

Federal Court



Cour fédérale

Date: 20121203

Docket: IMM-2571-12

Citation: 2012 FC 1407

Ottawa, Ontario, December 3, 2012

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

**MARISOL EUFEMIA ESPINOZA JIMENEZ
MELIETH ARGERY
(A.K.A. MELIETH ESPINOZA JIMENEZ)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Marisol Espinoza Jimenez and her daughter, Melieth Espinoza Jimenez, challenging a decision by the Refugee Protection Division of the Immigration and Refugee Board (Board) which dismissed their claims for refugee protection.

[2] The Applicants' claims to protection were based on their respective histories as victims of domestic abuse and family violence. The Board took no issue with the evidence of abuse in

Costa Rica and in Canada, but dismissed both claims on the basis that the presumption of state protection had not been rebutted.

[3] The Board's treatment of the country condition evidence concerning state protection was as follows:

[11] Furthermore, the contents of the most recent and presently probative country documents before me are at worst mixed and inconclusive, rather than preponderantly negative as they would need to be for a successful claim for refugee protection in this context, when it comes to state protection for women fearing violence in Costa Rica. While some of the text in the most recent documents indicates that Costa Rican gender violence state protection mechanisms are inadequate, other text in the same recent documents tells a different story and indicates that Costa Rica has reasonably functional state protection mechanisms available for women fearing domestic violence, both in legislation and in practice.

...

[13] In my view, it would be far too problematic for the surrogate notion of refugee protection if adequate state protection presumptions were found rebutted in the face of documentary state protection evidence this mixed and inconclusive, and in circumstances where the state has never even been given one chance to protect the claimants.

[14] In this regard, I would emphasize that there is no preference in this decision for some of the text in the above footnoted recent documentary evidence over the other, or that evidence over other evidence that I have not quoted. It is all credible and reliable documentary evidence and there is, therefore, no rational basis for preference of some of it over the other in either direction on the state protection question. However, given that all of it exists in the record before me, I find that it ends up leaving a mixed and inconclusive rather than a clearly negative picture when it comes to state protection for the claimants and for women in Costa Rica. Mixed rather than clearly negative state protection pictures are quite problematic for claimants who face an important burden to rebut an *a priori* presumption of adequate state protection and who have made no prior effort to seek home state protection, as in this case.

[4] There is an inherent inconsistency between a finding that all of the state protection evidence was credible and reliable and the finding that the resulting picture was mixed and inconclusive. The Board found that the most recent documents indicated that gender related state protection mechanisms in Costa Rica are inadequate. The Board then referred to other evidence that “tells a different story”. These two conclusions were only available to the Board by virtue of its failure to weigh the supposedly conflicting evidence and to make appropriate evidentiary choices. In almost every case involving state protection, the evidence will be mixed. If the Board is entitled to avoid making evidentiary findings in the face of conflicting evidence almost no one will successfully prosecute a refugee claim.

[5] The evidence in the record was amenable to meaningful review and it was not as mixed as the Board seemed to believe. That evidence indicated that Costa Rica had made reasonable efforts to create a legal framework for dealing with its serious domestic violence problem. What was lacking was an adequate *de facto* system of protection. According to the 2010 United States Department of State Report for the year 2009 (cited by the Board) the authorities opened 10,510 cases of domestic violence but prosecuted only 245 cases and convicted only 119 of those accused. According to a 2011 United Nations Report, Costa Rica had also created a separate judicial system for the prevention of domestic violence against women and opened more than 50,000 cases in 2009 alone. Nevertheless, fewer than 5000 of those cases brought before a specialized court led to a conviction and no sentencing data was available. This problem of impunity was confirmed in a 2010 news report that stated that the majority of domestic violence cases that end in a conviction do not lead to a jail sentence even for repeat offenders. Another news report from 2011 stated that one

in three women in Costa Rica is a victim of physical violence. Other evidence in the record indicated that fewer than 20 percent of protection requests were resolved in favour of an applicant. Even the evidence cited by the Board did not support its optimistic view. Rather, that evidence indicated that the responsible law enforcement officials “did not apply the law” and, in some cases, actually intimidated victims instead of helping them.

[6] Given this evidentiary record, it was not a reasonable response to conclude that the state protection issue could not be resolved one way or the other. Virtually all of the reliable third-party evidence before the Board indicated that Costa Rica does not have an adequate system for protecting women from violent abusers like Ms. Jimenez’s spouse.

[7] The Board’s criticism of Ms. Jimenez’s failure to pursue state protection in Costa Rica is also troubling. She gave anecdotal evidence about the unwillingness of the Costa Rican authorities to protect women from domestic abuse and she also described a personal incident with the police where her concerns were dismissed with laughter. She also testified that she feared that the prevailing culture of impunity would put her at a greater risk if she complained.

[8] In the context of all of the available evidence the Applicant’s subjective fear of retaliation cannot be said to lack an objective basis. Indeed, having particular regard to the Applicant’s well documented psychological profile, the severity of the abuse she had suffered over many years, and the gender guidelines, it was unreasonable for the Board to describe this evidence as “asserting only a subjective reluctance to engage the state”. This was a case of profound and long standing domestic abuse involving a spouse who, according to Ms. Jimenez, had threatened to kill her if she returned

to Costa Rica. Far more sensitivity to the Applicants' personal histories in the context of Costa Rica's state protection record is required than was afforded to the Applicants. The decision is accordingly set aside for re-determination on the merits by a different decision-maker.

[9] Neither party proposed a certified question and no issue of general importance arises from these reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed and the matter is to be re-determined on the merits by a different decision-maker.

"R.L. Barnes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2571-12

STYLE OF CAUSE: JIMENEZ ET AL v MCI

PLACE OF HEARING: Toronto, ON

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REASONS FOR JUDGMENT: BARNES J.

DATED: December 3, 2012

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