Federal Court		Cour fédérale

Date: 20110322

Docket: IMM-2673-10

Citation: 2011 FC 350

Ottawa, Ontario, March 22, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

KARLA MARTINEZ VERGARA
OMAR MUNGUIA ALBARRAN

Applicants

and

THE MNISTER 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*, SC 2001, c 27 (the Act) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated April 19, 2010, wherein the Board determined that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 or 97 of the Act.

Factual Background

[2] The principal applicant, Karla Martinez Vergara and her husband, Omar Munguia Albarran, are citizens of Mexico.

[3] Mrs. Vergara was employed as a lawyer for the Institutional Revolutionary Party (PRI) in Coacalco de Berriozabal. She was responsible for dealing with complaints made against the party. She also was a member of another political party affiliated with the IRP, the *Action Revolucionaria Mexicanis*.

[4] In 2005, the party allegedly suggested that she should run for municipal counsel for the city of Coacalco, Mexico. After receiving 90% of the votes, she took on her new position as a municipal counsel.

[5] On July 23, 2007, when leaving their home, Mrs. Vergara and her husband were stopped by two men who allegedly had guns and were police officers. Mrs. Vergara testified that one of the two police officers told her that she should not go back to the party if she didn't want anything to happen to her. Her husband tried to intervene and one of the men struck him over the head. After being brought to the hospital, officers of the Public Ministry came to take his deposition regarding the incident.

[6] Mrs. Vergara stopped working for the party. On August 8, 2007, Mrs. Vergara's husband noticed that the same police officers, who had attacked him, were at his work place. He immediately quit his job.

[7] On August 26, 2007, Mrs. Vergara and her husband saw the same two individuals through the peephole of their front door. One of their neighbours called the police and told the applicants they should file a complaint at the Public Ministry. On her way to the Public Ministry, Mrs. Vergara called her brother in Canada about the incidents that had happened on July 23 and August 26, 2007. Her brother allegedly told her she should consider coming to Canada.

[8] On August 27, 2007, the applicants obtained their passports and reserved a flight to Canada for September 8, 2007. Mrs. Vergara received a phone call from the Public Ministry and was told to show up at their offices on September 7, 2007 to confirm the complaint they had made on August 26, 2007.

[9] On September 7, 2007, Mrs. Vergara and her husband went to the Public Ministry's office to confirm the complaint. They were asked to identify the individuals who had threatened and beaten them from among the detainees. They identified one of the individuals. On their way out, the applicants ran into the second individual who had beaten Mr. Albarran. The police officer threatened to kill them.

[10] The applicants left Mexico on September 8, 2007. They claimed refugee status upon their arrival in Canada. Since their departure from Mexico, Mrs. Vergara's father has allegedly received threatening phone calls.

Impugned Decision

[11] The Board determined that the applicants were not Convention refugees or persons in need of protection because it found that there were many contradictions, inconsistencies and omissions in their testimonies. The Board also found that Mrs. Vergara was not credible because she was unable to explain why she was incapable of obtaining a copy of the complaint she and her husband filed on July 23, 2007. The Board was of the view that Mrs. Vergara was not diligent in her efforts to obtain a copy of the complaint.

[12] The Board stated that there were inconsistencies between Mrs. Vergara's personal information form (PIF) and her testimony. She testified that her lawyer called to obtain copies of the complaint. However, this was not mentioned prior to the hearing. When confronted to provide an explanation, she changed her story and blamed her other lawyer. She changed her story again to blame his secretary, alleging she is racist. The Board determined this affected her credibility.

[13] With respect to the legal document submitted, the Board decided not to give it much weight. The Board noted that the document lacked descriptions of the attackers and failed to indicate that they were police officers. The document also mentioned that the applicants were injured and received threats.

[14] In its analysis of state protection, the Board raised the different possibilities available to the applicants. The Board also underlined that the initial complaint was filed on July 23, 2007, the second complaint was filed on August 26, 2007 and the confirmation of the first complaint on September 7, 2007. However, the applicants had their passports and were ready to leave the day following the confirmation of their initial complaint. The Board noted that there was no time for the police to follow up on their complaints.

[15] Relying on the case law of this Court, the Board considered that the applicants did not take all measures that were offered by the state to protect them.

Statutory Provisions

[16] The following provision of the *Immigration and Refugee Protection Act* is relevant to these proceedings:

Convention refugee	Définition de « réfugié »
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	*b*) soit, si elle n'a pas de nationalité et se trouve hors du

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

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

Personne à protéger

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 Article 1 of the Convention Against Torture; or

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*) 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.

Issues

[17] The present application for judicial review raises the following issues:

a) Did the Board err in its assessment of the applicants' credibility?
b) Did the Board properly consider the evidence before it?
c) Did the Board err in its analysis of state protection?

Standard of review

[18] As a result of the decision of the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, it is trite law that credibility and fact findings are reviewable on the reasonableness standard. As it was held in *Dunsmuir*, *supra*, at para 47, reasonableness is concerned with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

[19] With regard to the issue of adequacy of state protection, this question requires an analysis of facts and should therefore be reviewed on a standard of reasonableness (*Jabbour v Canada (Minister of Citizenship and Immigration)*, 2009 FC 831, [2009] FCJ No. 961, at para 18).

Analysis

a) Did the Board err in its assessment of the applicants' credibility?

[20] The applicants argue that the Board erred in its assessment of their credibility because it misunderstood Mrs. Vergara's explanation regarding the possibility of obtaining originals or copies of the complaint. After reviewing the transcripts, the Court notes that Mrs. Vergara's testimony was confusing and did not reflect her story.

[21] The issue of filing additional documents to substantiate the applicants' story was raised throughout the hearing before the Board as it was at the heart of their claim. The burden is on the applicants to adduce evidence in support of their claim. Thus, it is not unreasonable for the Board to rely on their failure to adduce evidence relating to important aspects of their claim in order to make an adverse finding of credibility regarding their story.

[22] The applicants also argue that the Board erred in its negative credibility assessment based on Mrs. Vergara's omission in her PIF related as to her efforts to obtain a copy of her complaint made on July 23, 2007. The Court believes that it was reasonable for the Board to reject the applicants' explanations on the basis of this omission in their PIF.

[23] Finally, the applicants submit that there is no legal requirement for refugee claimants to provide corroborative evidence for all key pieces of evidence. Thus, they contend that they were not legally required to obtain a copy of the confirmation of their initial complaint, dated September 7, 2007. (*Mahmud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No. 729, 167 FTR 309.

[24] In the case at bar, the Court finds that the failure to provide confirmation of their initial complaint, dated September 7, 2007, is an important omission that is key to the applicants' claim. It was reasonable for the Board to find that it affects their credibility.

b) Did the Board properly consider the evidence before it?

[25] The applicants argue that the Board erred in the evaluation of the evidence before it by making misstatements of the evidence. The applicants allege that in evaluating Exhibit P-9, - i.e. the complaint made by the applicants on August 26, 2007 - the Board suggested that Mrs. Vergara contradicted herself by stating in her narrative that the complaint was made on August 26, 2007, while the document was dated August 27, 2007. Further, the document makes no reference to the police who have allegedly threatened the applicants. The Court is of the view that the Board did not reject the document based on this inconsistency. The Board accepted the evidence but determined that it would not award it much weight because it could not substantiate the applicants' allegations. It was not unreasonable for the Board to determine that this evidence was not sufficient to establish the identity of the alleged assailants or the details of the incident.

[26] Finally, the applicants claim that the Board erred by not considering other corroborating evidence, such as the medical reports (P-5, P-6) as well as the medical exam conducted at the Public Ministry's office (P-8). In fact, these reports refer to the applicants' own declarations regarding the circumstances surrounding their injuries. The Board was therefore again entitled to give no probative value to these documents.

c) Did the Board err in its analysis of state protection?

[27] The applicants contend that the Board incorrectly analysed the availability of state protection by not analyzing its effectiveness in Mexico. There is simply no evidence to conclude that there was no state protection or that it was ineffective. Indeed, the applicants left their country without following up on their complaints. There was only one day between the moment where the applicants went to the Public Ministry to confirm their first complaint and the moment they left for Canada. The applicants clearly had access to the police.

[28] This Court has recognized that it is trite law that applicants are first required to exhaust all available protection in their country before coming to Canada (see *Kadenko v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No. 1376, 206 NR 272; *Alvarez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 190, [2010] FCJ No 233). In the case at bar, this Court cannot conclude that the applicants have exhausted all protection as they left their country prematurely and failed to wait and see whether state protection was forthcoming. The police reacted promptly to the applicants' complaint and followed up in order to protect them. The evidence demonstrates that the state had not only the interest but the capacity to protect the applicants.

[29] For these reasons, the Court concludes that the decision of the Board was reasonable. The intervention of the Court is not warranted. The application for judicial review is therefore dismissed.

[30] No question was proposed for certification and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Richard Boivin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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