findings are entitled to the same degree of deference as its credibility findings. Thus, the Board is not restrained in its plausibility determinations as long as it justifies them with specific and clear reference to the evidence and that the inferences that it draws are not "so unreasonable as to warrant our intervention" (*Aguebor v Canada (Minister of Employment and Immigration)* [1993] FCJ 732 at para 4). In this case, the Board's reasons demonstrate that it engaged with the applicant's evidence and explanations for her

actions and reasonably found them to be “outside the realm of what could reasonably be expected” (*Valtchev*, above at para 7). It is also worth noting that in this case, the decision was not rendered solely based on a lack of plausibility, as in *Valtchev*, but also on major inconsistencies and contractions in the evidence (see *Valtchev*, above at para 15).

[19] Third, the applicant submits that the Board unreasonably drew a negative inference from her reluctance to denounce her husband by stating that she had “looked into matters when her relationship with her former spouse was dissolving but that in the following years nothing had been done”. The applicant alleges that the evidence indicates that she received legal information and not “legal support [to] initiate legal proceedings against her husband” as the Board mentioned. However, as I read the Board’s decision, the negative inference on this point results rather from the applicant’s inability at the hearing to provide more information with regard to her allegation that she was reluctant to report her husband’s abusive conduct because of the contacts he had in the judiciary and police force. The Board notes that the applicant was not able to provide any information about who those individuals might be. It is thus the inconsistency in the applicant’s testimonial evidence which undermined her credibility and the conclusion is not unreasonable.

[20] Fourth, the applicant’s credibility was also undermined by her 11 year old son’s testimony who mentioned to the Board that the purpose of obtaining passports for him and his sister was that they were going to Canada, and that he did not remember they had any plans to travel to Disneyland. The applicant had testified, however, that it was only a few days before their trip to Canada that the children were told they would not be going to Disneyland. The Board found that

had the child believed from April 2008 (when the children obtained their passports) to July 2008, that he was going to Disneyland, he would have recalled it.

[21] The applicant alleges that the Board erred in its assessment of the evidence by giving weigh to the child's testimony which contained other imprecisions such as the fact that he lived with her grandparents, her mother and her sister when they were in Mexico. It is true that the child might have been somewhat hesitant in answering the Board's questions in the beginning of his testimony. However, his testimony seems spontaneous and truthful to the Court. He did remember that they had all gone together to have their pictures taken for the passports and that they went to the circus later that day. It can reasonably be expected that he would also be able to remember it if he had been told about any plans to go to Disneyland in that period of time.

Did the Board err by failing to consider and apply the Chairperson's Guidelines on Women Fearing Gender-Related Persecution and on Child Refugee Claimants?

[22] The applicant further takes issue with the Board's conclusion that her allegations of harassment by her former husband were incompatible with her meeting with him on a regular basis and asserts that, despite its acknowledgement of the requirements of the Guidelines, the Board failed to demonstrate a degree of "knowledge, understanding and sensitivity" in judging the applicant's statements and conducts in accordance with the *Guidelines on Women Fearing Gender-Related Persecution*. It is well known, says the applicant, that victims of domestic violence can remain with their violent spouses despite years of abuse as a result of psychological frailties.

[23] In my view, the Board's credibility findings in the present case do not display a lack of the sensitivity or the contextualization called for by the Guidelines. The jurisprudence recognizes that

where the Board finds actual inconsistencies or contradictions in the applicant's evidence which put into question the veracity of the allegations, the mere fact that the applicant was not considered credible is insufficient to show that the Board was insensitive to her situation (*Vargas v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1347 at para 15; *SI v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1662 at paras 3-4).

[24] The applicant alleges that the Board also failed to observe the *Guidelines on Child Refugee Claimants* when hearing the applicant's son's testimony, as it did not "determine if the child understood the nature of the oath or affirmation to tell the truth". Yet, nothing in the child's testimony makes the Court doubt that he did not understand the nature of the proceedings at the hearing and it cannot reasonably be argued that just because his testimony did not favour the applicant's claim, he did not understand the meaning and the importance of an affirmation under oath.

Did the Board err by failing to determine whether the principal applicant was a victim of conjugal violence?

[25] The applicant asserts that even if the Board did not believe that her problems with her former spouse were ongoing since she left him, the Board failed to assess in its reasons whether she was a victim of conjugal violence as to warrant the granting of refugee protection.

[26] However, the Board's lengthy and clearly articulated reasons with regard to the credibility of the applicant's allegation of conjugal violence (particularly after she left her husband in 2002) plainly disposed of this issue, which is the principal ground of the applicant's refugee claim. The Board also turned its mind to this allegation when examining why she failed to seek legal recourse

against her husband. The final determination of the issue is also clear and unequivocal that the applicant “has not established, on a balance of probabilities, that, should she return to Mexico, she would face a serious possibility of being persecuted by her former spouse”.

Was the Board’s conclusion regarding state protection unreasonable?

[27] The impugned decision correctly states the jurisprudence on state protection, including the presumption that a state is capable of protecting its citizens, that the onus is on the applicant to rebut that presumption with clear and convincing evidence, and that the applicant has a duty to take all reasonable steps to seek protection unless it is objectively not reasonable not to do so. In reviewing the evidence, the Board notably considered that insufficient steps were taken by the applicant to seek protection by the State of Puebla in Mexico. In fact, the applicant never filed a report against her former spouse although in September 2000 she had been advised by the DIF that she had the possibility to do so. The Board stated that in making a complaint to the police only a few days before she left the country, the applicant did not even allow the State enough time to look into her complaint and concluded that State protection is not unavailable for the applicant in Mexico.

[28] The applicant submits that the Board’s conclusion of availability of state protection is made without proper regard for the evidence that suggests that protection might not be reasonably forthcoming in a case such as that of the applicant, but fails to point out any specific evidence that has been ignored by the Board. She argues that contrary to the Board’s findings on this point, according to the jurisprudence efforts made by a state to assure protection to its citizens should not be determinative of the availability of state protection at the operational level (*Gjoka v Canada (Minister of Citizenship and Immigration)*, 2010 FC 426) and that the existence of alternate

institutions other that the police force do not constitute avenues of protection *per se* (*Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491).

[29] The Court finds that the Board applied the correct legal principles and extensively reviewed the evidence that was made available to it, including the Hellman Report that was submitted by the applicant. Contrary to what the applicant contends the Board did not consider this evidence unauthoritative or non-credible but insufficient to counter other documentary evidence. Even if efforts, laws and alternate institutions to support victims of conjugal abuse are not sufficient, they can still militate in favour of the presumption of state protection on a balance of probabilities. It is worth noting that in its reasons the Board noted some inconsistencies among sources but concluded that, in the circumstances of this case and in view of the laws of the State of Puebla where the applicant lived, the applicant did not demonstrate that she could not reasonably expect protection. In submitting that the Board erred in deciding in one sense rather that the other, the applicant is asking the Court to reassess this evidence. The Board's conclusion is not unreasonable in the circumstances considering that the Board did not skip over the evidence but was principally concerned with the fact that the applicant actually never made a genuine attempt to seek state protection in Mexico, if not a few days before leaving the country.

[30] The present application for judicial review should therefore be dismissed. No question of general importance has been proposed for certification by counsel.

JUDGMENT

THIS COURT ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2168-11
STYLE OF CAUSE:	**MARIA ESTHER VILLAVICENCIO LOPEZ, MAURICIO AGUILAR VILLAVICENCIO, MARY JOSE AGUILAR VILLAVICENCIO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	November 16, 2011
REASONS FOR JUDGMENT:	MARTINEAU J.
DATED:	November 23, 2011

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