

Date: 20091021

Docket: IMM-2199-09

Citation: 2009 FC 1065

Toronto, Ontario, October 21, 2009

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

YENI HERNANDEZ PEREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Refugee law does not require altruism from those who seek protection from persecution nor does it exclude those who publicize their fears.

[2] In this case, the Board member repeatedly criticized the applicant's recourse to the media to call attention to her victimization. The member's comments that the applicant "failed frequently to address corruption before it affected her", used "duplicitous and threats" to press her case and lacked

“altruistic intent”, reflect judgments about the applicant’s integrity that are legally irrelevant and taint the entire decision.

[3] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (the Board) dated April 8, 2009, wherein it was determined that the applicant was not a Convention refugee and not a person in need of protection. These are my reasons for determining that the application must be allowed and the matter reconsidered by a differently constituted Panel.

Background

[4] Ms. Yeni Hernandez Perez, the applicant, a member of the judicial police in the Mexican State of Hidalgo was fired when she refused the sexual advances of the Director of the Ministerial Police. The applicant made a formal denunciation with the Attorney General’s Office in which she sought to have the Director summonsed to answer to the charge. She also sought reinstatement to her position.

[5] Instead of reinstatement, state agents including the Director himself initiated a campaign to silence her through threats to her life.

[6] The Attorney General advised the applicant he was working to get her job back but the applicant felt he was lying to her and so she went to the media. Friends and relatives held a protest in support of the applicant in front of government offices and her case became well known. She gained access to the Governor to press her case but was ultimately advised to leave the country as he could not help her. The applicant testified that her resolve remains to be reinstated and to have her denunciation of the Director result in his prosecution.

Decision Under Review

[7] The member found that the applicant had failed to rebut the presumption of state protection with clear and convincing evidence and that her attempts to seek state protection had been hindered by a lack of supporting evidence and her reliance on media exposure to press her case.

[8] The member stated that there is a well-defined process to be followed when reporting corruption in Mexico. The Member found that the applicant would have known of the Ministry of the Public Service (SFP) and its responsibilities and would have been better served if she would have sought the assistance of this institution instead of approaching the media with her allegations.

[9] It was determined that if the applicant feared a high level director of the police as an agent of persecution, it was a contradiction of that fear that the applicant sought media exposure naming him openly before seeking international protection.

[10] The member was not persuaded that the applicant was motivated solely by altruism and questioned her integrity in going to the media instead of approaching the appropriate authorities. The member questioned the applicant's claim that her intent was to be reinstated so as to address corruption in the police force.

Issues

[11] The sole issue is whether the member erred in her consideration of the availability of state protection in Mexico.

Analysis

[12] Several decisions of this Court have held that *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, has not changed the law in respect of factual findings subject to the limitation in paragraph 18.1(4)(d) of the *Federal Courts Act*: *De Medeiros v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 386, [2008] F.C.J. No. 509; *Obeid v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 503, [2008] F.C.J. No. 633; *Naumets v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 522, [2008] F.C.J. No. 655. It has also been held that a tribunal's decision concerning questions of fact is reviewable upon the standard of reasonableness: *Sukhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 427, [2008] F.C.J. No. 515.

[13] The Board member's analysis of the evidence and exercise of discretion are central to the member's role as a trier of fact. As such, these findings are to be given significant deference by the reviewing Court. The member's factual findings should stand unless the reasoning process was flawed and the resulting decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, supra, at para. 47.

[14] In a case such as this, there might be more than one reasonable outcome. As long as the process adopted by the member and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, at para. 59.

[15] I agree with the respondent that this Court has found that state protection is available in Mexico despite evidence of high levels of corruption within public authorities such as the police: *Santiago v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 247, [2008] F.C.J. No. 306; *De La Rosa v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 83, [2008] F.C.J. No. 98; *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 490, [2008] F.C.J. No. 624; *Ortiz Juarez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 288, [2006] F.C.J. No. 365; *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 134, [2008] F.C.J. No. 182.

[16] I also agree with the respondent that to rebut the presumption of state protection in the case of a democracy with a well-developed judicial and protective apparatus, claimants face a heavy burden of proving that they exhausted all the possible protections available to them and will be exempted from this obligation to seek state protection only in the event of exceptional circumstances: *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] F.C.J. No. 584.

[17] I would not interfere with the decision in this case but for my conclusion that the member unreasonably discounted the efforts made by the applicant to seek state protection and put too much emphasis on the manner in which the applicant pressed her case for recourse.

[18] The member's reference to a "single" denunciation ignores the evidence. The applicant made repeated attempts to get the authorities to hear her case and to protect her. Her efforts led directly to the State Attorney General whom she met with on several occasions over the course of three months. She reported repeated threats to herself and her family to the police. Eventually, the applicant took her case to the State Governor following which she was advised to leave the country.

[19] In her decision, the member suggests that the applicant should have sought the intervention of the Ministry of the Public Service (SFP), a federal agency. According to the documentary evidence, the SFP is mandated with the monitoring and oversight of anti-corruption efforts in the federal public service.

[20] The member states that “[t]he claimant might have been better served to seek this institution instead of approaching the media ... Her employment and contacts indicate that she would know of this Ministry and its responsibilities”. There are two problems with this suggestion. The first is that it was made without any analysis of whether the SFP would have a role to play in a case involving Hidalgo state authorities. The evidence in the record does not contain any information to indicate that the SFP would protect the applicant, in theory or in practice. The second problem is that the applicant was given no opportunity to explain why she did not approach the SFP as no question was put to her about this during the hearing.

[21] The claimant was not required to show that she has exhausted all avenues of protection but rather, that she has taken all steps that are reasonable in the circumstances. On the evidence, requiring that the applicant approach the SFP before seeking international protection was not objectively reasonable.

[22] I am also troubled by what counsel characterized as a “biting cynicism” in the member’s discussion of the core elements of the claim. Without making a credibility finding, the member was evidently sceptical that the sexual harassment had occurred. But she does not directly address that question, preferring to insinuate that the allegation was “unsubstantiated” and hence unfounded and that the applicant would not have acted as she did, “if” she actually feared the Director. A clear finding on this issue would have been more consistent with the principles of justification, transparency and intelligibility as per *Khosa*, supra, at para. 59.

[23] In conclusion, I find that the reasoning process employed by the member was flawed and the resulting decision falls outside the range of possible, acceptable outcomes. Consequently, it is open to this Court to intervene. For these reasons, the decision of the RPD is vacated and Ms. Perez's case is remitted to the Board to be assessed by a differently constituted panel.

[24] Neither party proposed a serious question of general importance for certification.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that this application is allowed and the matter is remitted to the Board for consideration by a differently constituted panel. No questions are certified.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Leigh Salsberg FOR THE APPLICANT

Amy Lambiris FOR THE RESPONDENT

SOLICITORS OF RECORD:

Leigh Salsberg FOR THE APPLICANT
Jackman & Associates
Toronto, Ontario

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario