Federal Court  Cour fédérale

Date: 20110310

Docket: IMM-1706-10

Citation: 2011 FC 289

Ottawa, Ontario, March 10, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

MARIA DEL CARMEN MARRERO NODARSE (A.K.A. MARIA DEL CARME MARRERO NODARSE)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated February 18, 2010, wherein the Applicant was determined to be neither convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 [IRPA]. The Board determined that the Applicant did not possess a well-founded fear of persecution.

[2] Based on the reasons below, this application is dismissed.

I. Background

A. *Factual Background*

[3] The Applicant, Maria Del Carmen Marrero Nodarse, is a citizen of Cuba. She seeks refugee protection in Canada alleging a fear of persecution on the basis of her political opinion.

[4] The Applicant occupied the position of commercial specialist. Her husband worked for the Ministry of Foreign Investment, and the Applicant accompanied him when he was posted abroad in Spain and in Canada.

[5] The Applicant claims that she first became the subject of interest by the Committee for the Defence of the Revolution (CDR) following her son's defection to Canada in 2002. The CDR questioned the Applicant and began to monitor her home.

[6] This, however, was not the first time the Applicant's family allegedly attracted unwanted attention from the Cuban authorities. The Applicant's husband was questioned after their daughter emigrated to Canada to join her Canadian husband in 2000. The Applicant's husband successfully assuaged any concerns the government had regarding his reliability. However, in 2001, the Applicant began to express unwelcome opinions during meetings at her workplace. These included

stating that Cuba's centralized economy was stagnant and overly controlled by the government. The Applicant attributes her name being removed from a list of possible acting managers to these comments. As such, she decided to retire before she got into any more trouble with the communist authorities.

[7] Following her son's defection in 2003 the CDR asked the now-retired Applicant to occupy a "surveillance" position in the CDR executive. The Applicant refused and reduced her participation in CDR activities. In the Applicant's account of this period, the CDR attempted to intimidate the Applicant by threatening to affect her ability to obtain exit permits to visit her children in Canada. The CDR also accused the Applicant of receiving packages containing banned items from abroad. The packages in fact contained medicine sent by the Applicant's children in Canada and were delivered by their friends. The same year, the Applicant attempted to obtain another job. After her references were checked the Applicant was rejected and she stated that she came to realize that she'd never be able to find another job.

[8] Nevertheless, the Applicant traveled to Canada in April 2003 and returned in July 2003. She made the same trip again in June 2005 and returned to Cuba in September 2005.

[9] The Applicant explained that as a result of her political beliefs, she and her husband decided to separate as he believed her attitude was jeopardizing his career with the government.

[10] The Applicant alleges that her situation worsened in July 2006 as the political climate in Cuba became increasingly repressive due to Fidel Castro falling ill. The Applicant claims that one

of her friends showed her a paper that had a photograph of the Applicant and described her as a person who needed to be kept under surveillance. Despite this alleged surveillance, the Applicant was able to travel to Canada in July 2006 and return to Cuba in September 2006.

[11] The Applicant's trouble with the CDR reached its most critical stage in June 2007 when the Applicant entertained friends of her daughter. The CDR made a report to the Office of the Social Workers accusing the Applicant of renting her house to foreigners. Nonetheless, the Applicant successfully obtained a visitor's visa and an exit permit in October 2007 and travelled to Canada to visit her children.

[12] The Applicant claims she did not intend to stay in Canada, however, following Raul Castro's election in February 2008 the Applicant felt that her situation in Cuba had become even more precarious as the authorities increased the use of the "dangerousness provision" against persons not considered politically reliable. The Applicant feared she would be targeted and so made a claim for refugee status on March 3, 2008.

B. *Impugned Decision*

[13] The Board found that the Applicant's re-availment to Cuba three times during the 2003-2006 period was inconsistent with a well-founded fear of persecution.

[14] The Applicant claimed to have been viewed with suspicion by the government due to both of her children having left Cuba, threatened by the President of the CDR, denied employment,

named as politically unreliable and put under surveillance by the CDR and yet she explained that she did not claim refugee protection during any of her three visits to Canada because at that point she merely felt harassed by the CDR and not threatened.

[15] The Board found this explanation to be implausible and contradicted by the documentary evidence. The Board concluded, on a balance of probabilities, that the Applicant was not negatively viewed by the government and that she failed to provide a reasonable explanation for freely returning to Cuba on three occasions.

[16] The Board also found it implausible that the Applicant would have been surprised by the results of the February 2008 "elections" which kept Raul Castro in power and thus, the Board found that the Applicant failed to reasonably explain her four month delay in claiming refugee protection in Canada. This factor further undermined the Applicant's credibility and her claim of subjective fear.

[17] The Board then completed a section 97 risk of harm analysis. The Applicant, having been outside of Cuba for more than the permitted eleven months, would be subject to provisions of the Penal Code of Cuba and could potentially face punishment upon her return to Cuba.

[18] The Board determined that the Applicant had, in effect, created an artificial situation in order to claim refugee status. The Board took the view that since any punishment would be the result of a law of general application, it did not constitute a risk of harm and that the Applicant

failed to establish, based on a balance of probabilities, that she would personally be subjected to serious harm.

II. Issues

[19] This application raises the following issues:

(a) Did the Board ignore or misconstrue evidence in coming to the conclusion that the Applicant lacked credibility?

(b) Did the Board err in its section 97 analysis by finding that potential punishment arising from the application of provisions of the Cuban Penal Code did not constitute a risk of harm?

III. Standard of Review

[20] It is well-established that decisions of the Board as to credibility and implausibility are factual in nature and are therefore owed a significant amount of deference. The appropriate standard of review is a standard of reasonableness (*Dong v Canada (Minister of Citizenship and Immigration)*, 2010 FC 575 at para 17; *Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558 at para 11; *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, 42 ACWS (3d) 886 (FCA) at para 4). Similarly, the weight assigned to evidence and the interpretation and assessment of evidence are all reviewable on a standard of reasonableness (*N.O.O. v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045, [2009] FCJ No 1286 at para 38).

[21] As set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 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.

[22] The correctness standard applies to the second issue. The Court will ask whether or not the Board was correct in finding that imprisonment for violating Cuba's exit laws does not amount to persecution (*Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 833 at para 10).

IV. Argument and Analysis

A. *The Board's Credibility Analysis was Reasonable*

[23] The Board determined that the Applicant lacked a subjective fear of persecution. The Board came to this conclusion after considering that the Applicant had freely returned to Cuba three times after she had already allegedly attracted the attention of the CDR and delayed making a claim when she arrived in Canada in 2007, all without a reasonable explanation. The Board found the Applicant's explanations to be implausible and inconsistent with the documentary evidence. The cumulative effect of the re-availment, delay in claiming and plausibility findings was to undermine the Applicant's credibility.

[24] The Applicant submits that in coming to these conclusions the Board misconstrued the evidence.

(1) Profile of the Applicant

[25] The Applicant submits that the Board misconstrued and selectively used evidence resulting in a flawed profile of the Applicant. It is the Applicant's belief that had the Board properly understood that the Applicant was "high profile" - a privileged Cuban with significant past travel experience who was considered politically trustworthy (by the Immigration authorities) given her previous position and her husband's current position - they would have accepted her explanation as to why she had no difficulty obtaining an exit permit in 2007.

[26] The Respondent argues that the Board did not fail to appreciate the Applicant's profile when it decided that it was implausible that her ability to travel would not be impeded. What the Board found implausible was the Applicant's own testimony that she returned to Cuba three times between 2003 and 2006 because she did not feel threatened, even though according to her testimony she was under surveillance by the CDR. The Board considered it implausible that a person with the profile of "suspected of being politically unreliable" would easily obtain an exit visa if she were truly of interest to the government.

[27] I find the Applicant's argument unconvincing. The Board is entitled to impugn the credibility of claimants as long as clear and detailed reasons are provided, as in the present case. The Board's explanation "must be based on rationality and common sense and must be consistent with the documentary evidence" (*Malveda v Canada (Minister of Citizenship and Immigration)* 2008 FC 447, 166 ACWS (3d) 337 at para 24).

[28] The Board cited documentary evidence indicating that dissidents are routinely denied exit permits. When the Board questioned the Applicant further on this point, she could only explain that she did not know how immigration works, but based her opinion that the immigration office only does a background check on an initial application for an exit permit on comments made by friends. This is only speculation, unsupported by documentary evidence.

[29] The Board ultimately concluded that it was implausible that the Applicant was being persecuted for her political beliefs by the CDR and the Office of the Social Work as she claimed but was not prevented from leaving the country. Based on the evidence before the Board, I find this to be a reasonable conclusion that was open to the Board.

[30] Despite the Applicant's contention that the Board cited documentary evidence relating to the "dangerousness" provision to support its finding that dissidents are not treated lightly, I cannot agree that the Board has failed to cite documentary evidence that supports its position. The statement that dissidents are routinely denied exit permits came from a U.S. Department of State Report and did not relate specifically to the dangerousness provision. That report further states that the government frequently denies exit permits for several years to people whose relatives have illegally migrated. The Board had ample documentary evidence to support its position, none of which was convincingly contradicted by the Applicant.

(2) Re-availment

[31] The Board concluded that the Applicant failed to provide a reasonable explanation for returning to Cuba from trips to Canada in 2003, 2005 and 2006. The Applicant submits that in coming to the conclusion the Board failed to appreciate the profile of the Applicant. Because the Applicant was a more privileged member of the Cuban regime, she was not as easily intimidated by the CDR and therefore she only began to feel threatened after the February 2008 elections.

[32] With respect, this argument does not point to the existence of any reviewable error made by the Board. It is clear from the transcript that the Board was privy to testimony regarding the social position of the Applicant. Nevertheless, ultimately the Board was convinced that the Applicant was either never a person of interest to the CDR, or that the Applicant overstated that interest.

[33] Furthermore, as the Respondent argues, it is the Applicant's own allegation that she began to have problems with the Cuban government in 2001, and those problems continued and escalated until she left for Canada in 2007. Re-availment to the country of persecution has been held by this court to be incompatible with a genuine fear of persecution (*Hevia v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 472). I agree with the Respondent that the Board's finding on this point is entirely reasonable.

[34] The Applicant further contends that the Board selectively referred to documentary evidence to support its conclusions. The Applicant is, in effect, asking this Court to re-weigh evidence, to

prefer one paragraph in the documentary evidence over another one, and come to a contrary finding regarding the Applicant's credibility. This is not the Federal Court's role on judicial review.

(3) Delay

[35] The Board rejected the Applicant's explanation for her delay in claiming in Canada. The Applicant again submits that the Board selectively quoted the Applicant's evidence. In my view, any selectivity that the Board applied to quoting the Applicant's testimony was with the purpose of writing a summary of her position as opposed to providing a verbatim transcript. This has in no way affected the reasonableness of the Board's conclusion regarding the Applicant's credibility.

B. *The Board's Finding that the Applicant was not a Person in Need of Protection was Correct*

[36] The Applicant claimed to fear persecution by the authorities in Cuba should she return, for overstaying her exit permit. The Applicant also argued that she might be subject to imprisonment under the "dangerousness" provision in the Cuban penal code.

[37] To travel to Canada in October 2007, the Applicant obtained an exit permit, valid initially for three months. The Applicant made no efforts to extend her permit, and knowingly allowed it to expire.

[38] The Board found that the Applicant had artificially created a circumstance in which she might be punished for violating a Cuban law of general application. As there was no evidence that

any prosecution the Applicant would face would not be neutral, the Board did not find that any potential prosecution constituted a risk of harm. This finding was consistent with the Federal Court's finding in *Valentin v Canada (Minister of Employment and Immigration)*, [1991] 3 FC 390 (CA), [1991] FCJ No 554 (QL).

[39] The Applicant submits that the Board failed to consider whether, given the profile of the Applicant, the Cuban government would use the exit laws as a means to punish the Applicant for her perceived political opinion. Furthermore, the Applicant submits that the Board failed to consider that her husband allegedly reported her refugee claim to the Cuban government.

[40] The Respondent submits that the Board's decision is aligned with the jurisprudence of this Court which holds that a refugee claimant who fails to renew her valid Cuban exit visa cannot rely on the possibility of punishment under Cuba's criminal laws as grounds for protection under section 96 or section 97 of IRPA (*Valentin*, above; *Perez*, above).

[41] *Valentin*, above, bars self-induced refugee status. In *Zaidi v Canada (Minister of Citizenship and Immigration)* (2004), 35 Imm LR (3d) 273 (FC) Justice Michael Kelen paraphrased the Federal Court of Appeal's holding in *Valentin*, writing at para 10:

> […] 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. As worthy as the applicant may be for Canadian immigrant status, the Refugee Board, and this Court, do not have the legal jurisdiction to grant defectors legal status.

[42] The Applicant did not provide any evidence, beyond mere speculation, that she would be subject to harsh and unusual treatment upon her return to Cuba. The documentary evidence provides that would-be legal migrants face harassment and intimidation by the government. The Applicant seeks to logically extend this information to posit that it is reasonable to conclude that there would be sanctions for those who seek to emigrate illegally by overstaying their exit permits.

[43] The Applicant cannot point to any documentary evidence that mirrors this exercise in theory. The documentary evidence, however, does provide that Cubans who overstay their exit permits can apply for a re-entry permit to legally return to Cuba. Without any actual evidence to support the Applicant's assertion, I see no reason to move away from the previous holdings of this Court. In *Perez*, above, Justice Judith Snider held that without sufficient evidence to find that the Applicant's fear of imprisonment was well-founded the Board was correct in concluding that the risk of imprisonment in Cuba upon the Applicant's return did not amount to persecution under section 96, or risk of cruel and unusual treatment under section 97. Similarly, in the present case the Board was correct in concluding that prosecution of the Applicant pursuant to the Cuban penal code does not constitute a risk of harm.

V. Conclusion

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

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

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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