Federal Court  Cour fédérale

Date: 20110920

Docket: IMM-1451-11

Citation: 2011 FC 1080

Ottawa, Ontario, September 20, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

MARIA ESTHER CASTANON GARCIA
PEDRO ANTONIO MENDEZ CASTANON
LESLI MENDEZ CASTANON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated January 28, 2011. The Board determined that the Applicants were not Convention refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, RS 2001, c 27 (IRPA).

[2] For the following reasons, this application is dismissed.

I. Facts

[3] Maria Esther Castanon Garcia (the Principal Applicant) and her two children, Pedro Antonio Mendez Castanon and Lesli Mendez Castanon, are nationals of Mexico. They arrived in Canada on February 8, 2009 and filed a refugee claim the following day. The Principal Applicant claims a well founded fear of persecution and risk of harm at the hands of her husband, Pedro Mendez Moctezuma.

[4] The Principal Applicant began a common law relationship with Pedro in 1992. The couple had two children together in 1993 and 1997 and subsequently married on November 27, 2000. Throughout their relationship, Pedro became increasingly violent. He began beating and threatening the Principal Applicant. In particular, he threatened to kill her and take away their children. Having become aware of the abuse, the son tried to intervene and was hit by his father.

[5] In 2007, the Principal Applicant sought assistance from the DIF (System for Integral Family Development). Pedro was sent a notice to appear but he disappeared before any action could be taken. Pedro returned in 2008 and beat the Principal Applicant, causing her to be hospitalized. Following her release, the family continued to be harassed by Pedro. The children feared attending school as they might see him.

[6] On January 27, 2009, the Principal Applicant filed a final report with the help of DIF. The outcome of this report is unknown as the Principal Applicant left for Canada with her children twelve days later. The Principal Applicant speculates that nothing was done but has not followed up with authorities.

II. Decision under Review

[7] The Board found that the Principal Applicant had failed to rebut the presumption of state protection. The Board examined evidence concerning corruption in the police force in Mexico as well as efforts to address domestic violence, specifically the introduction of new federal legislation. Although the documentary evidence showed that state protection was not perfect for victims of domestic violence in Mexico, serious efforts were being made by the authorities to address the problem.

[8] In these circumstances, the Principal Applicant was able to approach the authorities and receive assistance. She left Mexico following the second report and before a proper investigation could be conducted. There was no reason to believe that the police were not genuine in responding to the Principal Applicant's allegations of domestic violence. As a consequence, the Board considered the level of state protection adequate.

III. Issues

[9] This application raises the following issues:

(a) Was it reasonable for the Board to conclude that the Applicants failed to rebut the presumption of state protection?

(b) Did the Board err in not making a determination regarding the minor Applicants?

IV. Standard of Review

[10] The adequacy of state protection is a question of mixed fact and law reviewable on a standard of reasonableness (see *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 2007 Carswell Nat 950 at para 38; *Mendoza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 119, 88 Imm LR (3d) 81 at paras 26-27.)

[11] As articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47, reasonableness is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

V. Analysis

Issue A: Was it Reasonable for the Board to Conclude that the Applicants Failed to Rebut the Presumption of State Protection?

[12] Refugee protection is a form of surrogate protection invoked only in situations where the refugee claimant has unsuccessfully sought the protection of his or her home state (see *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, [1993] 2 SCJ 74 at paras 709, 724; *Hinzman*, above, at paras 41-44). To rebut the presumption of state protection, there must be clear and convincing evidence that state protection is inadequate or non-existent (*Carillo v Canada (Minister of Citizenship and Immigration*), 2008 FCA 94, 2008 CarswellNat 605 at para 38).

(i) Corruption in Mexico

[13] The Applicants submit that it was unreasonable for the Board to devote a portion of its reasons to analyzing corruption in Mexico as it is irrelevant to an assessment of the availability of state protection specific to domestic violence. As they suggest, a state may not be corrupt but still fail to provide adequate protection to victims of domestic violence.

[14] The Respondent argues, however, that the availability of state protection for victims of crime generally was relevant to the Board's overall assessment. The Board also recognized that its corruption discussion would not necessarily be determinative when it proceeded to evaluate the availability of state protection specifically for victims of domestic violence.

[15] I am satisfied that it was appropriate for the Board to provide context by considering the impact of police corruption in Mexico on the availability of protection for victims of crime generally. More importantly, the Board engaged in a detailed analysis of efforts made to address violence against women in the country. This analysis, along with the relevant Gender Guidelines, was given significant weight and serves as a primary basis for the Board's conclusion that the Applicants failed to rebut the presumption of state protection. Including a discussion on corruption where other pertinent factors were also considered does not make the decision unreasonable.

(ii) Effectiveness of Legislation

[16] The Applicants further submit that the Board should not have based its decision on the existence of new legislation when there was evidence that this legislation had not been practically implemented and was ineffective. The Applicants assert that state protection should be evaluated at the operational level, particularly in cases involving violence against women (see *Gilvaja v Canada (Minister of Citizenship and Immigration)*, 2009 FC 598, 2009 CarswellNat 1725). The Applicants point to several references in the Board's decision that qualify the existence of legislative reform, such as recognition that "sustained funding at the state and local level remains an issue" and "there are insufficient services to protect and attend to victims."

[17] As the Respondent submits, the Board highlighted several legislative measures taken by the authorities to directly address the problem of domestic violence. It also conducted an extensive analysis of the challenges faced in implementing new legislation. The Board expressly considered conflicting evidence by recognizing the gap between legislation and implementation. This is

evident in the Board's conclusion when it refers to its approach in weighing the totality of the evidence. While state protection must be adequate, it need not be perfect (see *Canada (Minister of Employment and Immigration) v Villafranca* (1992), 99 DLR (4th) 334, 18 Imm LR (2d) 130 at para 7).

[18] In addition, the determination that the Applicants failed to rebut the presumption of state protection was supported by the particular circumstances of this case. In a democratic state, such as Mexico, the Applicants would have to show that they exhausted all courses of action open to them without success before seeking protection (*Kadenko v Canada (Minister of Citizenship and Immigration)*, 124 FTR 160, 1996 CarswellNat 2216 at para 5 (FCA)). The Applicant sought police protection on two occasions. After the first report, the police issued a notice to appear. Although no action was taken because Pedro disappeared and the notice did not prevent him from returning two years later, it did not represent inaction by the authorities. The Principal Applicant did not wait for the outcome of the second report. It was reasonable for the Board to conclude that the Principal Applicant was able to seek protection.

[19] Given that evidence regarding the ineffectiveness of legislation was considered as well as the supporting circumstances, the Board's finding that the Applicants did not provide clear and convincing evidence to rebut the presumption of state protection was within the range of possible, acceptable outcomes.

Issue B: Did the Board Err in Not Making a Determination Regarding the Minor Applicants?

[20] The Applicants submit that it was unreasonable for the Board not to independently assess whether the minor Applicants would face persecution on their return to Mexico. In support of this argument, the Applicants point to violence experienced by the son and fears of both children that they would see their father, Pedro, while attending school.

[21] The Respondent contends that the claims of the Applicants were appropriately joined as they were based on substantially the same facts. The finding that the Principal Applicant failed to rebut the presumption of state protection was therefore also dispositive of the minors' claims.

[22] The Respondent provides as an example the decision of *Gilbert v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1186, 2010 Carswell Nat 4462. In that case, this Court addressed a similar question as to whether the Board should have reached a separate decision for minor claimants in a refugee claim involving spousal and child abuse. The determination took into account that the principal claimant at no time suggested her son's claim be treated differently. As Justice John O'Keefe stated at para 26:

> [26] […] The joined claims of the applicants were rejected on the basis that state protection was available for them. It was not an error for the Board to consider implicitly that the minor applicant would and could avail himself of that same protection from the agent of persecution.

[23] I agree with the Respondent and the conclusion in *Gilbert*, above, that it was reasonable for the Board not to conduct an independent analysis of the minor Applicants' claims. All claims were

based on sufficiently similar facts, the fear of continued threats and violence perpetrated by Pedro if returned to Mexico. Issues specific to the children were discussed by the Principal Applicant, who did not express a desire for them to be addressed separately.

VI. Conclusion

[24] It was reasonable for the Board to find that the Applicants failed to rebut the presumption of state protection. The Board was not required to make an independent determination regarding the minor Applicants.

[25] Accordingly, this application is dismissed.

JUDGMENT

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

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-1451-11**
STYLE OF CAUSE:	**MARIA ESTHER CASTANON GARCIA ET AL. v. MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**SEPTEMBER 8, 2011**
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APPEARANCES:

Lindsey Weppler	FOR THE APPLICANTS
Khatidja Moloo	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jacqueline M. Lewis Blanshay & Lewis Toronto, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General Canada	FOR THE RESPONDENT