Federal Court Cour fédérale

Date: 20101215

Docket: IMM-4414-09

Citation: 2010 FC 1200

Ottawa, Ontario, December 15, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

MARCELA CORTES MARTINEZ
CARLOS MANZANARES JR.

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for a judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated August 12, 2009, wherein the Applicants were determined to be neither convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 (IRPA). The Applicant failed to rebut the presumption of state protection.

I. Background

A. *Factual Background*

[2] The Applicant, Marcela Cortes Martinez, is a citizen of Mexico. The other Applicant is her minor son, Carlos Manzanares Jr., a citizen of the United States of America. They entered Canada on September 3, 2008 and claimed refugee protection the same day on the basis that the Applicant feared being found by her estranged husband.

[3] The Applicant was married to a lieutenant in the Municipal Police Force of Tezonapa. His two brothers are also members of the same police force. The Applicant's husband was abusive towards her before and after the marriage. The situation did not improve after the birth of their daughter in August 1996, and so the Applicant decided to leave her husband.

[4] The Applicant sought help from the Mexican authorities several times. She made a denunciation to the Public Ministry after she first decided to leave her husband. As a result, the Applicant's husband was called in and spoken to. He told the police he had beaten the Applicant because she was unfaithful. No further action was taken at that time.

[5] A lawyer was able to obtain a restraining order on behalf of the Applicant, but in January 1997 the husband broke the order when he went to the Applicant's uncle's home in the Federal District. The Applicant had moved in with him along with her daughter. The husband assaulted the

Applicant's uncle, threatened her brother and forced the Applicant and their daughter to go back with him.

[6] In January 1998, the Applicant reported her husband to the police for beating their daughter. The authorities detained the husband for three weeks, and the Applicant and daughter fled to Guadalajara.

[7] The Applicant returned to Cordoba in February 1999. Her husband found her and threatened her with a gun. The Applicant left her daughter with her mother and fled to the U.S.A.

[8] While the Applicant was in the U.S.A. the husband took their daughter to a party and refused to return her to the Applicant's mother. The government family services agency intervened, and the police were eventually successful in recovering the daughter. Charges were not laid because the Applicant and husband were not divorced.

[9] In 2004, after having started a common law relationship with her present partner and giving birth to their son in 2002, the Applicant returned to Mexico in order to arrange for her daughter to join her in the U.S.A. The Applicant could not obtain the required passport, and so returned to the U.S.A. after she heard that her husband was looking for her.

[10] In 2006 and again in 2008 the Applicant learned through friends that her husband was in the U.S.A. looking for the Applicant in order to kill her. That is why the Applicant fled to Canada in early September 2008.

B. *Impugned Decision*

[11] The Board found that the minor claimant did not have a well-founded fear of persecution in his first country of residence, which is the U.S.A.

[12] The Board found that the Applicant was a victim of domestic violence. The Board also found that Mexico is a functioning democracy, and although there is criminality throughout the country, the documentary evidence shows that Mexico is making serious efforts to professionalize the police.

[13] The Board found that when the Applicant reported her husband to the authorities, action was taken. The Board found that this was adequate state protection, even though the Applicant testified that she didn't feel that any punishment her husband had received was severe enough.

[14] The Board acknowledged the ample documentary evidence that the Applicant submitted regarding domestic violence, criminality and corruption in Mexico. However, the Board's same documentary evidence also demonstrates the government of Mexico is making serious efforts to protect its citizens.

[15] Furthermore, the Board found that the Applicant would have access to psychological counselling in Mexico, and provided a list of services that the government provides for victims of gender-related violence.

[16] The Board concluded that the Applicant had not persuaded the Board on a balance of probabilities that state protection is inadequate.

II. Issues

[17] The Applicant raises the following issues:

(a) Did the Board err in failing to address the Internal Flight Alternative (IFA) in its reasons?

(b) Did the Board err in concluding that the Applicant failed to rebut the presumption of state protection? Specifically, did the Board err in:

(i) Failing to recognize that the police did not provide protection;

(ii) Incorrectly applying the test for state protection;

(iii) Failing to consider documentary evidence that supported the Applicant's position and contradicted the Board's finding;

(iv) Failing to consider the psychological evidence.

III. Standard of Review

[18] The Board's conclusion regarding the availability of an IFA, the application of the test for state protection and the disregard of evidence in doing so are issues of mixed fact and law and are reviewable on a standard of reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12; [2009] 1 S.C.R. 339; *Barajas v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 21 (QL) at para. 21 and *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 696, 170 A.C.W.S. (3d) 168 at para. 11).

[19] As set out in *Dunsmuir*, above, reasonableness requires consideration of the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law.

IV. Argument and Analysis

A. *The Board Did Not Err in Failing to Address the IFA in its Reasons*

[20] The Applicant submits that the Board committed a reviewable error in not addressing an IFA in its reasons, even though the option of fleeing to Puebla was surveyed during the hearing.

[21] The Respondent argues that the Board made no finding regarding an IFA as the determinative issue was the Applicant's failure to rebut the presumption of state protection.

[22] The Applicant cites many cases in which the Board has committed some kind of reviewable error in relation to an IFA analysis. But these are of little help to the Applicant. When the Board concluded that state protection is adequate in Mexico, the need to analyze an IFA was negated. There is no basis for the Applicant's submissions relating to how the Board might have improperly analyzed an IFA, if they had decided to do an IFA analysis.

B. *The Board's Finding that there is Adequate State Protection is Reasonable*

(i) Police Action

[23] The Applicant submits that the Board erred in concluding that there was adequate state protection, based in part on the finding of fact that, "the times that [the Applicant] did report the crimes to the police, the police acted" (decision para. 33). The Applicant argues that the Board's conclusion is perverse.

[24] In its reasons the Board admits that the Applicant may be justified in her view that the punishment was not severe enough. However, the Board concerned itself with whether the authorities took appropriate action when a complaint was made, and decided based on the evidence that they had. The Board found that this amounted to an adequate level of state protection.

[25] The Applicant contends that the action taken by authorities was ineffectual and allowed the estranged spouse to act with impunity. Be that as it may, the standard is one of adequacy and not perfection. The Board has the job of making determinations of fact. It was reasonable to conclude based on the evidence of the restraining order, detention of the husband, and police involvement in the recovery of the Applicant's daughter that the police took action when it was requested.

[26] Furthermore, just as the Board did in its decision, Justice Richard Mosley relies on *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.) in *Flores v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 723, [2008] F.C.J. No. 969 (QL) for the proposition that, "It is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation" (at para.10).

[27] There is no merit to the Applicant's argument that the Board made a perverse finding of fact regarding the police action.

(ii) The Test to Rebut the Presumption of State Protection

[28] The Applicant submits that the Board erred in concluding that the Applicant failed to rebut the presumption of state protection based on the "serious efforts" being made by the government of Mexico to protect its citizens. The Applicant suggests that this test does not meet the standard set

out in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, and that the Board erred in relying on *Villafranca*, above.

[29] In my view, the Applicant has confused where the onus lies in the matter of state protection. The Board is not obliged to prove that Mexico can offer the Applicant effective state protection, rather, the Applicant bears the legal burden of rebutting the presumption that effective state protection exists by adducing clear and convincing evidence which satisfies the Board on a balance of probabilities (*Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, 69 Imm. L.R. (3d) 309 at para. 30). The quality of the evidence will be proportional to the level of democracy of the state (*Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 F.T.R. 35 at para.30). And, as Justice Russell Zinn noted in *Sandoval v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 868, [2008] F.C.J. No. 1084 (QL) at para. 16:

> Where, as in this case, protection was sought and provided, an applicant will have a challenge to show that it was an aberration unless there has been some material change in personal or state circumstances.

[30] Here the Board found that Mexico is a functioning democracy. This Court has recently held that Mexico is a democracy with the willingness and ability to protect its citizens (*Alvarez v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 197, at para.20) The Board also found that the Applicant had successfully sought protection from the Mexican authorities. If anything has changed in the decade plus since the Applicant fled Mexico, the documentary evidence before the Board suggests that the awareness level and ability of the government to appropriately handle the issues surrounding domestic violence have improved.

[31] Although one needs to keep in mind that the Federal Court of Appeal decided *Villafranca*, above, before the Supreme Court reached their decision in *Ward*, above, the proposition that state protection need not be perfect is still a correct one. The Federal Court of Appeal confirmed in *Carillo*, above, that the test for a finding of state protection is whether that protection is adequate, rather than whether it is effective, per se (*Carillo*, above, at para. 32).

[32] In the present case, the Board determined that the Applicant failed to adduce persuasive evidence that protection would be less forthcoming in the future than it was the three times she sought aid from the authorities in the past. In this case, absent any failure by the Board to appreciate the totality of the evidence, it was reasonable and open to the Board to conclude that the Applicant failed to rebut the presumption of state protection. The Board did not err in applying the test.

(iii) Contrary Documentary Evidence

[33] The Applicant submits that the Board failed to assess the substantial amount of documentary evidence that contradicted its finding that Mexico would be able to offer the Applicant, a victim of domestic violence, adequate state protection. It is the Applicant's position that had the Board turned their mind to this evidence, the Applicant would have been successful in rebutting the presumption of state protection.

[34] The Applicant lists several recent cases dealing with Mexico to support her argument that the Board is required to explain why it prefers some evidence over other evidence, especially when the rejected evidence contradicts the Board's finding (*Avila*, above, *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, 83 A.C.W.S. (3d) 264).

[35] The Respondent does not address this argument in their written submissions.

[36] The Board twice addresses the issue of contrary evidence in its decision. It is therefore a matter of determining whether this "nod" to the Applicant's submitted evidence is sufficient.

[37] First the Board discusses the state of Mexico generally at para. 32:

> The panel agrees there is criminality throughout Mexico, however, documentary evidence shows that Mexico is making serious efforts to professionalize the police. There are many state agencies that address criminality, including drug trafficking, kidnapping, and corruption to assist Mexicans in obtaining state protection. Documentary evidence indicates that public officials, including police and the army, are punished for their misconduct.

[38] Secondly at para. 40 when referring to the articles submitted by the Applicant's counsel:

> Counsel submitted several articles on domestic violence, criminality, and corruption. The panel agrees there are problems in Mexico with the above issues. The Board's documentary evidence supports this fact. However, the Board's same documentary evidence demonstrates that the government of Mexico is making serious efforts to protect its citizens.

[39] The Board then provided an extensive bulleted list of services offered, laws enacted and training available related to gender-related violence as proof that the Government of Mexico is making serious efforts.

[40] There is an abundance of case law emanating from the Federal Court dealing with cases of domestic abuse in Mexico. The Applicant cites many that have found reviewable errors in a Board's disinclination to discuss documentary evidence that suggests that state protection is ineffective or inadequate while relying on other documentary evidence that shows that the government is making serious efforts at improving state protection for women (*Huerta v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 586, 167 A.C.W.S. (3d) 968 at paras. 23-25; *Avila*, above, at para. 36; *Zepeda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, 167 A.C.W.S. (3d) 144).

[41] There is equally case law holding that a decision is not defective if it is clear from the reasons that the Board read and considered the applicants' submissions and the documentary references they cited, even if the Board does not reference specific documents in its reasons (*Monjaras v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 771).

[42] In the present case, I think the above excerpts make it obvious that the Board turned their attention to the Applicant's submissions. The Board acknowledged that their own documents attest to the same social problems emphasized in the Applicant's submissions. However, given the Applicant's personal experience with the Mexican authorities coupled with the documents

evidencing the support available for victims of domestic violence, the Board's conclusion that adequate state protection is available to the Applicant is not outside the range of reasonable outcomes justifiable in facts and law. After all, this Court has ruled that it is insufficient for an Applicant to rely solely on documentary evidence of flaws in the judicial system if they have failed to avail themselves of available state protection (*Alvarez*, above, at para. 22) and each case is sui generis, to be analyzed on its own specific set of facts (*Avila*, above, at para. 28).

(iv) Psychological Evidence and IRB Gender Guidelines

[43] I disagree with the Applicant's submission that the Board failed to consider the psychologist's report and the impact that returning to Mexico would have on the Applicant's mental health. In paragraph 41 of the decision, the Board finds that the Applicant would still be able to receive counselling in Mexico, something that the psychologist believes the Applicant needs in order cope with her symptoms of post-traumatic stress disorder.

[44] As for the Gender Guidelines, without explaining how the Board erred, the Applicant argues that the Board was not alive to the sensitivity required therein and failed to make any meaningful reference to the guidelines in the context of the Applicant's claim. I do not see how the Board could have placed greater weight on the Guidelines, for this was not a case that centered on the Applicant's unwillingness to seek state protection or whose outcome was affected by the Applicant's reluctance to testify at the hearing. I believe the Board was reasonable and appropriately sensitive to the Applicant's situation.

V. Conclusion

[45] […]

[46] No question to be certified was proposed and none arises.

[47] In consideration of the above conclusions, this application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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