Federal Court Cour fédérale

Date: 20100823

Docket: IMM-6504-09

Citation: 2010 FC 833

Ottawa, Ontario, August 23, 2010

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

SOFIA SOFI PEREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

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

I. <u>Background</u>

[1] The Applicant is a citizen of Cuba who came to Canada on a temporary resident visa in November 2008. Once in Canada, she claimed refugee protection pursuant to s. 96 and 97 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*). She claims a fear of persecution by the government of Cuba because of her perceived political opinion, and because she has overstayed her Cuban exit visa.

[2] In a decision dated November 5, 2009, a panel of the Immigration and Refugee Board, Refugee Protection Division (the Board) determined that the Applicant was neither a Convention refugee nor a person in need of protection.

[3] The Applicant seeks judicial review of this decision.

II. Issues

[4] This application raises the following issues:

1. Did the Board err by finding that imprisonment for violating Cuba's exit laws does not amount to "persecution" under s. 96 of *IRPA* or "cruel and unusual punishment" under s. 97 of *IRPA*?

2. Did the Board ignore the Applicant's evidence and documentary evidence when concluding that the mistreatment of the Applicant's husband and daughter was not politically-motivated?

III. The Board's Decision

[5] The Applicant's arguments to the Board fell into two categories. Firstly, the Applicant argued that she and her family had suffered persecution because of their political opinions. This persecution continued against her husband and daughter even after the Applicant's departure from

Cuba. Secondly, the Applicant asserted that she would suffer persecution by being imprisoned upon her return to Cuba for overstaying her Cuban exit visa.

[6] The Board examined the evidence before it to determine "how serious, persistent and repetitive the mistreatment was and whether it was systematic". The Board concluded that there was no persuasive evidence that the claimant was facing persecution "even if considered cumulatively". In reaching this conclusion that Board made the following findings:

- The Board noted that the Applicant's fine for selling items on the black market was imposed under Cuban laws whose purpose was to curb black-market activities. As such, the Board concluded that "the claimant fears lawful sanctions that have a valid purpose".

- The behavioural disorders and inadaptability of her daughter at school were typical of a 13-year old's separation from her mother, and the school's phone calls home for the daughter's absence caused no harm. The Board concluded that the daughter was not being persecuted at school.

- Although the Applicant's husband had lost his job, there is no evidence, beyond speculation, that the job loss was due to the Applicant's presence in Canada.

- Because the Applicant had been able to leave Cuba in 2008 on a legitimate visa, the Board concluded that "if the person was a person of interest in Cuba, it is unlikely

> that she would have been allowed to leave". If the family members were being persecuted for the Applicant's beliefs, it is "reasonable to expect her husband would have had more difficulty [when he was arrested for an illegal internet connection]".

[7] The Applicant also raised the possibility that she would be subjected to imprisonment if she now returned to Cuba after overstaying her Cuban exit visa. The Board acknowledged that she might be subjected to imprisonment upon her return to Cuba. However, the Board found that the punishment for this contravention of Cuba's laws was not "repetitive, persistent or extreme and thus cannot be considered persecutory". In addition, the Board noted that the law did not differentiate along Convention grounds. Moreover, the situation of overstaying was of the Applicant's own making. Citing *Valentin v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 390, 167 N.R. 1 (F.C.A.), leave to appeal dismissed, [1991] S.C.R. No. 430, (1992) 138 N.R. 406 (note), the Board observed that "the claimant cannot now create a cause to fear persecution by freely, without reason, make themselves liable to punishment for violating a law of general application."

[8] The Board separately considered the Applicant's claim under s. 97 and concluded that she was not a person in need of protection under s. 97.

IV. Analysis

A. Issue 1: Over-staying exit visa

[9] The Applicant submits that the Board erred in finding that imprisonment for violating Cuba's exit laws does not amount to "persecution" under s. 96 of *IRPA* or "cruel and unusual punishment" under s. 97 of *IRPA*.

[10] I will assume, without deciding, that a standard of correctness is applicable to the Board's decision on the first issue. In other words, was the Board correct to conclude that the Applicant's risk of imprisonment in Cuba upon her return did not amount to persecution under s. 96 of *IRPA*, or a risk of cruel and unusual treatment under s. 97? As taught by the Supreme Court of Canada case of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 50:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[11] The Applicant came to Canada on November 18, 2008 on a Canadian temporary resident visa. To leave Cuba, she obtained an exit permit, valid initially for almost 3 months (Certified Tribunal Record (CTR), p.17). The Applicant has made no efforts to renew her exit visa.

[12] The CTR contains some documentary evidence related to Cuban travel requirements (see, in particular, CUB101911E, Responses to Information Requests (RIRs), CTR, 107-109). An exit visa

can be renewed beyond the initial period of issuance for up to 11 months. However, beyond 11 months, the Cuban citizen must request a special permit to resume residence, which must be issued by the Cuban diplomatic mission abroad. A 2005 Report of Human Rights Watch indicates that, according to Article 215 of Cuba's Criminal Code, "[i]ndividuals who enter Cuba 'without completing legal formalities or immigration requirements' risk one to three years of imprisonment" (CTR, 225). However, the HRW Report contains no explanation of the law or examples of its application. Nor did the Applicant submit a copy of the relevant legislative provision or any other documentary evidence showing that persons in her situation have been imprisoned upon their return.

[13] The Federal Court of Appeal decision in *Valentin*, above, is directly applicable to this application. *Valentin* bars self-induced refugee status. It starts from the premise that a claimant has a valid exit visa. It then bars the claimant from overstaying the visa and relying on the self-created overstay as a ground of persecution. In this case, the Applicant held a valid exit visa. She failed to renew her permit, as she could have done. She cannot rely on self-created overstay as a ground of persecution. *Valentin* has been consistently followed in this Court where the facts are similar to those before me; see for example, *Jassi v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 356, [2010] F.C.J No. 412 (QL).

[14] The jurisprudence is to a similar effect in the context of a s. 97 claim for protection. In *Zandi v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 411, [2004] F.C.J. No. 503 (QL), Justice Kelen considered the situation of an Iranian who defected to Canada while here for an

athletic competition. In considering whether the claimant could claim protection on the basis that he would be punished for defecting on his return to Iran, Justice Kelen stated as follows:

> To paraphrase the Federal Court of Appeal in *Valentin*, *supra*, a defector cannot gain legal status in Canada under IRPA by creating a "need for protection" under section 97 of IRPA by freely, of their own accord and with no reason, making themselves liable to punishment by violating a law of general application in their home country about complying with exit visas, i.e. returning.

[15] In short, the jurisprudence is clear that the Applicant, who failed to renew her valid exit visa, cannot rely on the possibility of punishment under Cuba's Criminal Code as grounds for protection under s. 96 or s. 97.

[16] Moreover, it is far from clear that the Applicant will be charged and convicted under the applicable law. The documentary evidence demonstrates that the Applicant could still apply for a special re-entry permit to return to Cuba. There is no evidence that the Applicant would, with such a permit, be the subject of prosecution under Cuban laws. The documentary evidence contains not a single reference to a similarly-situated person being imprisoned pursuant to this law. On the facts before me, the allegation of imprisonment is mere speculation. There is simply insufficient evidence for me to find that the Applicant's fear of imprisonment is well-founded.

[17] I conclude that the Board was correct to conclude that the risk of imprisonment in Cuba upon her return did not amount to persecution under s. 96, or risk of cruel and unusual treatment under s. 97.

B. Issue #2: Failure to have regard to the evidence

[18] In spite of the correctness of the Board's conclusion on Issue #1, it is still possible that the Applicant could have satisfied the Board that she would suffer persecution – beyond a speculative prison term – upon her return to Cuba. The Applicant does not dispute the Board's findings that her treatment prior to leaving Cuba was not persecution. However, she submits that the Board erred by failing to have regard to the evidence that relates to the time after she left Cuba. In particular, the Applicant argues that the Board failed to have regard to the evidence that she presented about the treatment of her husband and daughter in Cuba after her departure.

[19] The Board's conclusion on this issue is reviewable on the standard of reasonableness. On this standard, the Court should not intervene where the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at para. 47). In addition, the Court may grant relief if it is satisfied that the tribunal made its decision without regard for the material before it (*Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(4)(d)).

[20] Having reviewed the Board's decision, I am not persuaded that any evidence was ignored. The Board makes explicit reference to the problems faced by the husband and daughter after the Applicant's departure.

[21] The Applicant merely presents to the Court interpretations of the evidence that are different than those found by the Board. The Applicant's conclusions may well be reasonable. However, on a standard of reasonableness, there may be a range of possible outcomes. As stated by Justice Binnie

in the Supreme Court of Canada case of *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59:

> There might be more than one reasonable outcome. However, as long as the process 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.

[22] The Applicant has not persuaded me that the findings of the Board are outside that range of possible, acceptable outcomes. For example, it is not unreasonable to find that the daughter's problems relate, to a large degree, on separation from her mother and not from persecution by her teachers or schoolmates. Similarly, the evidentiary record supports a finding that the husband's firing could have been part of change in Cuba that resulted in many people losing their jobs. It is not for this Court to substitute my own view of a different outcome from that of the Board.

V. **Conclusion**

[23] For these reasons, this application for judicial review will be dismissed.

[24] The Applicant proposes the following question for certification:

> Does a sanction of imprisonment imposed on a claimant for protection for illegally leaving or remaining outside his or her country automatically qualify as a sanction "imposed in disregard of accepted international standards" under s. 97(1)(b)(iii) of *IRPA*?

[25] I am not prepared to certify this question. In this case, I have insufficient evidence before me to find that Applicant would be subject to the sanction of imprisonment upon her return. Accordingly, the question is not dispositive of this application for judicial review.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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