

Date: 20080724

Docket: IMM-3079-07

Citation: 2008 FC 901

Ottawa, Ontario, July 24, 2008

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

Carolina Martinez Klemp

Applicant

and

The Minister of Citizenship and Immigration

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Carolina Martinez Klemp (the Applicant), seeks Judicial Review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act) of a decision of the Immigration and Refugee Board, Refugee Protection Division dated July 9, 2007 (the Decision) wherein it determined the Applicant was not a Convention Refugee or a person in need of protection.

BACKGROUND

[2] The Applicant was born on August 7, 1979 in Mexico City, Mexico. She had twelve years of education, had never travelled outside Mexico and was 28 years old at the time of the hearing. There was no evidence that she had any psychological difficulties.

[3] In January 1999, one of the Applicant's uncles was kidnapped and held for three months. Shortly after he returned, he approached authorities to report the crime. Several weeks later he was found murdered two blocks from the Applicant's family home. The Applicant's perception was that the Police took no action to protect her uncle.

[4] The Applicant alleged that her father, an accountant, had been involved in illegal gas sales and money laundering with Javier Quiroz Macias (Macias), his brother-in-law from a former marriage. She alleged that Macias is a boss in organized crime and therefore has the power to bribe Judges and Police. At some point Macias and her father had a falling out and Macias retaliated against her father and her family in various ways.

[5] For example, Macias allegedly bribed a Judge and an actuary to put a quick end to an eight year legal battle over possession of the Applicant's family home. In September 2004, Police evicted the Applicant and her family. The Applicant's perception was that the Police acted in a corrupt manner and were in the pay of Macias.

[6] In February 2005, the Applicant says her father was kidnapped by Macias and jailed in a prison in the state of Puebla. The Applicant alleged that her father told her that the State Police and Judges in that state were being bribed by Macias. Her father was sentenced to seven years imprisonment but was released in November 2006 following a successful appeal.

[7] The Applicant claims that on May 9, 2006, she was approached by a man she did not know who grabbed her and tried to persuade her to become a prostitute. The Applicant escaped and did not report the incident to the Police.

[8] The Applicant further alleges that on May 23, 2006, she was grabbed by several men and dragged into a large white car. One of the men told her that he had been responsible for putting her father in prison and asked whether she had considered becoming a prostitute. She assumed that he was Macias. The Applicant alleges she was beaten, threatened with a gun, sexually assaulted and forced to perform oral sex on the men in the car. She was released when she agreed to take an HIV test so that she could start working as a prostitute.

[9] The Applicant told her family about the incident but did not report it to the Police.

[10] The Applicant was not further harassed by Macias or his associates. However, she claimed that this was because she was escorted by her brother when travelling to and from work. She mentioned at the hearing that either Macias or his associates followed her on occasion.

[11] On May 24, 2006, the Applicant asked her family for help to purchase a plane ticket but they were unable to pay for one until July 25, 2006.

[12] On July 25, 2006, the Applicant fled to Canada and on September 18, 2006, she claimed refugee status.

THE DECISION

[13] The Decision turned on the issue of state protection. The Applicant testified at the hearing that, in her opinion based on her family's experience, the Police were corrupt. She had no expectation that they would pay attention to her problem and investigate and arrest Macias and others responsible for sexually assaulting her and trying to force her into prostitution. It is noteworthy that the Applicant did not testify that she feared the Police. She just thought it would be pointless to approach them because they hadn't "paid attention" when her uncle complained before his murder, when her family was evicted, or when her father was improperly imprisoned.

[14] The Board correctly state the issue as follows:

The issue is whether the government of Mexico is making serious efforts to provide adequate protection to individuals in the claimant's situation in Mexico.

[15] The Decision turned on the fact that the Applicant never approached the Police and on the Board's conclusion, relying on the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 724, which states that "the claimant will not meet the definition of

‘Convention refugee’ where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities”.

[16] The Board quoted extensively from documentary evidence dealing with Police corruption and methods for filing complaints against authorities and concluded that adequate state protection is available in Mexico.

[17] In reaching this conclusion, the Board said:

The panel assigns far greater probative value to the documentary evidence than to the testimony of the claimant with regard to the availability of state protection in Mexico. In this regard, the panel takes guidance from the case law in *Edomsky*, which stands for the proposition that the Board can prefer the objective documentary evidence to the subjective testimony of claimants. The documentary evidence cited herein is drawn from a variety of reliable and independent sources, none of which can have any vested interest in whether or not the claimants are determined to be Convention refugees. To that extent they are free of bias.

THE ISSUES

[18] The Applicant’s principal criticism is that the Board failed to recognize the gender basis of the claim. The Board analyzed the issue of state protection only from the perspective of Police corruption rather than considering as well the potential for harm from Macias which was the fear expressed in the Applicant’s Personal Information Form.

[19] The Applicant says that the Board also erred in quoting extensively from the documentary evidence without relating the quotations to the Applicant’s situation.

[20] Further, the Applicant is critical of the Board's decision to accord greater probative value to the documentary evidence than to her testimony on the basis that the documentary evidence is from reliable, independent and unbiased sources. However, her testimony did not actually deal with state protection for women in her circumstances. Rather, it dealt with her perception of her family's experiences with police corruption. Accordingly, this is not an issue of substance in this case.

[21] Finally, the Applicant suggested that the Board's application of the Gender Guidelines lacked substance and that its failure to apply the Vulnerable Persons Guideline (VPG) was an error. In my view, the submissions on this point do not merit further discussion and I did not call on the Respondent to address them during the hearing. I reached this conclusion because the Board said that it gave the Gender Guidelines "serious consideration" and because the Board was sensitive in its handling of the Applicant's evidence during the hearing. In addition, the VPG was not raised at the hearing. It was first mentioned in unsolicited post-hearing submissions and was not supported by medical or other evidence. In these circumstances and because of the Applicant's age and education and the fact that she managed reasonably well at the hearing, the Board was entitled to conclude that the VPG did not apply.

THE STANDARD OF REVIEW

[22] In light of the decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, and noting that the issues involve mixed questions of fact and law, I conclude that the standard of review should be reasonableness.

DISCUSSION

[23] The Board accepted that the Applicant feared persecution by Macias. The Board also explicitly accepted that there was a gender basis for the Applicant's fears: she feared that Macias would force her into prostitution. However, the evidence did not support a gender based explanation for why it was objectively reasonable for the Applicant to make no effort to seek protection from the Police or other authorities.

[24] Having accepted those fears, the question before the Board was whether the Applicant had rebutted the presumption of state protection. The Board noted that the Applicant had never gone to the Police or otherwise sought state protection. The Board considered whether this failure was objectively reasonable and concluded that it was not. Citing *Ward*, the Board noted that a claimant must show that it was objectively unreasonable not to seek state protection.

[25] The Applicant argued that the Board erred in failing to refer to the documentary evidence on the availability of state protection for women who have been subjected to domestic and sexual

abuse. In particular, the Board ignored a section in a February 2007 document entitled “Issue Paper - Mexico: Situation of Witnesses to Crime and Corruption, Women Victims of Violence and Victims of Discrimination based on Sexual Orientation” (the Issue Paper) under the heading “Women victims of violence” (the Section) although it quoted extensively from other parts of the same document. As the Applicant was a victim of sexual abuse, the Applicant argued that the Section should have been referred to in the Decision.

[26] The quotation from the Issue Paper was extensive and dealt with efforts to control security forces, procedures to report and prosecute crimes, efforts to control corruption in the public service and Police, victim assistance, efforts to encourage victims to report crimes and increase citizens’ confidence in public security agencies, redress for human rights violations by Federal District public servants, and protection for witnesses of crime.

[27] The Section primarily dealt with statistics about homicides and spousal abuse which were not directly relevant to the Applicant’s case. However, the introductory paragraph of the Section read in part:

violence against women, including domestic sexual violence, poses a significant challenge for Mexican authorities ... because such violence is not addressed effectively by many law enforcement agencies ... particularly at the municipal and state level.

[28] While the Section does suggest that victims of gender based persecution may have less access to state protection than other victims of crime. It does not suggest that there is no effective state protection for women in the Applicant’s situation. The passages to which the Board made no

reference do not support an argument that it was objectively reasonable for the Applicant not to seek state protection based on her personal belief that the Police would ignore her.

JUDGMENT

UPON reviewing the material filed and hearing the submissions of counsel for both parties in Toronto on Tuesday, February 26, 2008;

AND UPON being advised that no questions are posed for certification;

NOW THEREFORE THIS COURT ORDERS AND ADJUDGES that for the reasons given above the Application is dismissed.

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3079-07

STYLE OF CAUSE: CAROLINA MARTINEZ KLEMP v. MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 26, 2008

REASONS FOR JUDGMENT: SIMPSON J.

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