Date: 20090303

Docket: IMM-3445-08

Citation: 2009 FC 216

Ottawa, Ontario, March 3, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DANIELA HUERTA MORALES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Huerta Morales is a twenty-five year old Mexican national from Puebla. Her claim for Convention refugee protection is founded on the allegation that she fears persecution at the hands of her former boyfriend, Rogelio Roque Flores, the nephew of the Governor of the State of Puebla. She recounts that some three years after they began to date, he became possessive and distant, had relationships with other women and was drinking. When she confronted him, he became violent and physically assaulted her. He threatened her in August 2006 when she told him that she wished to end their relationship. She appears to have had no contact with him for the next two months,

until her birthday in October 2006 when he came to speak to her. He threatened her with a gun and told her that he would rather see her dead than with another man. He reminded her that his uncle was the Governor of Puebla.

[2] On account of this incident, Ms. Huerta Morales decided to leave Puebla and spend the Christmas season in Oaxaca. When it came time to return to Puebla, she confided her fear of Rogelio Roque Flores to her mother and her wish to remain in Oaxaca. The two remained there while the rest of the family returned to Puebla. Rogelio Roque Flores, however, tracked her down and called her, threatening that if she didn't return, her father would suffer the consequences. Subsequently, her family home was looted and her brothers were beaten. Rogelio Roque Flores told her that what had happened was just a taste of what was to come. Ms. Huerta Morales returned to Puebla and filed a complaint with the police, but nothing came of it. The police told her to think twice about the person she was denouncing, apparently with reference to Rogelio Roque Flores' uncle. The threats continued. As a result, Ms. Huerta Morales saw no alternative than to seek refuge abroad. She arrived in Canada in March of 2007 and claimed refugee protection.

[3] In its decision of June 13, 2008, the Board rejected Ms. Huerta Morales' claim on the basis of the existence of an Internal Flight Alternative (IFA) in Mexico City or Guadalajara. It referred specifically to Mexican Federal legislation passed in 2007 to respond to domestic violence against women, and free-of-charge legal, psychological, and medical counseling for victims of domestic violence in Guadalajara, through the *Sistema Nacional para el Desarollo Integral de la Familia*. The Board found that there was no basis for the applicant's contention that Rogelio Roque Flores

would be able to track her whereabouts, commenting that the way she suggested he had tracked her in Oaxaca was implausible. It also noted that her only attempts to obtain police assistance were made at the local, municipal level. The Board's key conclusion was that "even if the claimant was pursued to Mexico City or Guadalajara and I do not find this likely, police protection would be reasonably forthcoming for the claimant. The agent of persecution would have limited influence in those jurisdictions."

Issues

[4] The applicant raises three issues:

(a) Whether the Board's finding that the abuser would be unlikely to be able to trace the applicant anywhere in Mexico was unreasonable;

(b) Whether the Board erred in failing to properly consider that the identity of the abuser, and more specifically his uncle, would impact the availability of State Protection; and

(c) Whether the Board erred in its determination that state protection was available to the applicant in Mexico City and Guadalajara.

Analysis

[5] Canadian law relating to state protection has been stated and developed in a decade and a half of Federal Court jurisprudence interpreting and applying the seminal exposition of the issue in *Canada (Attorney General) v. Ward,* [1993] 2 S.C.R. 689. In that decision Justice LaForest stressed the surrogate nature of refugee protection; it is only the failure of the foreign state to protect that will

engage Canadian responsibility. Absent a situation of total breakdown of state institutions, the ability of the foreign state to provide protection is presumed. The surrogacy principle has raised various issues relating to the intensity of the presumption of state protection and the type of evidence that can demonstrate a failure thereof. The following principles have been articulated in this respect:

(i) The stronger the democratic institutions of the foreign state in question, the heavier the burden will be on the claimant to rebut the presumption: *Kadenko v. Canada (Solicitor General),* (1996), 206 N.R. 272 (F.C.A.).

(ii) A refugee claimant must make reasonable efforts to seek domestic state protection, but needn't exhaust every conceivable recourse: *Chaves v. Canada (Minister of Citizenship and Immigration),* 2005 FC 193.

(iii) Evidence sufficient to rebut the presumption must be "clear and convincing": *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171.

(iv) An absence of perfect or ideal protection in the foreign state will not engage Canada's surrogate role; "adequacy," not effectiveness *per se,* is what matters: *Canada (Minister of Citizenship and Immigration) v. Carillo,* 2008 FCA 94.

[6] The law relating to an IFA, is closely bound up with the notion of state protection. Justice Kelen in *Farias v. Canada (Minister of Citizenship and Immigration),* 2008 FC 1035, recently summarized the legal principles in this area at paragraph 34 of his Judgment.

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…

[7] With these principles in mind, I now turn to the specific issues raised by the applicant in this case.

Whether the abuser would be able to trace the applicant?

[8] The Board found that "there is no persuasive evidence that Rogelio would be able to trace the claimant anywhere in Mexico." The applicant submits that the Board asked itself the wrong question. The question the Board had to address was whether there was a reasonable chance or serious possibility of persecution: *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 67 (F.C.A.). She submits that the Board, instead of asking what might reasonably happen, asked what would happen and, in so doing, applied an overly stringent test.

[9] The respondent submits that no such error was made. The respondent submits that the finding that the abuser would not be likely to be able to trace the applicant anywhere in Mexico was a finding of fact, not a statement of the standard of proof the applicant was required to meet. Counsel points to passages in the decision where the Board accurately describes the burden as one requiring that the applicant "show that there is a reasonable chance that persecution will occur in the entire country" (emphasis added).

[10] In reply, the applicant submits that this situation is much like that in *Carpio v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 383, 76 F.T.R. 64 and *Ghose v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 464 where, although the Board correctly stated the test at the beginning of its analysis, the use of the word "would" on a key finding raised a doubt, and thus a reviewable error, as to which test was actually used by the Board.

[11] As was noted by Justice Reed in *Carpio*, in circumstances such as these it is not appropriate to assess words in isolation – one must examine the whole of the decision. The question to be asked is whether, on a reading of the whole of the decision, one is left in doubt as to whether the Board applied the right test. If so, then the matter is reviewable. If there is no doubt that the correct test was applied, then the decision is not reviewable.

[12] In the decisions cited by Justice Snider in *Ghose* at paragraph 21, the phraseology used by the Board suggested that it was holding claimants to the proof that they <u>would be persecuted.</u> For example, in *Carpio* the Board had written "[t]his does not mean (…) that there is a good chance that the claimant would be persecuted." Formulated in this way, the test is clearly more stringent than what is implied by the phrase "well-founded fear of persecution," which has a statutory foundation in the *Immigration and Refugee Protection Act* and its predecessor statute. In *Ghose* itself, Justice Snider considered the following passage from the decision there under review: "[It is] unreasonable to conclude that the BNP or Jamat goons would recognize the claimant in a dense metropolis of Dhaka or more specifically that the local Maulvibazar BNP leader Siddique or the local Maulvibazar Jamat leader would happen to notice the claimant in Dhaka should they be visiting."

While not so clearly a wrong formulation of the test as the phrase considered in *Carpio*, Justice Snider held that with this wording "the Board seems to have required that the Applicant prove that persecution would more likely than not occur in Dhaka." *Ghose* can be contrasted with *Nilani v. Canada (Minister of Citizenship and Immigration),* 2004 FC 1041, an earlier case where Justice Snider rejected a similar allegation concerning the Board's use of the word "likely", on the basis that in the impugned phrase, the Board was not actually discussing the likelihood or probability of persecution but something else.

[13] In this case, when the Board stated that "there was no persuasive evidence that Rogelio would be able to trace the claimant anywhere in Mexico," it was not, in my view, referring to whether persecution would be more likely than not to occur or articulating any kind of a test in this respect. Rather, it was commenting on something else - an absence of reliable evidence in relation to the claimant's assertion that Rogelio would find her anywhere in Mexico because he had found her in Oaxaca. When asked how he had found her there, she had responded that it was either through her electoral card and telephone receipts and / or by using his uncle's influence. The Board found that these explanations were either implausible or not possible as a means of discovering her whereabouts. Accordingly, it reasonably concluded, based on its analysis of the evidence, that there was no persuasive evidence that the boyfriend would be able to find her in the cities identified as an IFA.

[14] In *Mutangadura v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 298, where once more use of the word "would" in relation to a risk of persecution was an issue, Justice Phelan

remarked that "one cannot become fixated in these words or engage in matters of semantics without considering the whole of the decision and the context in which those words appear." I agree. In my view, and keeping in mind that the proper approach is examine the whole of the decision, it is clear that the Board was not imposing too high a standard on the applicant. On page 3 of its decision, the Board properly observed that "the claimant always bears the burden of proof to show that there is a reasonable chance that persecution will occur," which is a correct formulation of the test. After reviewing the evidence as to how the boyfriend had allegedly found the applicant, the Board wrote: "…if the claimant was pursued to Mexico City or Guadalajara and I do not find that this is likely, police protection would be reasonably forthcoming…" This passage makes it clear that the Board found it <u>unlikely</u> that the applicant would be persecuted and, furthermore, that protection <u>would</u> be forthcoming in any event. These findings are simply incompatible with the existence of a serious possibility, or reasonable chance, of persecution.

[15] Even if I had some doubt as to whether the Board had applied the correct test, I would dismiss this application for judicial review if this was the only basis raised to challenge the Board's decision. I say this because whatever test was used in relation to the possibility of Mr. Roque Flores tracking the applicant, in light of the Board's finding that state protection would be forthcoming in the identified IFAs, the claim would have been rejected.

Whether the identity of the abuser would impact the availability of State Protection?

[16] The applicant submits that the Board's conclusion that "the agent of persecution would have limited influence in [Mexico City and Guadalajara]" was unreasonable given the position occupied

by the abuser's uncle. It is submitted that the Board's findings are "speculative and without any support in the evidence."

[17] The applicant relies on documents that speak of a "deeply entrenched culture of impunity and corruption" in Mexico and submits that through the uncle's position as Governor of a State and his influence, the abuser would be able to locate the applicant anywhere in Mexico. As noted, the Board found that it would be unlikely that the abuser would find the applicant in Mexico City and Guadalajara.

[18] It was for the applicant to lead clear and convincing evidence that the uncle would be inclined to assist his nephew, and that he has the position and power to locate her. The Board observed that not once during the three and one-half years of her relationship with Rogelio Rogue Flores had the applicant ever met the uncle. Further, it held that there was "no persuasive evidence of a close relationship between Rogelio and the governor." Thus, even if the uncle was in a position to use his position to locate the applicant, there was no evidence that he would be inclined to do so. In my view, that was a conclusion that was reasonably open to the Board on the evidence before it. Absent evidence that the uncle and his nephew were close or that the uncle had indicated an inclination to assist his nephew in locating the applicant, the applicant's submission that the uncle would assist Rogelio Rogue Flores in his efforts to locate the applicant is nothing more than speculation. Accordingly, the Board's finding cannot be said to have been unreasonable.

Evidence of State Protection

[19] The applicant alleges that the Board erred in its determination that state protection was available to her in Mexico City and Guadalajara. She submits that the Board's finding was unreasonable as it made only selective reference to country condition documents and did not consider or was silent with respect to contradictory evidence. It is submitted that one document in particular deserved comment and consideration by the Board, namely a 2006 Human Rights Watch report. It is submitted that this report provides evidence that victims of domestic violence face challenges in Mexico City as well as elsewhere in the country.

[20] There is no legal requirement that the Board specifically reference each and every document placed before it by either party. However, if a document provides clear and convincing evidence that runs counter to the Board's findings, then the Board may have to explain why the document was found not to be persuasive. In this case, the Board relied heavily on *The General Law on Women's Access to a Life Free of Violence*, enacted as federal legislation in Mexico on February 1, 2007, and the application of that law in the Federal District and in the State of Jalisco, where Guadalajara is located. This law is more recent than the report the applicant says was passed over. In light of this newly enacted law, the information in the 2006 Human Rights Watch is arguably dated.

[21] A reading of the whole of the decision shows that the Board provided a basis for preferring the evidence it did and to which it gave weight. In my view, and having reviewed the certified tribunal record, there was no evidence before the Board that was contrary to its conclusions and so

compelling that it cried out for discussion. As such, the decision of the Board cannot be said to be unreasonable.

[22] For all of these reasons, the application for judicial review is dismissed. Neither party proposed any question for certification and there is none. This case turns on its particular facts.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is dismissed; and

2. No question is certified.

“Russel W. Zinn”
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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