Federal Court Cour fédérale

Date: 20100218

Docket: IMM-1166-09

Citation: 2010 FC 170

Ottawa, Ontario, February 18, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

REGINA ESTRADA LUGO
TAMARA ITZE CARRASCO ESTRADA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

<u>O'KEEFE J.</u>

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of the Immigration and Refugee Board's Refugee Protection Division (RPD or Board), dated February 16, 2008, wherein

the applicants were determined to be neither Convention refugees nor persons in need of protection under sections 96 and 97 of the Act.

[2] The applicants request that the Board's decision be quashed and that their claims be referred back to the Board to be considered by a differently constituted panel.

Background

[3] The applicants, Regina Estrada Lugo (the principal applicant) and Tamara Itze Carrasco Estrada (the minor applicant), are mother and daughter. Both are citizens of Mexico who lived in Pachuca, in the state of Hidalgo.

[4] In May of 2004 the principal applicant divorced the father of the minor applicant, Adrian Carrasco Tovar. Things were quiet until November 15, 2006 when the principal applicant alleges she noticed a black car outside her window. The principal applicant continued to notice the same car following her and parked in front of her daughter's school.

[5] The principal applicant alleges she then began receiving phone calls from a Lieutenant Colonel Jose Armendariz (Armendariz) who demand to know the whereabouts of her ex-husband. The principal applicant responded that she did not know of her ex-husband's location. Between late November 2006 and January 2007, persons identifying themselves as being from the Attorney General of the State of Hidalgo (PRG) would appear at the applicants' home and threatened them.

[6] The principal applicant alleges she was able to contact her ex-husband, who told her that he had fled Mexico to escape Armendariz, whose former fiancé he had become involved with.

[7] After a threat by PRG members on January 10, 2007, the principal applicant filed a complaint with the PRG administration on January 18, 2007. Instead of being helped, the principal applicant was ordered to go for a psychological assessment. Armendariz allegedly made a threatening call to her that day, claiming that she had reported him to the authorities.

[8] On January 21, 2007 the principal applicant alleges that while driving her daughter, herself and friends, they were run off the road by the same black car. Men from the black car tried to open their doors but witnesses came to the rescue. At that point, the principal applicant decided to move in with her brother but continued to receive death threats on her cell phone and saw the same black car parked near her brother's home. At that point, the applicants decided to flee to Canada. The applicants arrived on January 29, 2007 and claimed refugee protection two days later based on their fear of Armendariz of the Mexican military.

[9] The Board heard the applicants' claims for refugee protection on November 17, 2008 and December 8, 2008 in Toronto.

Board's Decision

[10] The Board began its decision by reviewing the evidence presented by the applicants. The Board member then stated that the determinative issue was whether a viable internal flight alternative (IFA) exists for the applicants in Mexico.

[11] The Board stated that the test to be applied in determining whether there is an IFA is two-pronged: (i) there is no serious possibility of the claimant being persecuted or subjected, on a balance of probabilities, to persecution or to a danger of torture or to a risk to life or of cruel and unusual treatment or punishment in the proposed IFA area, and (ii) conditions in the IFA area must be such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge there (see *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589, [1993] F.C.J. No. 1172 (C.A.) (QL)).

The First Prong

[12] The Board noted that the issue of an available IFA was raised during the hearing and determined that a viable IFA would exist for the applicants in Guadalajara or Monterrey. The Board noted that the principal applicant said she had thought about relocating within Mexico, but knew she would not be 100% safe because it is very easy to be found through the minor applicant's school registration or through the use of her bank card. The principal applicant also believed police officers would pass on information to Armendariz.

[13] The Board took issue with the principal applicant's submission that Armendariz could access public databases, noting the 2006 and 2007 documentary evidence which indicates that it would be very hard for an individual to access such data. The Board noted some 2005 documentary evidence suggesting that there are problems of confidentiality in the management of some databases operated by the Federal Electoral Institute (IFE), but noted that that report also stated that information was kept confidential and protected by law. In any event, the Board noted that it preferred the more recent 2006 and 2007 documentary evidence from the RPD package because the documentation was more definitive.

[14] In the determination that the applicants should have sought protection within Mexico, the Board took issue with the applicants' submission that they could not rely on the police for protection from Armendariz, a member of the military. The Board noted that the presumption of state protection applies for Mexico and that civilian authorities generally maintain control of security forces. The Mexican government normally respects human rights by investigating, prosecuting and sentencing public officials and members of the security forces. The Board noted several of the federal government's initiatives to combat corruption in public offices and to provide recourse for the victims of crime.

The Second Prong

[15] The Board felt that it would not be unreasonable for the applicants to seek protection in Guadalajara or Monterrey. The Board was strongly of the view that the applicants had an onus to at

least try to seek an IFA elsewhere in Mexico. The Board cited the principal applicant's age and experience as factors that would make it easier to adjust to life in a new part of her own country, especially since she had demonstrated an ability to come to a new country like Canada.

[16] The Board concluded that the applicants had not discharged their responsibility of showing that the risk of harm they fear would be faced in every part of Mexico pursuant to paragraph 97(1)(b) of the Act. While the Board acknowledged that there is "still room in Mexico to improve the climate of corruption and crime, these are problems faced by all citizens of Mexico and do not automatically make one a Convention refugee or a person in need of protection."

Issues

[17] The issues are as follows:

1. What is the standard of review?

2. Did the Board commit a reviewable error with respect to its application of the legal test for an Internal Flight Alternative?

3. Did the Board base its decision on erroneous findings of fact that it made without regard for the material before it?

Applicants' Written Submissions

IFA: Application of the wrong test

[18] The applicants begin by asserting that a refugee claimant must be given proper notice of the proposed IFA and provided with the opportunity to respond. Then the decision maker must embark on a two step approach. First, they must assess whether the claimant has demonstrated on a balance of probabilities that there is a serious possibility of persecution in the proposed IFA. Then the decision maker must assess whether in all the circumstances particular to the claimant, conditions in the proposed IFA are such that it would not be unreasonable for the claimant to seek refuge there.

[19] The applicants submit that they are not obliged to seek out potential IFAs prior to claiming refugee protection. The relevant question is whether an IFA exists, not whether the applicants sought out an IFA. Applicants must only demonstrate, if notified of a particular potential IFA that their fear is objectively well-founded throughout their country of origin including in the proposed IFA (see *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589, [1993] F.C.J. No. 1172 (C.A.) (QL)). The requirement that the applicants be given notice of a proposed IFA and the opportunity to respond (see *Thirunavukkarasu*), would be incoherent if there was an obligation to have already sought out that potential IFA.

[20] The applicants submit that the question of whether the Board applied the right test is reviewable on the standard of correctness.

IFA findings unreasonable and made without regard to the evidence

[21] The applicants submit that the Board did not assess specific IFA areas and only generalized findings regarding presumed protection in Mexico. Moreover, the Board did not consider that the applicant's persecutors included members of the military and other state agents, and that the military had actually been deployed in Monterrey recently. Nor did the Board discuss how the identity of the persecutors would impact the availability of IFAs. The Board only made generalized findings, and even listed the PRG as a source the applicants could look to for protection in an IFA. The Board should have turned its mind to the fact that Armendariz is a member of the military and that the local police may be unable to provide sufficient protection. Therefore, the Board's decision that Monterrey was an IFA lacks intelligibility and justification.

Ignoring Evidence

[22] The applicants submit that this Court has repeatedly held that a claimant's psychological state is a relevant consideration when assessing the second prong of the IFA test (see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35, [1998] F.C.J. No. 1425 (F.C.T.D.) (QL), *Cartagena v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 289, 69 Imm. L.R. (3d) 289, *Parrales v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 504, [2006] F.C.J. No. 624, *Javaid v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1730, 157 F.T.R. 233 (QL)).

[23] The applicants submitted a psychological report indicating that the principal applicant had post-traumatic stress disorder and detailed the symptoms and anxiety the principal applicant

experiences as a result of her past in Mexico and her fear of returning. The report concludes that the principal applicant's condition would deteriorate if returned to Mexico. The Board did not refer to or analyze the report at any point in it reasons.

[24] The applicants submit that a decision maker must make reference to important evidence, especially if the evidence directly contradicts the findings made by the decision maker. Failure to provide assessment of important contradictory evidence necessarily constitutes an unreasonable decision (see *Hassaballa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 489, [2007] F.C.J. No. 658 (QL) at paragraphs 23 to 26, *Nyoka v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 568, [2008] F.C.J. No. 720 (QL) at paragraph 21, *Cepeda-Gutierrez* above, *Ranji v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 521, [2008] F.C.J. No. 675).

Respondent's Written Submissions

IFA: Application of the wrong test

[25] The respondent submits that the applicants are using a microscopic analysis of the Board's words. A review of the IFA analysis on the whole indicates that the main point in its decision was that an IFA existed for the applicants in Guadalajara and Monterrey. The Board heard the applicants' arguments and reviewed the evidence before coming to its conclusion.

[26] Even if the Board erred by using the words "obligation" or "onus", sending the matter back for redetermination would be futile, since the Board's reasoning on the existence of an IFA was sound and determinative of the issue (see *Cartier v. Canada (Attorney General)*, 2002 FCA 384, [2003] 2 F.C. 317 at paragraph 31).

[27] Furthermore, there is no reviewable error in a finding that a refugee claimant should relocate to an available IFA. International refugee law was formulated to come into play only in situations where the protection one expects from the state in one's country of nationality is unavailable. If an IFA is available to someone, they should first avail themselves of this option (see *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 709, [1993] S.C.J. No. 74 (QL), *Thabet v. Canada (Minister of Citizenship and Immigration)*, 160 D.L.R. (4th) 666, [1998] F.C.J. No. 629 (C.A.) (QL)).

IFA findings unreasonable and made without regard to the evidence

[28] The respondent submits that the applicants' argument on this ground has no merit. The principal applicant's submission that she would be found by Armendariz and his men anywhere in Mexico was insufficient. The Board noted the documentary evidence it used to determine that it was highly unlikely that she could be found. The Board's determination is further substantiated by the principal applicant's own admission that Armendariz was only turning to her because he was not able to locate her husband on his own.

[29] The respondent submits that there was not sufficient evidence that the men seeking the principal applicant were police, military or employed by the PRG, nor was there sufficient evidence that they were acting in any official capacity. Thus, there was insufficient evidence that her persecutors could find her due to their positions.

Analysis and Decision

[30] **Issue 1**

What is the standard of review?

A refugee claimant under the Convention definition, must demonstrate his or her unwillingness or inability to seek or obtain the protection of his or her state throughout the entire territory of that state. A refugee claimant is rightly rejected should the Board determine that an IFA exists. Rebutting evidence of a potential IFA has become one of the fundamental hurdles to a refugee's ability to obtain protection in Canada. Setting out the basic test for determining IFA existence has become a general matter of law for which the Board is not entitled to deference.

[31] The applicants however, raise issues concerning the Board's application of the test for an IFA and the Board's disregard for evidence in doing so. In my opinion, once the correct test for an IFA is set out, the Board's application fo that legal test to the facts hinges primarily on determinations of fact or mixed fact and law. Parliament entrusted such determinations to the RPD, not the courts. As such, these determinations are reviewable on the standard of reasonableness.

[32] **Issue 2**

Did the Board commit a reviewable error with respect to its application of the legal test for an Internal Flight Alternative?

The applicants do not take issue with the Board's statement regarding the test for an IFA. Rather, the applicants submit that the Board when applying the test, added an onus on the applicants to have at least tried to seek refuge in the potential IFAs before seeking Canada's protection. After explaining the second prong of the test the Board stated:

> I am of the view that the claimants had an obligation to at least try to find a safe haven in their own country before abandoning it altogether and unless it were patently unreasonable for them to do so, their failure to at least try will be fatal to their claims.

[33] Later the Board stated:

> I am strongly of the view that leaving one's own country and seeking international refugee protection abroad is a reluctant last resort, and should only be undertaken after other measures, such as the seeking of an IFA within one's own country, have been tried unsuccessfully or are patently pointless. That is not the case in these claims. It is almost trite law to say that claimants have an obligation to at least try to find some place else to live in their own country before deciding to leave it altogether. In this case, I note that the claimants did not make any attempt to seek an IFA anywhere in the Republic of Mexico. I find that the claimants had the onus to move to an IFA, in this case specifically in Guadalajara or Monterrey, before leaving the country.

[34] No cases were brought to my attention to support the Board's contention that refugee claimants have an obligation to have already sought protection in the proposed IFA location. Thus, I find that the Board's comments were in error.

[35] The test for the existence of an IFA set out in *Thirunavukkarasu* above, is a two pronged test, but it is a test in which the refugee claimant need only defeat one of the prongs. Both prongs can be successfully defeated without a refugee having lived in or even travelled to the proposed IFA. A refugee claimant may defeat prong one by establishing that there is a serious possibility of being persecuted or subjected, on a balance of probabilities, to persecution or to a danger of torture or to a risk to life or of cruel and unusual treatment or punishment in the proposed IFA. Alternatively, a claimant can defeat prong two by establishing that conditions in the IFA are such that it would be unreasonable in all the circumstances for the claimant to seek refuge there.

[36] The Board must not only state the correct test but it must also apply the correct test. Adding an additional requirement in the application of the test will cause the Board to run afoul of the reasonableness standard. Adding the requirement that the applicants must have tried living in another, safer region of the country demonstrates a misunderstanding of the legal test for an IFA. As noted above, this was an error.

[37] The respondent submitted that it would not be proper to send the matter back for redetermination as the Board also applied the proper two prong test for an IFA and the new decision would necessarily be the same. I do not agree.

[38] When the Board's decision is reviewed, it becomes obvious that the Board considered the failure to try to live in the IFA a very important factor in denying the applicants' claim for refugee protection. I cannot determine whether the Board's decision would have been the same had the

Board applied only the proper factors for assessing an IFA. This is a decision to be made by the Board not by the Court.

[39] Consequently, the application for judicial review must be allowed and the matter is referred to a different panel of the Board for redetermination.

[40] Because of my finding on this issue, I need not deal with the remaining issue.

[41] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[42] **IT IS ORDERED that** the application for judicial review is allowed and the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *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,	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) 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	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) 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.	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	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) to a danger, believed on substantial grounds to exist, of torture within the meaning of	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au

Article 1 of the Convention Against Torture; or	sens de l’article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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,	(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(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) the risk is not caused by the inability of that country to provide adequate health or medical care.	(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 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.	(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.

FEDERAL COURT

SOLICITORS OF RECORD

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