

Date: 20080598

Docket: IMM-1985-07

Citation: 2008 FC 586

Ottawa, Ontario, May 8, 2008

PRESENT: The Honourable Mr. Justice Blanchard

PRESENT:

Erika Angelina ZAMORA HUERTA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Erika Angelina Zamora Huerta, is a citizen of Mexico who claimed refugee protection. She claimed a well-founded fear of persecution at the hands of her common-law spouse, Ernesto Ibanez Argumedo, a member of the Federal Investigative Agency (AFI) of the Mexican police, who sexually abused her and beat her. In its decision rendered on April 25, 2007, the Refugee Protection Division of the Immigration and Refugee Board (the Board) dismissed the claim for protection because it did not believe the Applicant was who she claimed to be nor did the Board find her story of abuse to be credible. The Board further determined that

state protection was available to the Applicant in Mexico and that she had internal flight alternatives (IFA) in Mexico.

[2] For the reasons that follow, this application for judicial review will be allowed.

I. Background

[3] In her claim, the Applicant alleges the following three specific incidents of abuse at the hands of her common-law spouse:

(a) On September 17, 2001, when she first moved in with him, he became very upset with her and hit her because she refused to have sex with him.

(b) In April 2003, he beat her severely for not serving him properly which left her with a broken arm and an unrecognizable face. He took her to the Medical Clinic Balbuena for treatment and told the doctor that she had been beaten by criminals. Upon their return home, she informed him that she wanted to end the relationship, but he burned her ID documents and threatened her with more beatings to keep her with him.

(c) Another incident occurred when a neighbour heard screams and called a social worker from the Integral Family Development Agency (DIF), who interviewed the Applicant and took her to the Public Ministry of the judicial police to file a complaint. One of the agents knew her common-law spouse and alerted him. She

was escorted home by police and her common-law spouse beat her in front of them until she passed out. She also believes that he attempted to strangle her.

[4] In 2004, the Applicant fled Mexico City for Queretaro; however, her common-law spouse located her, took her back home and locked her in the house for a few days. Subsequently, she managed to escape and flee.

[5] The Applicant arrived in Canada on September 24, 2004. After her arrival, she lived with a man for a year who had promised to marry and sponsor her; however, this did not materialize. The Applicant claimed protection on April 8, 2006.

II. The Board's Decision

[6] With respect to the Applicant's identity, the Board questioned the genuineness of her passport because she "appears to have obtained it improperly". The Board noted that she testified she obtained her passport in Mexico on the strength of an expired electoral card, since her husband had burned all of her identification papers and cards. The Board found her explanation to be contrary to country documents on Mexico which indicate that a birth certificate is required to obtain a valid passport. Further, the Applicant admitted that she did have a birth certificate with her mother in Mexico, but had not sent for it because counsel had instructed her not to. The Board concluded that the passport, the only document adduced as to the Applicant's identity, was not genuine.

[7] With respect to her allegations of abuse, the Board found the following inconsistencies and contradictions in the Applicant's testimony:

- (1) The psychological report submitted as evidence explained that, as a result of the trauma caused by her abusive experience with her common-law spouse, "she is quite adamant that she will not engage in any sexual activities", however, shortly after her arrival in Canada on September 24, 2004, she entered into a common-law relationship with another man for approximately one year. The Board indicated that the Applicant was unable to provide an explanation for this inconsistency.
- (2) The Applicant testified that she was severely beaten and had an arm placed in a cast, however, the medical certificate submitted as evidence indicated that she had suffered "multiples in both arms" and pelvis, but made no mention of either arm specifically needing to be placed in a cast. The Applicant was not able to provide an explanation for this discrepancy.

[8] The Board found that both inconsistencies taken together rendered her story of physical abuse not credible.

[9] With respect to state protection, the Applicant had not rebutted the presumption that state protection is available in Mexico. The Applicant's one attempt to file a complaint was not sufficient in light of the other avenues for protection available including the National Human Rights Commission, the National Institute for Women, SACTEL (a 24 hour confidential hotline

service created for the citizens to make complaints about public servant misconduct), or the General Comptroller's Citizen Assistance directorate.

[10] In support of its finding, the Board cited documentary evidence indicating that the Mexican government is moving forward with police reform, and investigating possible misconduct by federal officers and government employees resulting in the issuance of warnings, reprimands, suspensions, and dismissals.

[11] The Board also indicated that there was strong evidence of the government's serious efforts at improving state protection for women. The government set up various initiatives aimed at tackling the problem of violence against women, including pursuing the adoption of new legislation on violence against women in 15 states and the implementation of programs in 16 states to combat such violence. Specifically, the UN Special Rapporteur on violence against women reported that "[t]he Government of Mexico has taken significant steps to prevent, punish, and eradicate violence against women with due diligence."

[12] Finally, on the issue of the IFA, the Board was of the view that the Applicant could move to other large cities, such as Guadalajara or Monterrey if she took reasonable precautions such as not revealing her new address to relatives and friends. The Board saw no serious possibility that the Applicant would be tracked down by her ex-common-law spouse despite his employment with the AFI. The Board evaluated the possibility that, as an AFI agent, he would be able to track down the Applicant using electronic means on the basis of the Applicant's voter registration card but concluded, based on the record, that on a balance of probabilities this would not occur.

Further, given the Applicant's education and work experience as a waitress and sales person, the Applicant would be able to settle in a new city in Mexico without undue hardship.

III. Issues

[13] This application raises the following issues:

- A. Did the Board err in its credibility findings?
- B. Did the Board err in its state protection analysis?
- C. Did the Board err in its IFA analysis?

IV. Standard of Review

[14] The Board's conclusions in respect to its credibility findings, state protection and internal flight alternative in Mexico available to the Applicant are all reviewable against the standard of reasonableness. The degree of deference to be afforded to each of these questions of mixed fact and law has already been satisfactorily considered in the jurisprudence. See *Dunsmuir v. New Brunswick*, 2008 SCC 9, for the standard of review generally; (*Xu v. Canada (Minister of Citizenship and Immigration)*), 2005 FC 1701, [2005] F.C.J. No. 2127 (QL), at para. 5; *Asashi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 102, [2005] F.C.J. No. 129 (QL), at para. 6; *Canada (Minister of Citizenship and Immigration) v. Elbarnes*, 2005 FC 70, [2005] F.C.J. No. 98 (QL), at para. 19), for credibility findings; *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, (2007), 362 N.R. 1 at paragraph 38 (F.C.A.), for conclusion about the adequacy of state protection; and (*Hattou c. Canada (Ministre de la Citoyenneté et de l'Immigration)*), 2008 FC 230, [2008] F.C.J. No. 275 (QL), at para. 12; *Chorny v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 999, [2003] F.C.J. No. 1263 (QL), at para. 11), for conclusions relating to IFA.

[15] In applying the reasonableness standard to the Board's findings, I must inquire "into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir*, above, at para. 47).

V. Analysis

A. *Did the Board err in its credibility findings?*

[16] In the present case, I find the Board's credibility findings to be unreasonable in the circumstances.

[17] In rejecting the Applicant's passport, her only identity document, the Board relies on information which pertains to the procurement of a Mexican passport abroad as opposed to within Mexico. The documentary evidence reveals that when applying for a passport abroad a birth certificate is required. However, there is no evidence on the record that indicates the process for obtaining a passport in Mexico has the same requirement. The decision to reject the passport establishing the Applicant's identity was therefore made on a misapprehension of the facts and without regard to the evidence. Consequently, the Board erred in finding that the Applicant had not established her identity.

[18] With respect to the first of the two contradictions in the Applicant's testimony, I find that the Board ignored the explanation offered by the Applicant. The Board referred to the psychologist's report which indicated that the Applicant did not want to engage in sexual activities because of her traumatic experiences with her common-law spouse in Mexico and contrasted this with the fact that she had been involved in a relationship with a man shortly after her arrival in Canada. When faced with this contradiction, the Applicant offered an explanation which I reproduce from the transcripts of the hearing:

Member: I have one question, because there's something that bothers me.

In reading Dr. Palowski's report, he said, on page 4, that you will not engage in any sexual activities.

Claimant: At this moment.

Member: So, what kind of relationship did you have with this man?

Claimant: No, what I meant was, at that moment, now that I finish my relationship with this man, I will not engage in any sexual activity until I feel better, until I cure myself.

Member: Thank you.
(p. 282, Tribunal Record)

[19] While this explanation was indeed offered at the hearing, in its reasons, the Board indicated that "[s]he could not provide an explanation for the inconsistency between the statement in the psychological report and her common-law relationship with Mr. Ramirez." The Board erred by stating that no explanation was offered by the Applicant and by failing to address the sufficiency of the Applicant's explanation in its reasons. Its finding with respect to the inconsistency is therefore unreasonable.

[20] The second contradiction, noted by the Board involved the Applicant's statement that she needed a cast after being assaulted by her common-law spouse while in Mexico and a medical report of the incident which did mention that the Applicant had suffered "multiples in both arms" but did not refer to a cast being required. Again, the Board found that the Applicant had failed to explain the discrepancy. While no explanation was forthcoming, the Board did acknowledge that this particular contradiction, on its own, would not suffice to render the Applicant's story of alleged abuse unbelievable. However, the Board went on to indicate that when viewed together, the two contradictions justified its finding of non-credibility.

[21] In my view, the Board's finding of a second contradiction is also questionable in the circumstances. In any event, given my determination that the Board's finding with regard to the first inconsistency is unreasonable, and considering the Board's statement that it was the cumulative effect of the two contradictions that rendered the Applicant's story not credible, it is not possible to ascertain what effect the erroneous finding would have had on the Board's analysis and on its ultimate credibility finding. I therefore find that the Board's credibility finding was made in error and is reviewable. See *Qalawi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 662, [2007] F.C.J. No. 904 (QL), at para. 17.

B. *Did the Board err in its state protection analysis?*

[22] The Board relied on documentary evidence to conclude that, "as a progressive democracy, Mexico can be said to be providing adequate though not necessarily perfect state protection to its citizens." The Board found that the Applicant did not reasonably exhaust any

course of action available to her prior to seeking international protection. It concluded that state protection is available to the Applicant in Mexico.

[23] The Board stated that there is strong evidence of the government's serious efforts at improving state protection for women. These efforts included the adoption of new legislation on violence against women, the implementation of programs to combat such violence, and the creation of the women's national health program with the view to assisting victims of domestic violence.

[24] The same documents relied on by the Board also evidence circumstances that directly contradict its finding that protection was available to women in Mexico. A careful review of the documents establishes that:

- “Unbearably high levels of violence against women continue to exist in Mexico, the government needs to do more to live up to its international obligations. The responsiveness of the police and justice sectors to gender-based violence remains inadequate overall and needs to be improved”; (UN Rapporteur on violence against women);
- Police corruption, inefficiency and lack of transparency continue to be major problems in the justice system and many police officers are involved in kidnapping and extortion;
- While the federal government has made some efforts in corruption awareness and prevention, the same cannot be said for enforcement and prosecution;
- Domestic violence is considered by many as a private matter; many believe that sexism and even violence against women are part of the social fabric and this mindset has led many men, including policemen, prosecutors, judges and others in positions of authority, to underestimate the problem of violence against women;
- Women who are victims of domestic violence face numerous obstacles when they attempt to report it.

[25] The Board failed to explain its selective reliance on the documentary evidence. It failed to deal with the above noted evidence that directly contradicted its finding that protection was available for women in Mexico. This evidence supports the Applicant's testimony and directly contradicts the evidence relied on by the Board to conclude that protection was available to the Applicant in Mexico. The Board's decision, concerning state protection, lacks justification and intelligibility. It does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. (See *Dunsmuir* at para. 47.) Consequently, the decision with respect to state protection is unreasonable and must be set aside.

C. *Did the Board err in its IFA analysis?*

[26] The Board found that the Applicant had an IFA in other large cities in Mexico, specifically, Guadalajara, West of Mexico City, North East of Mexico City and Monterrey, provided she took reasonable precautions and not reveal her new address to relatives and friends.

[27] In determining the existence of an IFA, the Federal Court of Appeal stated in *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589, [1993] F.C.J. No. 1172 (QL), at para. 12 that:

...Thus, IFA must be sought, if it is not unreasonable to do so, in the circumstances of the individual claimant. This test is a flexible one that takes into account the particular situation of the claimant and the particular country involved. This is an objective test and the onus of proof rests on the claimant on this issue, just as it does with all the other aspects of a refugee claim. Consequently, if there is a safe haven for claimants in their own country, where they would be free of persecution, they are expected to avail themselves

of it unless they can show that it is objectively unreasonable for them to do so. [My emphasis.]

[28] The Court further held that an IFA cannot be speculative or theoretical but rather it must be a realistic and attainable option; "...The claimant cannot be required to encounter greater physical danger or to undergo undue hardship in travelling there or in staying there."

(*Thirunavukkarasu*, above, at para. 14). The Court stated that individuals should not be forced to hide out in isolated areas of the country, but "... neither is it enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there..." (*Thirunavukkarasu*, above, at para. 14)

[29] The Applicant's evidence is that she did relocate to Queretaro in 2004, but was tracked down by her common-law spouse, a trained police interrogator, who assaulted the Applicant's mother, and forced her to disclose the Applicant's new location. The Board did not expressly address these circumstances in considering the IFA in its reasons. But the Board did qualify its finding by stating that an IFA existed for the Applicant in Mexico, provided she took reasonable precautions and not reveal her new location to relatives and friends. Not to be able to share your whereabouts with family or friends is tantamount to requiring the Applicant to go into hiding. It is also an implicit recognition that even in these large cities, the Applicant is not beyond her common-law spouse's reach. In these particular circumstances, this cannot constitute an IFA for the Applicant. The Board's finding of an IFA does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law in the circumstances. As a result, the decision with respect to an IFA is unreasonable and must be set aside.

IV. Conclusion

[30] For these reasons, the application for judicial review will be allowed. Counsel posed no question for certification, and I agree that no question arises on this record.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the decision of the Refugee Protection Division dated April 25, 2007, is hereby set aside.
2. The matter is remitted for redetermination by a differently constituted panel of the Refugee Protection Division.
3. No question of general importance is certified.

“Edmond P. Blanchard”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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