

Date: 20070307

Docket: IMM-4284-06

Citation: 2007 FC 263

Ottawa, Ontario, the 7th day of March 2007

PRESENT: THE HONOURABLE MADAM JUSTICE TREMBLAY-LAMER

BETWEEN:

**MARIA DEL PILAR VILLARREAL ZEMPOALTE
MONSERRAT HERNANDEZ VILLARREAL
AMNER HERNANDEZ VILLARREAL
LUIS ANGEL HERNANDEZ VILLARREAL**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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 (the Act), of a decision dated May 17, 2006, by the Refugee Protection Division (RPD) of the Immigration and Refugee Board that the applicants are neither “Convention refugee[s]” nor “person[s] in need of protection” under sections 96 and 97 of the Act.

[2] The principal applicant, Maria Del Pilar Villarreal Zempoalte, and her three minor children, all citizens of Mexico, left their country for Canada in August 2005. They claimed refugee protection in Canada by reason of the principal applicant's membership in a particular social group, namely, abused women.

[3] They allege the following facts in support of their claim.

[4] During the 11 years of her marriage, the applicant was assaulted by her husband, especially during sexual relations. The applicant allegedly informed the police in 2004 and 2005, but to no avail. The fact she did this allegedly made her husband more violent and forced the applicant to take cover in the city of Puebla. Her husband allegedly found her and forced her to return home with him.

[5] The applicant and her husband divorced in 2005; after the divorce, the husband became more aggressive towards her and the children. She was in family therapy, but that did not improve the situation. Believing that she would not receive police protection, she left her country with her children to go to Canada in August 2005.

[6] In dismissing the applicant's claim, the RPD found that she was not credible because of omissions, the absence of any persuasive documents, and her vague evidence.

Analysis

[7] It is settled law that that the RPD has the expertise to determine questions of fact and to gauge the credibility of refugee protection claimants (*Aguebor v. Canada (Minister of Employment and Immigration)*), [1993] F.C.J. No. 732 at paras. 3-4 (C.A.) (QL)); therefore, the appropriate standard of review is patent unreasonableness.

[8] That being said, the RPD decision must still be supported by the evidence and must not be made in a perverse or capricious manner or be based on erroneous findings of fact or be made without regard for the material before the panel (*Mugesera v. Canada (Minister of Citizenship and Immigration)*), [2005] 2 S.C.R. 100 at para. 38; *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*), [1998] F.C.J. No. 1425 at para. 14 (QL)).

[9] The applicants claim that the RPD made an error warranting the Court's intervention by failing to consider *Women Refugee Claimants Fearing Gender-based Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act* (Guidelines) in its analysis of the applicant's credibility.

[10] It is clearly settled by Federal Court caselaw that the RPD is required to take the Guidelines into consideration with regard to gender-based persecution (*Griffith v. Canada (Minister of Citizenship and Immigration)*), [1999] F.C.J. No. 1142 (Trial Division) (QL); *Myle v. Canada (Minister of Citizenship and Immigration)*), 2006 FC 871, [2006] F.C.J. No. 1127 (F.C.) (QL)).

[11] However, failing to expressly refer to the Guidelines is not necessarily determinative. What matters is that the RPD demonstrates a degree of understanding and awareness in its assessment of a claimant's statements and behaviour, which must be reflected in its reasons.

[12] In relation to this, Mr. Justice Yves de Montigny stated the following in *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1066, [2006] F.C.J. No. 1345 at para. 12 (QL):

As to the Guidelines first of all, it is true that the RPD did not expressly refer to these in its reasons. However, that is not fatal as such, since the board member's silence in this regard does not support a conclusion that the Guidelines were not considered in his analysis of the case. In the same way, a mere ritual mention that the Guidelines had been considered would not suffice to establish that the panel had complied with them. What matters is that the reasons for decision demonstrate that the decision-maker was aware of the particular situation of women when the basis of their claim was related to their vulnerability. Although the Guidelines are not binding on the RPD, they must still be considered in appropriate cases (*Fouchong v. Canada (Secretary of State)* (1994), 88 F.T.R. 37, at paras. 10-11 (F.C.), [1994] F.C.J. No.1727 (QL); *Khon v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 143, (2004), 36 Imm. L.R. (3d) 55, at para. 18 (F.C.), [2004] F.C.J. No.173 (QL)).

[Emphasis added.]

[13] In my view, the reasons for the decision in this case did not demonstrate any awareness on the part of the panel of the special situation of an abused woman. Her vulnerability could explain her behaviour, especially the fact that she did not report her ex-husband's alleged abuse of her.

[14] The member impugned the applicant's credibility because she should have reported her husband to hospital staff when she was being treated in hospital, and she should have informed the

police. Questioned about this, she explained that she was afraid, that her husband had been outside with the children and that he had threatened her and her children if she reported him.

[15] The member rejected her explanation. However, reluctance on the part of the victim to reveal the existence or the seriousness of abuse is consistent with battered-woman syndrome and explains why a woman will stay in an abusive situation (*R. v. Lavallée*, [1990] 1 S.C.R. 852).

[16] With regard to this, the psychology reports from the therapy that the applicant received in Mexico and Canada explain her behaviour. This is important evidence in the applicant's file. However, these reports were rejected by the member because they were not evidence of the truthfulness of the information on which the expert opinions were based.

[17] In my view, these reports, at the very least, demonstrate the applicant's traumatized state and explain in detail the many symptoms she was suffering because of conjugal violence.

[18] The Supreme Court of Canada stated in *Lavallée, supra*, that expert testimony is admissible to assist the fact-finder in drawing inferences in areas where the expert has relevant knowledge or experience beyond that of the lay person. The Court reminds us that each of the specific facts underlying the expert's opinion need not be proven in evidence before any weight can be given to the opinion. In this case, the allegations of conjugal violence and the specialized knowledge required in such a case should have led the panel to review the psychological reports and determine what weight they should be given.

[19] The member should not have immediately rejected this relevant evidence and should not have found that there was no compelling evidence that could allow the member to find the applicant credible.

[20] In this case, I believe that the RPD did not only fail to expressly refer to the Guidelines, it did not consider them at all in its analysis of the case. This error and the failure to consider relevant and important evidence are determinative errors in the present case and warrant the intervention of the Court.

[21] For these reasons, the application for judicial review is allowed. The matter is referred to a differently constituted panel for redetermination.

JUDGMENT

The application for judicial review is allowed. The matter is referred to a differently constituted panel for redetermination.

“Danièle Tremblay-Lamer”

Judge

Certified true translation
Gwendolyn May, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4284-06

STYLE OF CAUSE: MARIA DEL PILAR VILLARREAL
ZEMPOALTE, MONSERRAT HERNANDEZ
VILLARREAL, AMNER HERNANDEZ
VILLARREAL, LUIS ANGEL HERNANDEZ
VILLARREAL v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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REASONS FOR JUDGMENT BY: The Honourable Madam Justice Tremblay-Lamer

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