

Date: 20080606

Docket: IMM-4391-07

Citation: 2008 FC 709

Ottawa, Ontario, June 6, 2008

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

CHRISTEL PENA VARGAS

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Vargas, a 29-year old citizen of Mexico, entered Canada in March of 2005. She applied for refugee status in April of 2006. The Refugee Protection Division (the board) drew a negative credibility inference and concluded that her actions were inconsistent with her alleged fear. The board also found that adequate state protection exists in the capital district D.F. (Mexico City). It rejected her claim.

[2] Ms. Vargas contends that the board ignored and misapplied critical evidence in arriving at its negative credibility finding. Moreover, its conclusion that adequate protection exists was unreasonable and wrong in law.

[3] I conclude, for the reasons that follow, that the application should be granted.

Background

[4] Ms. Vargas worked for a number of years as a public relations assistant at the head office of the powerful Institutional Revolutionary Party (PRI) National Executive Committee. When the PRI was not successful in the 2000 presidential elections, the President of the Executive Committee resigned and was replaced by Mr. Roberto Madrazo. Ms. Vargas's loyalty to the new president was scrutinized and questioned.

[5] In September of 2003, Ms. Vargas was informed that she was to be laid off and would be provided with 7000 pesos (\$700 U.S.), if she left voluntarily. Ms. Vargas believed that, based on her years of service, she was entitled to 50,000 pesos (\$5,000 U.S.). After consulting her lawyer, she initiated an action for unlawful dismissal against the PRI and Madrazo. Shortly thereafter, she received a telephone call. The caller advised her not to continue with her lawsuit. When the time for court appearances arrived, she (and her lawyer) received telephone calls conveying a message that she should accept the amount offered.

[6] Ms. Vargas relocated in an effort to find employment. She attributes her lack of success to possible negative references from the PRI. In September of 2004, the brakes of her vehicle

inexplicably failed. Her automobile collided with a truck; she sustained injury and was hospitalized for more than a month.

[7] Upon discharge from hospital, Ms. Vargas moved in with her mother and sister. When she received threatening calls, the threesome relocated. Ms. Vargas spoke to her lawyer about leaving the country because of the situation. By written Power of Attorney, she appointed her lawyer as her agent and authorized him to continue her lawsuit.

[8] On March 14, 2005, Ms. Vargas arrived in Canada on a six-month visitor visa. She claims that she was not sure of her plans at that time. She thought that she would return to Mexico when things settled down and her lawsuit was resolved. She states that she did not consider making a refugee claim, in part, because the information might make its way back to the Mexican government and, by association, to the PRI. After the expiration of her visitor visa, Ms. Vargas remained in Canada without status.

[9] In January of 2006, she learned that her lawyer in Mexico was dead. This information prompted her to consult a Canadian lawyer. After being assured of the confidentiality associated with refugee claims, she applied for refugee status in April, alleging a fear of persecution on the basis of political opinion. Eight days before her hearing, Ms. Vargas learned, from her mother, that her lawyer had died in a car accident.

[10] Ms. Vargas claims that her mother, in May of 2006, informed her that the lawsuit was being handled by another lawyer. In November of that year, her mother further informed her that yet a third lawyer had carriage of the file due to the death of the second lawyer.

[11] Ms. Vargas maintains that Madrazo views her as having betrayed the PRI and would not hesitate to have her killed because she is an embarrassment. She made no attempt to approach the police before leaving Mexico.

[12] Her Canadian counsel referred Ms. Vargas for psychological assessment. She was diagnosed with post traumatic stress disorder (PTSD) with associated symptoms (reliving traumatic events through nightmares and flashbacks, avoiding social interactions, feeling frightened, being hyper-vigilant, irritable, etc.).

Decision

[13] The board drew a negative credibility inference and concluded that Ms. Vargas's actions were inconsistent with her stated fear. It further held that Ms. Vargas did not rebut the presumption of state protection. It rejected the claim.

Standard of Review

[14] Credibility is a factual finding and as such is reviewable on the grounds enumerated in paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at para. 38. See also: *Colistro v. BMO Bank of Montreal*, 2008 FCA 154. The issue of state protection is a question of mixed fact and law.

Dunsmuir v. New Brunswick, 2008 SCC 9 directs that where the standard of review can be ascertained by reference to existing jurisprudence, there is no need to engage in a standard of review analysis. Such is the situation here. The standard of review with respect to a finding of state protection is that of reasonableness: *Chaves v. Canada (Minister of Citizenship and Immigration)* (2005), 45 Imm. L.R. (3d) 58 (F.C.).

Analysis

[15] The applicant acknowledges that she must succeed on both of her arguments in order to have the board's decision set aside.

Credibility

[16] Ms. Vargas claims that the board's conclusion regarding her "delay" in making a refugee claim led to an overall negative credibility finding. Because the board ignored material evidence, its credibility determination is flawed.

[17] Factual findings must be grounded in the evidence. Otherwise, they may be regarded as erroneous. It was entirely open to the board to conclude that Ms. Vargas is not credible. However, the law has long required that credibility findings be stated in clear and specific terms: *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 130 N.R. 236 (C.A.).

[18] The board specifically stated that "delay is usually not a determinant issue". However, its findings in support of the negative credibility conclusion revolve exclusively around the issue of delay. In particular, the board noted that Ms. Vargas was in Canada for approximately 13 months

before she submitted her claim for refugee status. I see no difficulty with that observation.

However, the board also concluded that “during the first six months when she had legal status in Canada, she had more than sufficient time to research her options of making her status in Canada permanent and legal” (my emphasis). Further, it considered that her skill level was sufficient to enable her to make the appropriate inquiries during this time frame. The board, in arriving at this determination, does not address Ms. Vargas’s evidence that it was the knowledge of her lawyer’s death that precipitated her desire to remain in Canada.

[19] Delay in making a claim is a relevant (and significant) factor to be taken into consideration. It is not determinative: *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.).

[20] Aside from the “delay” factor, it is impossible to ascertain, from its reasons, the basis of the board’s conclusion. The issues of credibility, subjective fear and state protection are conflated. Cursory references to delay and failure to approach the Mexican authorities are rolled into a cryptic analysis that purports to constitute a negative credibility finding. There is no reference to the psychological assessment or, as noted above, to the applicant’s evidence that it was her lawyer’s death that precipitated her fear to return to Mexico.

[21] While the weight to be assigned to the applicant’s evidence and the contents of a psychological report are matters for the board to determine, the board must not disregard the existence of evidence which is material to the claim. Rather, it must deal with such evidence and state why it rejects it, or assigns it little weight. There may well be any number of facts related by

Ms. Vargas that the board views as problematic. If that is so, the board must articulate, at a minimum, the significant problem areas. Here, the board does not refer to any evidence other than delay, in relation to credibility. The board's credibility determination in this case was made without regard to the evidence and was not articulated in a comprehensible fashion. Consequently, it is not sustainable on the noted standard of review.

[22] Moreover, the analysis advanced to support the finding cannot be said to be reasonable because it does not display the existence of justification, transparency and intelligibility. In this respect, I agree with the respondent that the issue can easily be characterized as the adequacy of reasons.

State Protection

[23] The analysis in relation to state protection is similarly flawed. The board member places much stock on the fact that Ms. Vargas filed a lawsuit in Mexico. It infers that, because she accessed the justice system regarding her employment situation, she would (or should) have accessed the system regarding the threats. While this observation is not lacking justification, it nonetheless ignores the fact that the alleged threats arose as a result of the filing of the lawsuit.

[24] Ms. Vargas testified that she relocated several times in an effort to find employment and be safe. She continually asked questions of her lawyer with respect to the threats. The board concludes that the claim is exaggerated because her "current employment letter is most positive". In fact, the letter is from the former employer (PRI prior to the leadership of Mr. Madrazo). It is

incumbent on the board to ensure that the evidence, and particularly that relied upon to support a finding, is described accurately.

[25] More importantly, while the board recognizes, in a general sense, that impunity and corruption persist in Mexico, it does not address the plethora of documentary evidence before it which specifically discusses the power and influence exerted by Mr. Madrazo. This evidence was central to Ms. Vargas's claim.

[26] Finally, in approaching the issue of state protection and the applicant's failure to approach the authorities, the board does not address (either by way of acceptance or rejection) the evidence of Ms. Vargas that when she left Mexico, she expected to return there.

[27] It may well be that state protection is available to Ms. Vargas. However, the board's determination that state protection exists on the circumstances of this case cannot be sustained on the basis of the reasons provided by the board. The failure to properly analyse the issue of state protection yields an unreasonable decision which lacks justification, transparency and intelligibility.

[28] Ms. Vargas has established, as she must, that the credibility and state protection determinations are deeply flawed. Neither can be regarded as falling within a range of possible acceptable outcomes which are defensible in respect of the facts and the law. Consequently, her application must succeed. Counsel did not suggest a question for certification and none arises.

JUDGMENT

The application for judicial review is granted and the matter is remitted to the Refugee Protection Division, differently constituted, for determination.

“Carolyn Layden-Stevenson”
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-4391-07

STYLE OF CAUSE: CHRISTEL PENA VARGAS
v.
MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 28, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** Layden-Stevenson J.

DATED: June 6, 2008

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