Federal Court  Cour fédérale

Date: 20090521

Docket: IMM-4686-08

Citation: 2009 FC 512

Ottawa, Ontario, this 21st day of May 2009

Present: The Honourable Orville Frenette

BETWEEN:

Antonio de Jesus PELLON FRICKE
Dolores ALARCON PORTILLA
Jose Daniel PELLON ALARCON
Miguel Alexis NUNEZ ALARCON
Francisco Emmanuelle NUNEZ ALARCON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "Act") of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board"), dated September 15, 2008,

determining that the applicants were not Convention refugees or persons in need of protection pursuant to sections 96 and 97 of the Act.

I. The Facts

[2] The applicants are a family of five from Veracruz, Mexico. The principal applicant is Dolores Alarcon Portilla. Her common-law spouse, Antonio de Jesus Pellon Fricke, their child, Jose Daniel Pellon Alarcon, and her two children from her previous marriage, Miguel Alexis and Francisco Emmanuelle Nunez Alarcon, are the other refugee claimants.

[3] The applicants fled Mexico after being verbally and physically threatened over a number of years by Ms. Alarcon's estranged husband, Miguel Angel Nunez Damian (Miguel).

[4] Ms. Alarcon alleges that in January 2003, she separated from her husband as a result of physical and verbal violence within the marriage.

[5] In June 2004, Miguel allegedly appeared at judicial proceedings for child support and violence was cited as the reason for the break-up of the marriage. He was released, provided he paid support into courts. Ms. Alarcon contends that Miguel showed up at her place of employment and was abusive toward her. She claims she was forced to quit her job in August 2004, as a result.

[6] On August 28, 2004, Mr. Fricke alleges he was beaten by two men, who he claims looked like judicial police officers. He maintains that, at a later date, he saw Miguel in the same car as the perpetrators.

[7] In May 2005, Mr. Fricke and Ms. Alarcon began cohabiting when they found out that she was pregnant. There was no contact between Miguel and the applicants from August 2004 to August 2005.

[8] On August 12, 2005, approximately one year after the alleged beating, Ms. Alarcon claims that Miguel showed up at her home while Mr. Fricke was at work. She states that Miguel brandished a gun at her and threatened her. Her neighbours called the police, who attended at the residence and her ex-husband fled. The police returned requesting money in order to continue investigating.

[9] In August 2005, the applicants decided to live separately, so Ms. Alarcon moved back into her parents' home.

[10] It is alleged that Miguel is employed as some high ranking member of a political party, the Party of the Democratic Revolution.

[11] In December 2005, Mr. Fricke quit his job and started a new business.

[12] In June 2006, Mr. Fricke and Ms. Alarcon moved back in together. However, Miguel would have threatened Ms. Alarcon on the phone and in September 2006, he would have showed up at the applicants' home. They allege that Miguel was armed and accompanied by two men who assaulted Mr. Fricke. When neighbours appeared, Miguel fled. The applicants did not report this incident to police. Nevertheless, Mr. Fricke notes that the police were called but because Miguel had fled, they

did not come to investigate. He further states that the perpetrators would have actually warned him against contacting the police.

[13] In September 2006, Mr. Frick alleges his workplace was vandalized and he attributes this to Miguel, because of the language used in the written threats.

[14] In October 2006, Ms. Alarcon claims that she got two threatening calls.

[15] Mr. Frick came to Canada in October 2006, and Ms. Alarcon and the children came to Canada in December 2006. Ms. Alarcon remained behind to seek legal assistance in getting the courts' permission to bring Miguel Alexis and Francisco Emmanuelle to Canada.

II. The Impugned Decision

[16] The Board concluded that the applicants' fear of persecution is not well-founded. The determinative issues were the availability of state protection and the viability of an Internal Flight Alternative ("IFA") to Guadalajara.

[17] The Board accepted that Ms. Alarcon had suffered abuse during the time she was married and made no adverse credibility finding with respect to the subsequent events related by the applicants, except that it did not believe Ms. Alarcon had received harassing phone calls from Miguel during the final two months she was in Mexico, as she testified.

[18] Specifically, on the question of state protection, the member found: "that the claimants did not make a reasonable or diligent effort to seek protection in Mexico before coming to Canada". The Board rejected the applicants' explanation that state protection would not be effective, saying:

> The Board has found the claimants' responses regarding the effectiveness of state protection to be unreasonable and unsatisfactory, since their statements about the police are vague, speculative and inconsistent with what objective agencies who observe conditions in Mexico indicate.

The Board concluded: "protection would be reasonably forthcoming".

[19] With regard to the IFA, the member correctly set out the two-pronged analysis from *Rasaratnam v. Canada (M.E.I.)*, [1992] 1 F.C. 706 (C.A.), and concluded as to the first prong that "the claimant could not be easily located in Guadalajara", and that Miguel would not pursue her there since if he "was going to harm her, he would have done so by now".

[20] The Board also appeared to find that Guadalajara is too far from Veracruz for Miguel to bother pursuing her there. In any event, according to the Board, there is state protection available if Miguel does locate her.

[21] As for the second prong, the Board concluded that "it would not be unreasonable" for the family to seek refuge in Guadalajara.

III. The Issues

[22] The applicants raise the following issues:

a. Bias Regarding the Agent of Persecution: Whether there is a reasonable apprehension of bias with respect to the Board member's assessment of the actions of the agent of persecution?

b. Internal Flight Alternative for Children: Whether the Board member erred in law by failing to consider whether an individual could be located by means of legal entitlement a father has to his children?

c. Internal Flight Alternative Generally: Whether the Board member made inferences not supported by the evidence as to whether the agent of persecution would seek to find the claimants and what he would do to them?

d. State Protection: Whether the Board member failed to follow Federal Court jurisprudence in her analysis of state protection; ignored specific evidence of the lack of state protection and failed to consider documents supporting the applicant's testimony?

IV. The Legislation

[23] Sections 96 and 97 of the Act read 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 social group or political opinion,

(*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

(*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.

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 son appartenance à un groupe social ou de ses opinions politiques :

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) 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.

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

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

V. The Standard of Review

[24] The jurisprudence has established that the standard of review for the assessment of facts or mixed facts and law is one of reasonableness and, on questions of law the standard is correctness

(*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190). Deference must be given to decisions in findings of fact (*Minister of Citizenship and Immigration v. Khosa*, 2009 SCC 12). Breaches of the rules of natural justice or procedural fairness are also governed by the standard of review of correctness (*Juste v. Minister of Citizenship and Immigration*, 2008 FC 670, paragraphs 23 and 24; *Bielecki v. Minister of Citizenship and Immigration*, 2008 FC 442, paragraph 28; *Hasan v. Minister of Citizenship and Immigration*, 2008 FC 1069, paragraph 8).

VI. Analysis

A. *Apprehension of Bias*

[25] The applicants assert that the Board adopted an attitude which gave rise to an apprehension of bias because of the way it misused the information from the Designated Representative in regards to the intentions of the agent of persecution. They declare that they had no reason to believe it was biased during the hearing and it only became apparent after a review of the reasons of the decision. They plead that this had a direct impact on the central issues of their claim.

[26] The respondent contests this submission arguing that there is no evidence to support such a conclusion.

[27] The test for reasonable apprehension of bias was set out by the Supreme Court of Canada in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, at page 394:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. […] that

> test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude”.

[28] The high threshold of the apprehension of bias test has to be based upon evidence to reverse the strong presumption of judicial impartiality (*Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 260; *Ferrari v. Minister of Citizenship and Immigration*, 2008 FC 1334, paragraphs 24 to 29).

[29] In this case, the applicants admit they perceived no sign justifying a reasonable apprehension of bias during the hearing. I see no evidence in the Board’s decision which would support a conclusion of reasonable apprehension of bias. Even if the Board interpreted the evidence or drew inferences unfavourable to the applicants, this does not support *per se*, such a conclusion. The respondent submits the allegation of bias is without foundation and the Board was merely exercising its obligation to assess the evidence.

[30] It was the Board’s duty to draw the inference which it believed, emanated from the evidence. Therefore, in my view, the issue of bias is not founded.

B. *Internal Flight Alternative*

[31] The applicants resided in Veracruz, Mexico; the estranged husband apparently lived in Mexico City, about 600 kilometres away.

[32] There was question of an IFA to Guadalajara, which is 1200 kilometres from Veracruz. During the last two months, the principal applicant lived in Mexico City, but in hiding because she feared the biological father of her children who had threatened them.

[33] The applicants argue the Board unreasonably inferred from the evidence that they could live elsewhere in Mexico such as Guadalajara. They submit that they could be reached there because of parental rights of visitation for the children. However, the respondent answers that in such a case, accommodation can be obtained from the Court to avoid publicizing their residential address.

[34] The respondent pleads that it was reasonable for the Board to suggest an IFA such as Mexico City or Guadalajara without a serious possibility of being persecuted. Furthermore, the Board considered the evidence with regard to the test set out in case law (*Rasaratnam, supra* and *Thirunavukkarasu v. Canada (M.E.I.)*, [1994] 1 F.C. 589 (C.A.)).

[35] The Board considered the likelihood that the children's biological father would be able to find the applicants, if he desired to do so. However, as the respondent pointed out, in custody proceedings in Mexico the parents report their addresses, but the Court can, in case of domestic violence, allow the aggrieved to orally give his or her address to the Court.

[36] In my view, the Board's reasoning is based on its assessment of the facts, and the applicable law; therefore it did not commit a reviewable error on this question.

C. *State Protection*

[37] The applicants submit that the Board erred in finding that they did not diligently seek state protection because when they did in Mexico, it was adequate and "reasonably forthcoming". The Board faulted the principal applicant for not contacting the police on many occasions over the years when she was assaulted by Miguel. As for Mr. Fricke, it found that he never reported to the police the physical assault suffered on September 16, 2006 or that his business had been vandalized.

[38] The respondent answers that the Board interpreted correctly the evidence and that the applicants had not established by "clear and convincing evidence" that the state was unable or unwilling to protect them based upon *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; *Hinzman v. Minister of Citizenship and Immigration*, 2007 FCA 171; *Carrillo v. Canada*, [2008] 1 F.C.R. 3 (C.F.); and *Granados v. Minister of Citizenship and Immigration*, 2009 FC 210, at paragraph 19.

[39] Mexico is considered a "democratic country" and clear evidence is required to rebut the presumption of state protection depending on the level of democracy in that country (*Carrillo*, *supra*). However, claimants have the obligation to show they sought state protection in their country before claiming refugee status in Canada (see *Hussain v. Minister of Citizenship and Immigration*, 2003 FCT 324; *Castro v. Minister of Citizenship and Immigration*, 2006 FC 332, and *Canseco v. Minister of Citizenship and Immigration*, 2007 FC 73). Although Mexico is a developing democratic country, it is recognized in documentation and by the Board that it has persistent problems with corruption, state involvement in organized crime, drug trade, and lack of respect for

the rule of law (*De Leon v. Minister of Citizenship and Immigration*, 2007 FC 1307; *Zepeda v. Minister of Citizenship and Immigration*, 2008 FC 491).

[40] The evidence in the present case reveals that violence against women remains an important problem in Mexico and the state does lack an effective system to protect the victims even though it is making efforts to correct the situation (*Human Rights Watch World Reports, 2007, 2008* and *2009*).

[41] The applicants allege that the Board did not consider whether the state protection available in Mexico was effective, a problem pointed out in documentary evidence. The respondent points out that the Board did address this concern and referred to the applicable law.

[42] The specific question as to whether there is "effective" state protection is not, according to Justice Richard G. Mosley, the right test as much as "adequacy". He wrote these lines in *Mendez v. Minister of Citizenship and Immigration*, 2008 FC 584:

> [22] A number of decisions of this Court have held effectiveness is too high a standard . . . the test is whether the state protection is adequate.

[43] Therefore, the basic question is whether state protection was solicited and if so, was it "adequate". A number of recent decisions of our Court upon the questions of IFA and state protection in Mexico have dismissed applications for judicial review on this very point. See *Ferrari, supra*; *Lozada v. Minister of Citizenship and Immigration*, 2008 FC 397; *Mendoza v. Minister of Citizenship and Immigration*, 2009 FC 376, and *Granados, supra*.

[44] The Board's decision on these questions of IFA and state protection is subject to the standard of review of reasonableness. The decisions of administrative tribunals are entitled to deference (*Dunsmuir* and *Khosa*, *supra*).

[45] The evidence in the present case revealed that the principal applicant has been a victim of numerous incidents of domestic violence and threats on the part of her estranged husband. During her marriage she did report this to the police in Mexico. On one occasion, the police did not investigate and on another they came but demanded a bribe to investigate. After another complaint, her estranged husband found out about it, and threatened her. This engendered a lack of confidence in the police or judicial authorities.

[46] The applicants resided in Veracruz but move frequently to avoid harassment. However, they never sought an IFA such as Guadalajara in Mexico. I must admit that the situation of abuse applications is sympathetic but this Court cannot intervene with a Board's very well analyzed and documented decision unless it is decided to be unreasonable.

[47] Applying the *Dunsmuir* and *Khosa* decisions of the Supreme Court of Canada, I must conclude that the Board's decision falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, *supra*, at paragraph 47).

VII. Conclusion

[48] Based upon the foregoing reasons, the application for judicial review will be dismissed.

JUDGMENT

The application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, of the decision of the Refugee Protection Division of the Immigration and Refugee Board, dated September 15, 2008, is dismissed.

No questions are certified.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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