

Federal Court



Cour fédérale

Date: 20091102

Docket: IMM-277-09

Citation: 2009 FC 1118

Ottawa, Ontario, November 2, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

Valentina Esther HENRIQUEZ PINEDO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision by the Refugee Protection Division of the Immigration and Refugee Board (panel), dated January 5, 2009, that Valentina Esther Henriquez Pinedo (the applicant) is not a refugee within the meaning of section 96 of the Act or a person in need of protection under section 97.

[2] The application for judicial review will be allowed for the following reasons.

[3] The applicant, 56 years of age, is a citizen of Colombia. She is alleging that her common-law spouse of 20 years, with whom she has two children, physically and sexually abused her for 16 years.

[4] She stated that she never went to the hospital or to a shelter for abused women. She never filed a complaint with the authorities regarding the death threats made by her spouse because he had privileged contacts with the police and paid them bribes.

[5] The applicant left her spouse in the beginning of 2007 and went to live with her sister. She arrived in Canada on May 23, 2007, as a visitor. A few months later, she filed her refugee claim.

Impugned decision

[6] In its decision, the panel noted that the applicant's allegations of violence were not corroborated by any documentary evidence. It also criticized her for not making any effort to avail herself of protection from her family or from public agencies that focus on domestic violence.

[7] Referring to the documentary evidence, the panel accepted that conjugal violence in Colombia was a serious problem in 2004. However, it did not accept that the applicant did not go to the police. Furthermore, it considered that the documentary evidence provided by the applicant was in relation to the real estate transactions between her common-law spouse and one of her daughters who lives in Canada as a permanent resident.

[8] Assessing the evidence is within the jurisdiction of the panel. Since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, credibility findings made by the panel regarding a claimant continue to be subject to deference by the Court and are reviewable on the standard of reasonableness (*Dunsmuir*, at paragraphs 55, 57, 62 and 64; *Rajadurai v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 119, [2009] F.C.J. No. 147 (QL) at paragraph 23). Therefore, the Court will intervene only if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, at paragraph 47).

[9] In the case at bar, the applicant's credibility is not in dispute. The panel did not find any contradiction, inconsistency or implausibility in the applicant's account. Moreover, the respondent admitted at paragraph 7 of his supplementary memorandum that the panel did not call into question the credibility of the applicant's statements.

[10] The respondent argues that the applicant's failure to provide evidence in support of her allegations was a fatal flaw under subsection 100(4) of the Act and section 7 of the *Refugee Protection Division Rules*, SOR/2002-228, which require that documents be provided in support of a claim.

[11] He added that the panel's decision is not unreasonable merely because it noted that the applicant had not made any effort to avail herself of protection from her own family or from public agencies that assist abused women.

[12] It is important to recall that a claimant's testimony is presumed to be true unless there are implausibilities, inconsistencies or contradictions (*Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302; *Puentes v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1335, [2007] F.C.J. No. 1729 (QL) at paragraph 16; *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, [2001] F.C.J. No. 1131 (QL) at paragraphs 6 to 8).

[13] A panel cannot draw a negative inference from the mere fact that a party failed to produce any extrinsic documents corroborating his or her allegations, except when the applicant's credibility is at issue (*Ahortor v. Canada (Minister of Employment and Immigration)* (1993), 65 F.T.R. 137 (FCT); *Nechifor v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1004, [2003] F.C.J. No. 1278 (QL) at paragraph 6).

[14] Here, as the applicant's credibility was not at issue, the Court believes that the panel erred in requiring that she produce evidence to corroborate her allegations.

[15] In other words, under the particular circumstances of this case, the panel's negative inference drawn from the lack of evidence corroborating the abuse committed by the applicant's common-law spouse warrants the Court's intervention.

[16] It is also true that the applicant filed documents concerning the real estate transactions between her common-law spouse and her daughter. However, the panel did not comment on the

allegations of manipulation and threats by the common-law spouse surrounding these transactions as set out in the applicant's PIF (pages 24 and 25, Tribunal Record) or on the e-mail he sent her on March 21, 2007 (pages 84 and 85, Tribunal Record).

[17] No question for certification was proposed and this application does not give rise to any.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed. The matter is referred back for redetermination by a differently constituted panel. No question is certified.

“Michel Beaudry”

Judge

Certified true translation
Susan Deichert, Reviser

ANNEX

Immigration and Refugee Protection Act, S.C. 2001, c. 27

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 themselves 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.

100. . . .

(4) The burden of proving that a claim is eligible to be referred to the Refugee Protection Division rests on the claimant, who must answer truthfully all questions put to them. If the claim is referred, the claimant must produce all documents and information as required by the rules of the Board.

Refugee Protection Division Rules, SOR/2002-228

7. The claimant must provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them.

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.

100. (...)

(4) La preuve de la recevabilité incombe au demandeur, qui doit répondre véridiquement aux questions qui lui sont posées et fournir à la section, si le cas lui est déferé, les renseignements et documents prévus par les règles de la Commission.

7. Le demandeur d'asile transmet à la Section des documents acceptables pour établir son identité et les autres éléments de sa demande. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour s'en procurer.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-277-09

STYLE OF CAUSE: Valentina Esther HENRIQUEZ PINEDO
and THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: October 29, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** BEAUDRY J.

DATED: November 2, 2009

APPEARANCES:

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