

Federal Court



Cour fédérale

Date: 20130508

Docket: IMM-9512-12

Citation: 2013 FC 486

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Montréal, Quebec, May 8, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**ELIZABETH DEL CARMEN GONZALEZ DE
RODRIGUEZ**

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary comments

[1] The case law from this Court is consistent in cases where the Refugee Protection Division (RPD) considers the issue of state protection. As Justice Robert Mainville, now a judge of the Federal Court of Appeal and at the time a judge of the Federal Court, noted in *Jimenez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 727:

[4] . . . the availability of state protection should not be decided in a factual vacuum in terms of a refugee claimant's personal circumstances. A decision with regard to the subjective fear of persecution, which includes an analysis of the refugee claimant's credibility and the plausibility of his or her account, must be made by the Immigration and Refugee Board to establish an appropriate framework for an analysis, where necessary, of the availability of state protection that takes into account the individual situation of the refugee claimant in question.

. . .

[2] The following excerpts from the guidelines of the Chairperson of the Immigration and Refugee Board on *Women Refugee Claimants Fearing Gender-Related Persecution* (1996)

[Guideline 4] regarding evidentiary matters relating to state protection are instructive and worth reviewing:

2. **Decision-makers should consider evidence indicating a failure of state protection if the state or its agents in the claimant's country of origin are unwilling or unable to provide adequate protection from gender-related persecution.** If the claimant can demonstrate that it was objectively unreasonable for her to seek the protection of her state, then her failure to approach the state for protection will not defeat her claim. Also, the fact that the claimant did or did not seek protection from non-government groups is irrelevant to the assessment of the availability of state protection.

When considering whether it is objectively unreasonable for the claimant not to have sought the protection of the state, **the decision-maker should consider, among other relevant factors, the social, cultural, religious, and economic context in which the claimant finds herself.** If, for example, a woman has suffered gender-related persecution in the form of rape, she may be ostracized from her community for seeking protection from the state. Decision-makers should consider this type of information when determining if the claimant should reasonably have sought state protection.

In determining whether the state is willing or able to provide protection to a woman fearing gender-related persecution, **decision-makers should consider the fact that the forms of evidence which the claimant might normally provide as "clear and convincing proof" of state inability to protect, will not always be either available or useful in cases of gender-related persecution.**

. . .

In cases where the claimant cannot rely on the more standard or typical forms of evidence as “clear and convincing proof” of failure of state protection, **reference may need to be made to alternative forms of evidence to meet the “clear and convincing” test.** Such alternative forms of evidence might include the testimony of women in similar situations where there was a failure of state protection, or the testimony of the claimant herself regarding past personal incidents where state protection did not materialize. [Emphasis in original.]

II. Judicial proceedings

[3] The applicant is a 32-year-old citizen of the Dominican Republic. She made a claim for refugee protection in Canada as a member of a particular social group within the meaning of the Convention, namely, women who are victims of domestic violence. She is seeking judicial review of the RPD decision, dated August 16, 2012, in which it was held that the applicant was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

III. Facts

[4] The applicant, Elizabeth Del Carmen Gonzalez de Rodriguez, recounted in her Personal Information Form (PIF) a long history of violent domestic abuse that began when she was 13 years old. At that age, she was the victim of an attempted rape by two men. When she was 14 years old, she was in an abusive and violent relationship with a man who fathered her first child.

[5] The applicant then met another man, also very violent, who tried to kill her by setting fire to their house. The applicant’s mother filed a complaint against the boyfriend. He was never arrested by the police, but this event put an end to the relationship.

[6] The applicant engaged in prostitution for a time in La Romana, Higüey and Santo Domingo, when she was only 17 years old. She returned to live with her mother when she was pregnant with her daughter. The father, who was one of the applicant's clients, never accepted any responsibility for the child. The applicant was only 19 years old at the time.

[7] The applicant also alleges that she was subjected to domestic violence at the hands of her ex-partner, Juan Manuel Lizardo, to the point that she attempted suicide. This union lasted seven years, and the couple had twins on July 15, 2002. The applicant testified that her partner had begun to mistreat her after she gave birth, since he had wanted her to get an abortion.

[8] After their separation, on July 13, 2007, the applicant's partner began harassing her. He also took her twins from her. On July 16, 2007, he allegedly went to the applicant's mother's home and attacked her mother with a knife. On July 17, 2007, he allegedly returned, made death threats against the applicant and injured her. The applicant's neighbours drove her to the hospital, a fact supported by the certificate of the medical examiner dated July 17, 2007, filed in evidence.

[9] The applicant also alleges that she filed a complaint with the police the same day. A copy of this complaint filed in evidence is dated July 16, 2007.

[10] The applicant alleges that, for fear of being arrested by the police, her ex-partner moved to another city located 10 hours away from her home in Moca. However, the applicant alleges that her ex-partner tried to attack her again the last time they saw each other in June 2008.

[11] In November 2007, the applicant met another man, Juan Carlos, whom she married on January 5, 2008. The applicant alleges that her husband abused her constantly. She alleges that she called the police three times between September 2008 and February 2009.

[12] In 2009, the applicant was persuaded to accompany her husband, a Canadian citizen, to Canada. The situation did not improve. The man continued to abuse and beat the applicant, and she learned that he had serious mental health issues. The applicant's husband withdrew his sponsorship application when the applicant filed a complaint with the police after several months and the courts issued an order against him.

[13] The applicant returned to Canada on March 17, 2010, and claimed refugee protection. She left her husband for good in October 2010, and their divorce was finalized on December 25, 2011.

IV. Decision under review

[14] For the purposes of the RPD hearing, the applicant was identified as a vulnerable person on the basis of psychotherapeutic evaluation reports and her medical file because of the gender-based persecution she had suffered in her country. The RPD noted that it had granted the accommodations requested by the applicant's counsel, taking into account the requirements of Guideline 4.

[15] The RPD also began by noting that the applicant's testimony was detailed and credible. However, the RPD mentioned that while it had given a certain amount of weight to the medical reports describing the history of the applicant's persecution in assessing her state of mind and the credibility of her narrative, it had accorded these documents little weight in making its finding with respect to state protection, which was a determinative factor in the refusal of the applicant's claim for refugee protection.

[16] The RPD essentially did not consider credible the complaint filed by the applicant with the police following the incident of July 17, 2007, since that report was dated July 16, 2007, and it referred to a medical certificate issued on July 17, 2007. The applicant stated that she had lost the documents after moving to Canada and that her mother had picked up copies of the documents on her behalf. The applicant was of the view that the error was attributable to the police. The RPD was not satisfied with this explanation and found that the applicant had not really sought the protection of the authorities.

[17] The RPD noted that the Dominican Republic is a democratic state that benefits from the presumption that states are capable of protecting their nationals. The RPD also noted that, according to the case law, the determination of adequacy of state protection cannot rest on the subjective fear of a claimant (*Martinez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1050 at para 9).

[18] The RPD therefore rejected the applicant's allegation that the police failed to follow up on her complaints, noting that, according to the applicant's testimony, Lizardo left Moca and

moved to Punta Cana because he was afraid of being caught by the police. The RPD mentioned that the applicant had herself acknowledged that the police authorities exercise their authority with respect to individuals against whom complaints are filed. The RPD also noted that the applicant had lived at the same address, at her mother's home in Moca, until November 2007 without being disturbed.

[19] Finally, the RPD asked itself why the applicant had not reported the fact that her husband had attacked her again in May or June 2008. The RPD also noted that the applicant had failed to report the kidnapping of her twins by their father upon their separation in July 2007. The applicant replied that she had been told that she had to file a complaint in the capital and that she did not do so because she did not know where the capital was and did not have the means to take legal action against her partner. However, the applicant stated that she had gone to the youth protection directorate when her partner refused to let her visit her children, but that she had not thought to obtain a document attesting to her dealings with that agency.

[20] The RPD recognized that [TRANSLATION] "spousal and domestic violence against women is pervasive in the Dominican Republic", but it held, on the basis of the documentary evidence, that several resources and NGOs are available to women who have been subjected to violence. The applicant did not seek assistance from any agency other than the police.

[21] The RPD held that the applicant did not provide an adequate explanation as to why she had not sought the protection of her own country before seeking protection in Canada. Nor did the applicant provide clear and convincing evidence that state protection was not adequate in her

country. Accordingly, the applicant's claim for refugee protection was rejected on the sole basis of this finding that she had failed to seek the protection of her state.

V. Issue

[22] Did the RPD err in finding that state protection was available to the applicant without any real analysis of her individual circumstances?

VI. Standard of review

[23] It is common ground that the RPD's findings with respect to state protection are reviewable on a standard of reasonableness (*Zeferino v Canada (Minister of Citizenship and Immigration)*, 2011 FC 456 at para 28).

VII. Analysis

[24] This Court recently held on the basis of the evidence that there is state protection available to women victims of domestic violence in the Dominican Republic (*Reyes v Canada (Minister of Citizenship and Immigration)*, 2012 FC 926 at para 30; *Nunez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 792 at para 9). However, it is important to note that in *Mendoza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 119, Justice François Lemieux write that “[e]ach case is *sui generis* so while state protection may have been found to be available in Mexico, maybe even in a particular state, this does not preclude a court from finding the same state to offer inadequate protection on the basis of different facts” (at para 33).

[25] Therefore, each case is *sui generis* based on its own individual circumstances and facts. This means that, in some cases, exceptional factors may cause the state to fail to provide adequate protection.

[26] Having read the entire record, this Court is of the view that, in this case, the RPD committed several reviewable errors in its analysis of the state protection available to the applicant, for example, by relying on erroneous findings of fact without regard to the applicant's personal circumstances. Consequently, the RPD did not properly analyze the applicant's prospective fear or the protection that would be available to her in the Dominican Republic if she were to return under the same conditions.

[27] First, the RPD unreasonably rejected all the explanations provided by the applicant during her testimony. A mere error in the date should not suffice to reject the evidence of the complaint that the applicant had filed with the police, given that a copy of the complaint had been obtained by the applicant's mother and not the original. Nor should the RPD have relied on the perception of the applicant's partner that he was at risk of being captured by the police for having beaten and injured her to find that the police were capable of protecting the applicant and following up on her complaint. The evidence clearly established that nothing had been done to follow up on her complaint, and the subjective perception or fear that one might have experienced after committing a crime has no relevance. To meet the standard, a decision must fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[28] Second, even if the RPD were entitled to deference from this Court with respect to its finding that the applicant had not exhausted the recourses available to her from government agencies and NGOs in seeking protection in her country, this Court, in light of the exceptional facts that have been held to be credible, is of the view that the RPD was not sensitive to the “social, cultural, religious, and economic context” in which the claimant found herself when it held that it was objectively unreasonable of her not to have sought state protection, contrary to the requirements of Guideline 4 (see also the Supreme Court of Canada’s decision in *R v Lavallée*, [1990] 1 SCR 852, regarding battered woman syndrome).

[29] The applicant testified that she came from a small town where she lacked both the necessary information and resources to take action against the violent partner who had abused her and prevented her from seeing her children. The RPD should have taken into account the circumstances of the narrative that it held to be credible (including the social milieu to which the applicant belonged, her abusive and turbulent marital relations and her state of psychological health); its failure to do so renders its decision unreasonable.

[30] The case law from this Court is consistent with respect to the analysis of state protection by the RPD. Justice Mainville noted the following in *Jimenez*, above:

[4] . . . the availability of state protection should not be decided in a factual vacuum in terms of a refugee claimant’s personal circumstances. A decision with regard to the subjective fear of persecution, which includes an analysis of the refugee claimant’s credibility and the plausibility of his or her account, must be made by the Immigration and Refugee Board to establish an appropriate framework for an analysis, where necessary, of the availability of state protection that takes into account the individual situation of the refugee claimant in question.
. . .

VIII. Conclusion

[31] For all of these reasons, the application for judicial review is allowed and the matter referred back to a different RPD member for redetermination.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed and the matter referred back to a different Refugee Protection Division member for redetermination. No question of general importance arises for certification.

“Michel M.J. Shore”

Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9512-12

STYLE OF CAUSE: ELIZABETH DEL CARMEN GONZALEZ DE
RODRIGUEZ v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 8, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: May 8, 2013

APPEARANCES:

Stéphanie Valois FOR THE APPLICANT

Margarita Tzavelakos FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stéphanie Valois FOR THE APPLICANT

Counsel

Montréal, Quebec

William F. Pentney FOR THE RESPONDENT

Deputy Attorney General of Canada

Montréal, Quebec