

Federal Court



Cour fédérale

Date: 20100722

Docket: IMM-6659-09

Citation: 2010 FC 772

Ottawa, Ontario, July 22, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

FATIMA MORENO HERNANDEZ

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of the Refugee Protection Division (the Board), dated December 2, 2009, where Fatima Moreno Hernandez (the Applicant) was found not to be a Convention refugee or a person in need of protection.

[2] This application shall be granted for the following reasons.

Factual Background

[3] The Applicant is a citizen of Mexico who resided in the state of Guanajuato. She claims that she fears her ex-husband, Juan Luis Hernandez, and their relationship has a long history of psychological and physical abuse. The Applicant married Hernandez in 1994. She has two children. Throughout the marriage, Hernandez was physically and psychologically abusive. He is a municipal police officer and used his position to threaten the Applicant and would tell her that any complaints would be ineffective and that he would frame her for a crime so that she would have to go to jail. The couple separated in December 2000 but the abuse and threats continued.

[4] In March 2006, Hernandez went to the Applicant's home saying he wanted to bring the children to a family party. The children refused to go with him; he then punched the Applicant in the face. After this incident, the Applicant filed a complaint and sought medical treatment. She also brought a motion for divorce which was granted along with a restraining order against Hernandez.

[5] Despite the order, Hernandez continued to threaten and harass the Applicant. On June 3, 2008, Hernandez presented himself at the Applicant's home under the pretext that he wanted to see the children. However, he went into a fury and tried to rape the Applicant. Her mother and sister arrived during the attack and Hernandez ceased and went away. She did not report the attempted rape. She arrived in Canada on June 14, 2008 and made a claim for refugee protection shortly thereafter.

Impugned Decision

[6] The Board identifies credibility and state protection as determinant issues in this case.

[7] With regard to credibility, the Board notes that the Applicant did not obtain a copy of the complaint that she made regarding Hernandez and cites evidence that indicates that it is a relatively simple process to obtain a copy of a complaint. The Board also mentions that she did not provide a copy of the restraining order. The Board states that the Applicant has the burden of proof to present corroborative evidence and finds that the explanations given were not reasonable and the Applicant did not make a diligent effort to obtain documentation. The Board concludes that this affects the Applicant's credibility regarding those aspects of her testimony.

[8] As for state protection, the Board writes that the Applicant testified that she did not mention the violence committed by Hernandez to the judge during the divorce motion. Furthermore, the Applicant did not make a complaint to the police after the granting of the divorce and the restraining order. The Board remarks that even though Hernandez is a municipal police officer, this does not grant him immunity regarding criminal acts.

[9] The Board goes on to review the documentary evidence on country conditions which states that 30 out of 32 Mexican states have passed the law on women's access to a life free of violence and that the Federal District has entered into force regulations requiring immediate police intervention in violent situations. The Board also cites documentary evidence on the process for filing a complaint regarding a public servant in the Federal District. The evidence also states that in

Guanajuato state there is a free service for citizens who want to file complaints against a public servant for any type of human rights-related violation and from April 2003 to March 2004, 1119 complaints were filed including 334 against municipal police.

[10] The Board mentions the applicable legal principles on state protection and emphasizes that Mexico is a democratic country which places a heavy burden on the Applicant to rebut the presumption of state protection. The Board then finds that, in the circumstances of this case, the Applicant did not take all reasonable steps and those that she did take were not sufficient. The Board also adopts the reasoning with regard to state protection in the persuasive decision in file TA6-07453. The Board concludes that the Applicant has not refuted the presumption of state protection and the claim is rejected.

[11] The Board's consideration of evidence is a matter of fact which attracts a deferential standard (*Villicana v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1205, 357 F.T.R. 139 at paras 35 to 39). This Court has also held that the Board's decisions on credibility and state protection should be reviewed on a standard of reasonableness (*Aguirre v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 571, [2008] F.C.J. No. 732 at para. 14; *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 490, [2008] F.C.J. No. 624 at para. 10).

[12] Accordingly, the Court will only intervene if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47).

[13] The parties agreed at the hearing that the main issue in this case is state protection.

[14] The Applicant has raised three grounds which she submits renders the Board's decision unreasonable.

[15] There is a well accepted principle that the Board is presumed to have considered all of the evidence before it and that it need not comment on every piece of evidence. That being said, when the Board relies heavily on evidence supporting its finding, but is silent with regard to evidence leading to the opposite conclusion, it may be easier to infer that the contradictory evidence was overlooked (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 para. 17 (QL)).

[16] In the case at bar, as its analysis of country conditions, the Board cites extensively from a document titled *Implementation of the General Law on Women's Access to a Life Free of Violence (Ley General de Acceso de las Mujeres a una Vida Libre de Violencia)* (May 26, 2009). This document details the resources available to women who are victims of violence under the new law. The Board cites the beginning of the second paragraph which states that 30 of 32 states have adopted the legislation but then omits to mention the following lines from the very same paragraph:

(...) however, there remain a number of states that have not realized key provisions, including "implementation mechanisms," an agency coordination mechanism, and the building of new shelters. Nevertheless, according to the ex-legislator and co-creator of the General Law, Angélica de la Peña Gómez, the law has been successful for two reasons: the first because it has been able to gain

approval in almost every state in the country, and "broke the inertia" (ha roto la inercia) other national laws have faced in state congresses; and the second concerns the approval of budgetary payments of 3 million pesos [\$1 CAN = 10.62 MEX (Canada 22 Apr. 2009)] for each state to implement the law (CIMAC 3 Feb. 2009).

[17] The same documents also contains the following evidence:

In March 2009, however, the President of INMJURES, Rocio García Gaytán, stated that only six states in the country have approved the corresponding regulations outlined within the General Law (Milenio 9 Mar. 2009). In this context, García Gaytán noted that while efforts to harmonize state laws were advancing, in states like Campeche, Tamaulipas and Michoacán provisions such as "murder for reason of honour" (homicidio por razón de honor), still appear in the criminal code (ibid.). Ex-legislator Pena Gomez also stressed the urgency for states which passed the General Law, to begin enforcing the rules outlined in the law so that the system could begin to function effectively at the local level (CIMAC 3 Feb. 2009). Peña Gómez stated that in order to enforce the rules, state legal frameworks still require budgetary endorsement for their implementation (ibid.). AI corroborates the preceding information, noting that:

The real test of the effectiveness of the new legislation in combating violence against women will be its impact at the state and municipal level. In the vast majority of cases, it is the 32 state governments that have the primary responsibility for ensuring that women who experience violence have access to justice, security and reparations. To become effective at this level, legislation in all 32 states needs to clearly identify responsibilities, lines of accountability and budgets. (1 Aug. 2008, 13)

[18] I further note that the same document incorporates a table produced by Amnesty International which shows that the Applicant's state – Guanajuato State – has not adopted either the law or the regulations (Amnesty International, *Implementation of the General Law on Women's Access to a Life Free of Violence in Mexican States* (January 27, 2009)).

[19] The Board did not mention any of this evidence, nor does it mention articles submitted by the Applicant on the ineffectiveness of the implementation of the law and regulations in general. Such evidence was extremely relevant in this case and contrary to the Board's finding that state protection existed for the Applicant in Mexico.

[20] As stated by Justice Martineau in *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 F.T.R. 35 at para. 27 "...the legislation and procedures which the applicant may use to obtain state protection may reflect the will of the state. However, they do not suffice in themselves to establish the reality of protection unless they are given effect in practice". This makes the evidence on the implementation of the law and its regulations, which are supposed to provide for the resources, all the more important.

[21] There was also evidence before the Board showing that, in spite of the complaints mechanisms regarding public servant, police still act with impunity. Once again, it is the reality of protection that need be acknowledged and analysed by the Board. The Board does not need to accept the contrary evidence but it must review it and explain why it relies on other evidence to reach its conclusion.

[22] No question for certification was proposed and none arises.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be allowed. The matter is returned for redetermination by a newly constituted Board. No question is certified.

“Michel Beaudry”

Judge

APPENDIX

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.

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 themselves 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,

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 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) 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 d'un respect 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.

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SOLICITORS OF RECORD

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STYLE OF CAUSE: **FATIMA MORENO HERNANDEZ**
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THE MINISTER OF
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