Date: 20070703

Docket: IMM-4648-06

Citation: 2007 FC 681

Ottawa, Ontario, July 3, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

GERARDA CARRANZA BERMUDEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] In its decision, the Immigration and Refugee Board concluded that Ms. Gerarda Carranza Bermudez failed to rebut the presumption of state protection. Costa Rica is not in a state of civil war, invasion, or internal collapse. The government is in effective control of its territory, and has military, police and civil authority in place. The evidence demonstrates that the Costa Rican government takes the problem of domestic violence very seriously and is making serious efforts to protect victims of domestic violence.

In respect to state protection in Costa Rica, the Immigration and Refugee Board found:

> Neither the documentary evidence, nor the experience of her family with the authorities, supports the claimant's allegations of a lack of state protection. According to documentary evidence, Costa Rica is a constitutional democracy governed by a president and unicameral Legislative Assembly directly elected in free multiparty elections every four years. Documents indicate there are a number of recourses available in Costa Rica for the assessment, prosecution and granting of remedies resulting from failure of law enforcement agencies to conduct their work.
>
> The same document also reveals:
>
> > As of August, the Ombudsman's office had received 47 reports of police abuse of authority or misconduct. Of these, 34 reports under investigation, 1 was determined to be legitimate, and 12 were found to be without merit.
>
> The document goes on to state that each ministry had an internal disciplinary unit to investigate charges of abuse and corruption against its officers. All new police recruits received human rights awareness as part of their basic training course. This illustrates that if there is a police misconduct or abuse, an effective mechanism for lodging complaints exists through various channels regarding violations of their civil and human rights.

[2] In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at paragraphs 49, 50 and 52, the Supreme Court of Canada determined that the State is presumed to be capable of protecting its citizens in the absence of a complete breakdown of the state. The danger that this presumption will operate too broadly is tempered by a requirement that clear and convincing proof of a state's inability to protect must be advanced. An Applicant might advance testimony of similarly situated individuals unassisted by state protection or the Applicant's testimony of past personal incidents in which state protection did not materialize or the Applicant's personal experience as proof of a state's inability to protect its citizens. An Applicant can also provide country condition documentation to rebut the presumption that a state is capable of protecting its citizens. (Reference

is also made to *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, [2006] F.C.J. No. 439 (QL), at paragraphs 27 to 32.)

[3] In *Xue v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1728 (QL), Justice Marshall E. Rothstein held that it was not erroneous to conclude that "clear and convincing" confirmation required a higher standard of proof than the bottom end of the broad category of a "balance of probabilities." Specifically, he stated the following:

> [12] Having regard to the approach expressed by Dickson C.J.C. in *Oakes*, i.e. that in some circumstances a higher degree of probability is required, and the requirement in *Ward* that evidence of a state's inability to protect must be clear and convincing, I do not think that it can be said that the Board erred in its appreciation of the standard of proof in this case. If the Board approached the matter by requiring that it be convinced beyond any doubt (absolutely), or even beyond any reasonable doubt (the criminal standard), it would have erred. However, the Board's words must be read in the context of the passage in *Ward* to which it was referring. Although, of course, the Board does not make reference to *Oakes* or *Bater*, and while it would have been more precise for the Board to say that it must be convinced within the preponderance of probability category, it seems clear that what the Board was doing was imposing on the applicant, for purposes of rebutting the presumption of state protection, the burden of a higher degree of probability commensurate with the clear and convincing requirement of *Ward*. In doing so, I cannot say that the Board erred.

JUDICIAL PROCEDURE

[4] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board) rendered on June 28, 2006, wherein it found the Applicant neither a Convention refugee nor a person in need of protection pursuant to section 96 and subsection 97(1) of the IRPA.

BACKGROUND

[5] The Applicant, Ms. Bermudez is a 40 year old citizen of Costa Rica, who claims to be a Convention refugee because of her membership in a particular social group, namely, women abused by their spouse, under section 96 of the IRPA. In her refugee application, she also claimed to be a person in need of protection, on the basis that she would face a risk to her life, risk of torture or cruel and unusual treatment or punishment in accordance with subsection 97(1) of the IRPA, should she be returned to Costa Rica.

[6] Ms. Bermudez alleges that her common-law spouse became abusive during her pregnancy in 1986. She also claims that his behaviour changed for the better in 1989, but deteriorated again in May 2003, when she confronted him about his alleged abuse of her 19 year-old daughter from a previous relationship.

[7] Thereafter, the Applicant claims that her spouse "tricked her" to ride with him on his motorcycle, and caused an accident, whereby she fell and lost consciousness. In her oral testimony, Ms. Bermudez stated that her spouse threatened to kill her prior to the alleged accident. Following this incident, the Applicant's daughter moved to her sister's house.

[8] Ms. Bermudez also alleges that her spouse is a leader of drug dealers; however, she refused to go to the authorities with this information because her spouse threatened her. Moreover, she claims that she was afraid to seek police assistance as her spouse is "wealthy and very well-connected with the police".

[9] In March 2004, the Applicant entered Canada and claimed refugee status upon arrival.

DECISION UNDER REVIEW

[10] In its decision rendered on June 28, 2006, the Board determined that Ms. Bermudez' refugee claim provided that there was no objective basis for her claim for refugee status on any of the enumerated Convention grounds. Thus, the Board found that she did not qualify as a refugee under the IRPA. The Board also concluded that Ms. Bermudez' removal to Costa Rica would not subject her personally to a risk to her life, to a risk of torture or to cruel and unusual treatment or punishment.

ISSUES

[11] (1) Did the Board err in its finding on state protection?

(2) Did the Board err in ignoring evidence?

(3) Did the Board err in its credibility finding?

STATUTORY SCHEME

[12] Section 96 of the IRPA reads as follows:

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	**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

social group or political opinion,	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.

[13] Subsection 97(1) of the IRPA states the following:

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 torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, 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	*b*) soit à une menace à sa vie ou au risque de traitements

treatment or punishment if	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.

STANDARD OF REVIEW

[14] In regard to state protection, Justice Danièle Tremblay-Lamer in *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, [2005] F.C.J. No. 232 (QL), at paragraph 11, after conducting a pragmatic and functional analysis, determined that the assessment of state protection involves the application of the law to the facts and as such is a question of mixed law and

fact, reviewable on the reasonableness *simpliciter* standard. This being said, there is no reason to diverge from this standard in the case at bar. As such, in what concerns state protection, a finding by the Board will not be overturned where such a finding is supported by reasons that can withstand a somewhat probing examination. (*Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*), [1997] 1 S.C.R. 748, at paragraph 56.)

[15] In regard to credibility findings, it is trite law that the Board has a well-established expertise in the determination of questions of facts, particularly in the evaluation of an applicant's credibility. Under judicial review, this Court does not intervene in findings of fact reached by the Board unless it is demonstrated that its conclusions are patently unreasonable or capricious, made in bad faith or not supported by the evidence. (*Aguebor v. (Canada) Minister of Employment and Immigration* (F.C.A.), [1993] F.C.J. No. 732 (QL), at paragraph 4); *Wen v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 907 (QL), at paragraph 2); *Giron v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 481 (QL); *He v. Canada* (*Minister of Employment and Immigration*), [1994] F.C.J. No. 1107 (QL); *Khan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 839, [2006] F.C.J. No. 1064 (QL), at paragraph 27.)

ANALYSIS

(1) Did the Board err in its finding on state protection?

[16] Ms. Bermudez argues that the Board misstated the law on state protection made available for victims of domestic violence in Costa Rica.

[17] It is noted that, in *Canada (Attorney General) v. Ward*, above, at paragraphs 49, 50 and 52, the Supreme Court of Canada determined that the state is presumed to be capable of protecting its citizens in the absence of a complete breakdown of the state. The danger that this presumption will operate too broadly is tempered by a requirement that clear and convincing proof of a state's inability to protect must be advanced. An Applicant might advance testimony of similarly situated individuals unassisted by state protection or the Applicant 's testimony of past personal incidents in which state protection did not materialize or the Applicant's personal experience as proof of a state's inability to protect its citizens. An Applicant can also provide country condition documentation to rebut the presumption that a state is capable of protecting its citizens. (Reference is also made to *Avila*, above, at paragraphs 27 to 32.)

[18] Moreover, in *Xue*, above, Justice Rothstein held that it was not erroneous to conclude that "clear and convincing" confirmation required a higher standard of proof than the bottom end of the broad category of a "balance of probabilities." Specifically, he stated the following:

> [12] Having regard to the approach expressed by Dickson C.J.C. in *Oakes*, i.e. that in some circumstances a higher degree of probability is required, and the requirement in *Ward* that evidence of a state's inability to protect must be clear and convincing, I do not think that it can be said that the Board erred in its appreciation of the standard of proof in this case. If the Board approached the matter by requiring that it be convinced beyond any doubt (absolutely), or even beyond any reasonable doubt (the criminal standard), it would have erred. However, the Board's words must be read in the context of the passage in *Ward* to which it was referring. Although, of course, the Board does not make reference to *Oakes* or *Bater*, and while it would have been more precise for the Board to say that it must be convinced within the preponderance of probability category, it seems clear that what the Board was doing was imposing on the applicant, for purposes of rebutting the presumption of state protection, the burden of a higher degree of probability commensurate with the clear and convincing requirement of *Ward*. In doing so, I cannot say that the Board erred.

[19] In its decision, the Board concluded that Ms. Bermudez failed to rebut the presumption of state protection. Costa Rica is not in a state of civil war, invasion, or internal collapse. The government is in effective control of its territory, and has military, police and civil authority in place. The evidence demonstrates that the Costa Rican government takes the problem of domestic violence very seriously and is making serious efforts to protect victims of domestic violence. In respect to state protection in Costa Rica, the Board found:

> Neither the documentary evidence, nor the experience of her family with the authorities, supports the claimant's allegations of a lack of state protection. According to documentary evidence, Costa Rica is a constitutional democracy governed by a president and unicameral Legislative Assembly directly elected in free multiparty elections every four years. Documents indicate there are a number of recourses available in Costa Rica for the assessment, prosecution and granting of remedies resulting from failure of law enforcement agencies to conduct their work.
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> The same document also reveals:
>
> > As of August, the Ombudsman's office had received 47 reports of police abuse of authority or misconduct. Of these, 34 reports under investigation, 1 was determined to be legitimate, and 12 were found to be without merit.
>
> The document goes on to state that each ministry had an internal disciplinary unit to investigate charges of abuse and corruption against its officers. All new police recruits received human rights awareness as part of their basic training course. This illustrates that if there is a police misconduct or abuse, an effective mechanism for lodging complaints exists through various channels regarding violations of their civil and human rights.
>
> Specifically, with respect to domestic violence, the document states …

(Decision of the Board, at page 3)

[20] Consequently, the Board did not make an unreasonable error in its findings on state protection in Costa Rica.

(2) Did the Board err in ignoring evidence?

[21] Contrary to Ms. Bermudez' allegations, the Board did not ignore or fail to weigh the evidence it had before it. It is well established that the Board is assumed to have weighed and considered all of the evidence unless the contrary is shown. Hence, the Court has also ruled on numerous occasions that it is also within the Board's discretion to exclude evidence that is not material to the case before it. The Board's decision, not to admit evidence submitted before it or to refer to each and every piece of evidence, does not amount to a reviewable error. (*Yushchuk v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1324 (QL), at paragraph 17.)

[22] In fact, the Board has great flexibility in terms of the evidence that it may consider. It is not bound by any legal or technical rules of evidence and may rely on any evidence it considers credible or trustworthy in the circumstances. (IRPA, subsection 173(*c*) and (*d*), *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 349, [2004] F.C.J. No. 395 (QL), at paragraph 7.)

[23] The general documentary evidence indicating that there are problems with the protection regime for victims of domestic violence does not assist Ms. Bermudez since the Board recognized that there were domestic violence issues in Costa Rica:

> The government continued to identify domestic violence against women and children as a serious and growing societal problem…

(Decision of the Board, at page 4)

[24] Nonetheless, in considering Ms. Bermudez's particular circumstances, the Board concluded that she failed to demonstrate, with clear and convincing evidence, that she would not be able to obtain state protection. The Board did not find that Costa Rica was a state unable or unwilling to protect any victim of domestic violence. On the contrary, the Board found that:

> In this case, the claimant's own document, illustrates that, once a complaint was made against the claimant's spouse regarding his abuse of her daughter and his son, steps were taken by the judicial system.
>
> > "It is ordered that the body of proof is forwarded to the local Attorney General's Office, for the investigation of the existence of a sexual crime by… against the minor… Also, the body of proof is to be sent to the National Foundation for the Child, based in Guipales, for them to proceed as it may correspond.
> >
> > ...
> >
> > Once the period for the ordered protection measures has expired, and the interested party does not file for an extension of the period, then File the dossier.
>
> This clearly illustrates that the Law Against Domestic Violence was applied, and protection measures were granted for a period of six months.

(Decision of the Board, at page 5)

[25] Moreover, the decision of the Board demonstrates that it considered the Applicant's submissions relating to her having sought state protection in order to obtain a protection order against her spouse but was told that her file had been closed; however, it determined that the Applicant failed to provide any document to substantiate her contention that any effort was made to file an extension of the protection order. As such, the Applicant's allegation that state protection is not available in Costa Rica was unjustified, given the evidence on country conditions, indicating

that the state was responding to the problem of domestic violence and that perpetrators of such crimes were being prosecuted.

[26] The onus was on Ms. Bermudez to provide clear and convincing evidence to show that state protection would be unavailable. The existence of documents suggesting that the situation in Costa Rica is not perfect is not, by itself, clear and convincing confirmation that state protection is unavailable, especially when there are numerous other documents indicating that state protection is available. As stated in *Pehtereva v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1491 (QL):

> [12] In addition, I am not persuaded that the tribunal ignored documentary evidence provided by the applicant. That evidence, of newspaper and other articles with translations to English where necessary, is not specifically referred to by the tribunal, but in its decision it recorded its agreement with the Refugee Hearing Officer's observations that the most reliable evidence was from independent objective sources such as Human Rights Watch, Amnesty International and the Department of State Country Reports as opposed to anecdotal, newspaper articles. The sources referred to by the tribunal are sources regularly relied upon by refugee claims tribunals as providing generally objective information on country conditions. Reliance upon such sources cannot be characterized as error; even if the newspaper articles submitted by the applicant provided examples indirectly supportive of the applicant's claim, for it is trite law that the weight to be assigned to given documents or other evidence is a matter for the tribunal concerned. Even if the reviewing court might have assigned different weight or reached other conclusions that provides no basis for the reviewing court to intervene where it is not established that the tribunal has been perverse or capricious or its conclusions are not reasonably supported by the evidence. I am not persuaded that the tribunal's conclusions can be so classified in this case.
>
> [13] Finally, the tribunal's decision does not set out in precise terms why it preferred certain documentary evidence and not other evidence, but that does not constitute error. Here, the applicant's concern is primarily that the documentary and other evidence offered by the RHO was relied upon without specifying why evidence of the applicant was not. But that preference of the tribunal, related to evidence of the general circumstances within Estonia, of which the applicant's experience was but an example. The general circumstances based on documentary

> evidence from recognized sources provided the basis for objectively assessing the applicant's expressed fear. In my opinion, the tribunal did not err by ignoring evidence offered by the applicant, or by failing to specify reasons for preferring other sources of evidence, particularly in seeking an objective overview of circumstances within Estonia. Nor am I persuaded that the tribunal misunderstood or misstated the evidence of the applicant in any way significant for its ultimate finding that the applicant is not a Convention refugee, because it found no serious possibility or reasonable chance she would be persecuted for any reason set out in the definition of Convention refugee should she return to Estonia.

[27] The Court finds that the Board did properly assess the objective and subjective facets of the Applicant's claim. Consequently, no error is found on this basis.

(3) Did the Board err in its credibility finding?

[28] Ms. Bermudez argues that the Board erred in its credibility finding. The Court disagrees, finding instead that the Board was justified in arriving at such a conclusion and provided clear reasons for its determination.

[29] The Board noted significant discrepancies in Ms. Bermudez's testimony. First, the Board found that the Applicant's answers, with respect to why she failed to mention that her spouse was going to kill her before her accident, were vague and unrelated. On this note, the Board stated the following:

> Soon after, the claimant's spouse allegedly tricked her to go with him on his motorcycle, and caused an accident, whereby she fell and lost consciousness. In her oral evidence she stated that he told her he was going to kill her; however, this information is not contained in her Personal Information Form (PIF) narrative. She was given several opportunities to explain why she had failed to mention this in either her original PIF narrative, or in the amended one, that her spouse had actually warned her before the accident that he was going to kill her, but her answers remained vague and unrelated.

(Decision of the Board, at pages 1 and 2.)

[30] Second, it found that the Applicant's explanation, as to why she omitted to include in her narrative that her common-law spouse had a lot of money, was well-connected to the police and that he was a leader of drug dealers, was incompatible with her written account. In this regard, the Board stated the following:

> The claimant stated that her spouse has a lot of money, is very well-connected with the police, and she was too afraid of him to go to the authorities. There were some additions to the claimant's PIF narrative, the most significant one being that, 10 years ago, she learned her spouse was a leader of drug dealers.
>
> When asked why she had not included this in her narrative, the claimant said she was afraid someone would tell her spouse. The panel finds her explanation for the omission is incompatible with her written account, which already contains other highly sensitive details.
>
> How did the claimant know her spouse was a leader of drug traffickers? She said that she heard people call him "chief" on the phone, and that he gave his father a big house; she also heard them talking of "disappearing" people. She did not go to the authorities with this information because he threatened her. First, the panel finds her deduction that her spouse was into drug trafficking to be based on speculation. But more importantly, if she really believed for 10 years that her spouse was a leader of drug traffickers, who talked of eliminating people, the knowledge gave her more clout to report his abusive behaviour to the authorities.

[31] Consequently, in light of all the evidence presented, the Board did not err in its credibility finding.

CONCLUSION

[32] For all the above reasons, the judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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