Date: 20080916

Docket: IMM-658-08

Citation: 2008 FC 1035

Ottawa, Ontario, September 16, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

ALEJANDRINA DAYNA GALLO FARIAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated December 14, 2007 concluding that the applicant, a Mexican citizen, is not a Convention refugee or a person in need of protection.

[2] In this application the Court found that (1) the applicant's personal situation in relation to her alleged abuser, a high-ranking agent of the state, was not properly considered by the Board; and (2) the Board did not properly consider whether the applicant had a viable internal flight alternative (IFA) in Mexico.

The Court has summarized the legal criteria which the Board must follow in identifying an IFA in Mexico and elsewhere and applying it to the circumstances of this applicant and other refugee claimants.

FACTS

[3] The applicant arrived in Canada in July 2005 at the age of 22 seeking refugee protection because of her abusive relationship with a senior government official in the Mexican state of Hidalgo.

[4] The applicant states that she first met this man in January 2002 while applying for a job at the Hidalgo Ministry of Public Security, Transit and Civil and Municipal Protection. The applicant was 19 years old at the time. The official was 20 years the applicant's senior.

[5] The applicant states that the two developed an intimate relationship. However, the public official was married to another woman at the time, and remained so throughout the relationship. In June 2003, the applicant moved into an apartment rented by the public official. She states that during this time, the public official helped her gain admission to the state university in Pachuca and provided her with money and a credit card.

[6] The applicant states in her Personal Information Form (PIF) that shortly after moving into the apartment, the public official began to abuse her physically and verbally. She lists several such incidents:

a. in August 2003 the public official slapped the applicant's face after an argument about how much time she was spending with friends at the university;

b. in November 2003 the public official beat the applicant during an argument about his refusal to allow the applicant to visit her family in Mexico City. A few days later he raped the applicant, telling her it was because of their argument;

c. in January 2004, after spending the New Year with the applicant's family, the applicant and the public official had an argument over his treatment of her family. During the argument, he "became more violent than he ever had before," verbally abused her, and raped her. The applicant sought medical attention and reported the incident to the police in Pachuca. The police refused to take her rape complaint because of the public official's position, and told the applicant that they doubted its veracity because he was married and a public figure. After this incident, the applicant began attending a group for abused women. She was told that because the group was connected to the ministry run by the public official, they could not assist her in taking action against the public official;

d. in May 2004 the public official accused her of being unfaithful and pushed her to the floor, choked her with a belt, and raped her. After this incident, the applicant moved out of the apartment and went to live with her grandmother in Mexico City. She was examined by and obtained a medical report from a physician and reported the incident to the police in Mexico City, but was told that she could only make a report to the police in her home state of Hidalgo where the assault occurred; and

e. in August 2004, the public official tracked her down in Mexico City and arrived at her grandmother's home in a "judicial police car" with four armed individuals who forced the applicant to return with the public official.

The applicant states that despite these incidents, she maintained her relationship until March 2005 when she consulted a lawyer in Pachuca. The lawyer advised the applicant that acting against such a high-ranking public official would be impossible. In fact, the lawyer feared personal repercussions if the lawyer acted against the public official.

[7] The applicant continued to move around Hidalgo and Mexico City, staying with a number of friends and relatives in an attempt to avoid the public official. This continued from March 2005 until July 2005 when she fled to Canada and sought refugee protection.

Decision under review

[8] On December 14, 2007, the Board concluded that the applicant was not a Convention refugee or a person in need of protection. In the decision, the Board made no findings with respect to the applicant's credibility. (In the transcript of the hearing, at p. 322, the Board member stated "In light of the psych report … I'm going to take credibility off the table.") Rather, the Board's decision is based solely on the adequacy of state protection, wherein it concluded that the Federal District of Mexico City was making "serious efforts to provide adequate protection" to persons in the applicant's situation.

[9] The Board began its analysis by recounting the submissions of the applicant's counsel as well as the specific circumstances of the applicant's situation. The Board next reviewed the documentary evidence concerning state protection in Mexico before concluding at page 5:

> This review satisfies me that at the federal level, that is, at least in the D.F. of Mexico City, there is in place a legislative framework that is designed to provide victims of domestic violence recourse through the rule of law.

[10] The Board then considered whether the evidence was sufficient to conclude that the framework was being "implemented and supported" in the Federal District. The Board noted that there are "vast differences" between the manner in which federal initiatives are implemented and supported throughout the country. However, the Board narrowed its analysis to the Federal District of Mexico City, which it held most effectively implemented all of the relevant initiatives.

[11] After reviewing the relevant evidence, the Board concluded at page 10:

> For all of the above, the claimant has failed to establish she will not be afforded effective protection in the D.F. within Mexico City as she is required to do. Hence, the Refuge Protection Division rejects the claim pursuant to both sections 96 and 97 of the *Immigration and Refugee Protection Act*.

ISSUES

[12] There are three issues to be considered in this application:

a. Did the Board err in finding that adequate state protection was available to the applicant within the Federal District of Mexico City;

b. Did the Board implicitly find that the applicant had an internal flight alternative in Mexico City, and if so, did the Board properly address this issue; and

c. Did the Board err in failing to assess psychological evidence, medical evidence, the Gender Guidelines, and the applicant's psychological risk if returned to Mexico?

STANDARD OF REVIEW

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question."

[14] In *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 362 N.R. 1, the Federal Court of Appeal affirmed at paragraph 38 that questions as to the adequacy of state protection are "questions of mixed fact and law ordinarily reviewable against a standard of reasonableness." This standard has been previously applied in a number of decisions of this Court:

see *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, 45 Imm. L.R. (3d) 58; *Nunez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1661, 51 Imm. L.R. (3d) 291; and *Franklyn v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1249, [2005] F.C.J. No. 1508 (QL). Accordingly, as long as the Board's reasons are "tenable in the sense that they can stand up to a somewhat probing examination," the decision is reasonable and the Court will not interfere with the Board's decision: see *Franklyn*, above, at para. 17.

ANALYSIS

Issue No. 1: <u>Did the Board err in finding that adequate state protection was available to the applicant within the Federal District of Mexico City?</u>

[15] In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, the Court held that refugee protection is a form of "surrogate protection" intended only in cases where protections from the home state are unavailable. As Mr. Justice La Forest held at page 709:

> … International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. …

Further, the Court held that except in situations where there has been a complete breakdown of the state apparatus, there exists a general presumption that a state is capable of protecting its citizens.

[16] While the presumption of state protection may be rebutted, this can only occur where the refugee claimant provides "clear and convincing" evidence confirming the state's inability to

provide protection. Such evidence can include testimony of similarly situated individuals let down by the state protection arrangement, or the refugee claimant's own testimony of past incidents in which state protection was not provided: see *Ward* at pp. 724-725.

[17] In *Hinzman*, above, the Federal Court of Appeal relied on *Ward* in holding that a person will only be afforded refugee protection in Canada where they can demonstrate through "clear and convincing" evidence that the protections provided by the home state are "unavailable or ineffective": see *Hinzman* at para. 54.

[18] In *Kadenko v. Canada (Solicitor General)* (1996), 206 N.R. 272 (F.C.A.), the Federal Court of Appeal held at paragraph 5 that in order to rebut the presumption of state protection, refugee claimants must make "reasonable efforts" at seeking out state protection, and that the burden on the claimant increases where the state in question is democratic:

> ¶ 5 When the state in question is a democratic state, as is the case at bar, the claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her. …

[19] However, recent Federal Court jurisprudence has held that *Kadenko* cannot be interpreted as requiring refugee claimants to exhaust "every conceivable recourse" available to them in order to rebut the presumption of state protection. This is especially true where the state is alleged to be

involved in the persecution. For example, in *Chaves*, above, Madam Justice Tremblay-Lamer held at paragraph 15:

> ¶ 15 In my view, however, [*Ward*], *supra* and *Kadenko*, *supra*, cannot be interpreted to suggest that an individual will be required to exhaust all avenues before the presumption of state protection can be rebutted…. Rather, where agents of the state are themselves the source of the persecution in question, and where the applicant's credibility is not undermined, the applicant can successfully rebut the presumption of state protection without exhausting every conceivable recourse in the country. The very fact that the agents of the state are the alleged perpetrators of persecution undercuts the apparent democratic nature of the state's institutions, and correspondingly, the burden of proof. …

See also *Nunez*, above, at para. 15 and *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 731, 36 Imm. L.R. (3d) 283 per Madam Justice Mactavish at para. 22.

[20] In the case at bar, the Board concluded that at least in the Federal District of Mexico City, the state was "making serious efforts to provide adequate protection" for individuals in the applicant's situation. The applicant challenges that the Board erred in its conclusion by equating "serious efforts to provide adequate protection" with the actual requirement in *Ward*, above, that the state be able to provide "adequate protection."

[21] The applicant has alleged that the specific circumstances surrounding her relationship with a powerful public figure exclude her from any otherwise available state protection. The Board addressed the issue of corruption of public servants by canvassing the remedies available to victims of violence by public officials and members of the security forces. However, the Board's analysis on this issue does not directly address whether the applicant could reasonably obtain state protection

when the agent of persecution was a powerful, high-ranking public official. Given that the Board did not make any negative credibility assessments, it accepted that the applicant unsuccessfully sought assistance from the police on more than one occasion, from a lawyer, and from the support group attended by the applicant in Hidalgo.

[22] The Board did not address the applicant's attempts to avail herself of state protection. In addition to attempting to make a report to the police in Hidalgo, the applicant went to the police in Mexico City, taking with her a medical report from a Mexico City physician, when she fled following the May 2004 assault. The applicant argues that if recourse to adequate state protection existed in Mexico City, the police there would have taken steps to communicate with Hidalgo police rather than simply turning her away for lack of jurisdiction. In light of these facts, unquestioned by the Board, the Board could not reasonably find that state protection was available to the applicant in the Mexico City. Could the applicant be expected to return to Mexico City after being forcibly taken back to Hidalgo in order to report this incident to the authorities after they had already once told her they were unable to help her?

[23] The Board's analysis of the state protection available in the Mexico City is too general and inadequately addresses the allegation that the applicant approached the Mexico City police for assistance, after being denied protection from the police and from a support group in Hidalgo, the jurisdiction where the applicant was allegedly assaulted and raped.

[24] In *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, [2006] F.C.J. No. 439 (QL), Mr. Justice Martineau held at paragraph 32:

> ¶ 32 Here is the rub: the main flaw of the impugned decision results from a complete lack of analysis of the applicant's personal situation. It is not sufficient for the Board to indicate in its decision that it considered all the documentary evidence. …

[25] Similarly, in the case before me, the Board's decision did not analyse the applicant's personal situation in relation to adequate police protection, in particular,

a. whether the police would prosecute the high ranking public official who allegedly raped her twice, and kidnapped her;

b. whether the three attempts by the applicant to report the criminal acts by the senior public official to the police in Mexico City, in Hidalgo, and to a lawyer in Hidalgo show that the authorities will not protect the applicant because the alleged abuser is a high ranking agent of the state. This lack of analysis by the Board renders the decision unreasonable. "Conducting a state protection analysis in the absence of a determination as to the nature of the persecuting agent risks short circuiting a full assessment of the claim". See *Lopez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1341, [2007] F.C.J. No. 1733 (QL) at paragraph 21.

[26] The Board, in its decision acknowledged this question but provided no response. The Board said at page 8:

> Would the fact the claimant's former lover is a powerful person result in her not being afforded legal recourse?

[27] For these reasons, the Board's decision on state protection is unreasonable, and must be set aside.

Issue No. 2: <u>Did the Board implicitly find that the applicant had an internal flight alternative in Mexico City, and if so, did the Board properly address this issue?</u>

[28] The applicant is not from Mexico City. She is from the city of Pachuca in the State of Hidalgo. The Board did not address the adequacy of state protection in the State of Hidalgo. Instead the Board focussed its consideration of state protection on Mexico City. Neither the Board nor the parties expressly considered Mexico City as an internal flight alternative (IFA) or applied the two-step analysis required for an IFA.

[29] The Board addressed the issue of whether there is adequate state protection in Mexico City as the primary issue. From the Board's analysis, it is evident that the Board accepted that state protection was not available to the applicant in the state of Hidalgo. Then the Board proceeded to the IFA step of its analysis by considering whether there was adequate state protection in Mexico City. The Board's conclusion that there was adequate state protection in Mexico City was effectively a finding that Mexico City was a viable IFA for the applicant. This is not a proper approach to an IFA analysis, as will be discussed below.

<u>The law on internal flight alternatives</u>

[30] The concept of an IFA is "inherent" in the definition of a Convention refugee: see *Urgel v. Canada (Minister of Citizenship and Immigration)*, 142 A.C.W.S. (3d) 486, 2004 FC 1777, at para. 15; *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (C.A.) at paras. 2 and 9. In *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.), writing for the Federal Court of Appeal, Mr. Justice Mahoney stated:

> ¶6 …by definition a Convention refugee must be a refugee from a country, not from some subdivision or region of a country, a claimant cannot be a Convention refugee if there is an IFA. It follows that the determination of whether or not there is an IFA is integral to the determination whether or not a claimant is a Convention refugee.

[31] The applicant was not given the opportunity to show that Mexico City is not an IFA in this case. The failure of the Board to raise the issue of an IFA specifically and apply the two-step test constitutes an error of law; *Kulanthavelu v. Canada (Minister and Citizenship of Immigration)* (1993), 71 F.T.R. 129 (F.C.), 46 A.C.W.S. (3d) 503, at para. 13, and warrants the quashing of the Board's decision.

Internal flight alternatives in Mexico

[32] In cases before this Court, it is clear that crime and domestic abuse in Mexico are widespread. The Court has seen more refugee claims from Mexico than any other country in the past few years. Many of these cases involve domestic abuse. In its Departmental Performance Report of the Immigration and Refugee Board of Canada to the Treasury Board of Canada Secretariat for the 2006-2007 fiscal year, available at <http://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/irb/irb01-eng.asp>, the Immigration and Refugee Board of Canada provides the following statistics:

> Mexico was the top source country in 2006-2007 with 5,490 claims referred; China was second, far behind Mexico, with 1,700 claims; and Colombia was third with 1,450 claims. Mexico accounted for 23% of all claims referred in 2006-2007, 43% above the number of claims referred in 2005-2006; this source country is the principal reason for the overall increase in referrals.

[33] If the state is not able to protect these victims in their hometown, the Board must examine whether they have an internal flight alternative in their own country of 108 million people. The research directorate of the Refugee Board should analyze the number of cities and locations in Mexico where a victim of domestic abuse could seek refuge far away from their abuser. Mexico is of a large geographic size and has a population three times the size of Canada. There may be an IFA in Mexico so that the refugee claimant does not need to come as far as Canada to seek refuge from domestic abuse. Victims of domestic abuse cannot seek refuge in Canada without proving that they cannot safely or reasonably relocate in Mexico.

Criteria for a determination of an IFA

[34] For ease of reference, I summarize a checklist of legal criteria for determining whether an IFA exists. The checklist is as follows:

1. If IFA will be an issue, the Refugee Board must give notice to the refugee claimant prior to the hearing (*Rasaratnam*, supra, per Mr. Justice Mahoney at paragraph 9, *Thirunavukkarasu*) and identify a specific IFA location(s) within the refugee claimant's country of origin (*Rabbani v. Canada (MCI),* [1997] 125 F.T.R. 141 (F.C.), supra at para. 16, *Camargo v. Canada (Minister of Citizenship and Immigration)* 2006 FC 472, 147 A.C.W.S. (3d) 1047 at paras. 9-10);

2. There is a disjunctive two-step test for determining that there is not an IFA. See, e.g., *Rasaratnam*, supra; *Thirunavukkarasu*, supra; *Urgel*, supra at para. 17.

    i. Either the Board must be persuaded by the refugee claimant on a balance of probabilities that there is a serious possibility that the refugee claimant will be persecuted in the location(s) proposed as an IFA by the Refugee Board; or

    ii. The circumstances of the refugee claimant make the proposed IFA location unreasonable for the claimant to seek refuge there;

3. The applicant bears the burden of proof in demonstrating that an IFA either does not exist or is unreasonable in the circumstances. See *Mwaura v. Canada (Minister of Citizenship and Immigration)* 2008 FC 748 per Madame Justice Tremblay-Lamer at

para 13; *Kumar v. Canada (Minister of Citizenship and Immigration)* 130 A.C.W.S. (3d) 1010, 2004 FC 601 per Mr. Justice Mosley at para. 17;

4. The threshold is high for what makes an IFA unreasonable in the circumstances of the refugee claimant: see *Khokhar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 449, per Mr. Justice Russell at paragraph 41. In *Mwaura*, supra, at para. 16, and *Thirunavukkarasu*, supra, at para. 12, whether an IFA is unreasonable is a flexible test taking into account the particular situation of the claimant. It is an objective test;

5. The IFA must be realistically accessible to the claimant, i.e. the claimant is not expected to risk physical danger or undue hardship in traveling or staying in that IFA. Claimants are not compelled to hide out in an isolated region like a cave or a desert or a jungle. See: *Thirunavukkarasu*, supra at para. 14; and

6. The fact that the refugee claimant has no friends or relatives in the proposed IFA does not make the proposed IFA unreasonable. The refugee claimant probably does not have any friends or relatives in Canada. The fact that the refugee claimant may not be able to find suitable employment in his or her field of expertise may or may not make the IFA unreasonable. The same may be true in Canada; and

Issue No. 3: **Did the Board err in failing to assess psychological evidence, medical evidence, the Gender Guidelines, and the applicant's psychological risk if returned to Mexico?**

[35] The applicant argues the Board erred by failing to consider psychological and medical evidence demonstrating the applicant suffered from post-traumatic stress disorder and would suffer further psychological deterioration if returned to Mexico. Further, the applicant states that the Board erred by not making any reference to the applicability of the *Gender Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (the Gender Guidelines).

[36] As I discussed in *Gisela Gallo Farias v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 735 (QL) at paras. 13-19, psychological and medical evidence goes to the

credibility of the applicant's testimony and whether or not the applicant has a subjective fear of persecution. It is not relevant to the objective issue of state protection.

[37] Given that state protection was the determinative issue before the Board, the psychological and medical evidence was not relevant and need not have been referenced in the Board's decision. Similarly, the Gender Guidelines referred to by the applicant are not relevant to the issue of state protection.

CONCLUSION

[38] I have concluded that the Board's decision was unreasonable because it inadequately addressed the particular circumstances of the applicant's relationship and her attempts to seek state protection. As discussed, the Board did not question the credibility of the applicant in deciding this refugee claim and thus accepted that these events took place. Although the Board recognized the issue of corruption among public officials, it did not address the specific difficulties the applicant faced in seeking state protection against her abuser, including in the D.F., where the Board held that adequate protections existed. Neither did it apply the appropriate test for determining that Mexico City was an IFA.

[39] For these reasons, this application for judicial review will be allowed and the matter referred back to the Board for redetermination.

[40] I note, however, that I find it a coincidence that the applicant's sister has made the same type of refugee claim, and that this matter was before me in *Gisela Gallo Farias*, supra. That case was

sent back by me to the Board for redetermination. It may be important that the Board take this coincidence into account in redetermining the credibility of the applicant.

[41] Neither party considered that this case raised any serious question of general importance that ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is allowed, the decision of the Board is set aside, and the matter is remitted to another panel of the Board for redetermination.

"Michael A. Kelen"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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