Date: 20090127

Docket: IMM-2825-08

Citation: 2009 FC 83

Ottawa, Ontario, January 27, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

ROCIO MORALES PECH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board, dated May 14, 2008, denying the refugee claim on the basis that the applicant had not established that "state protection" was not available to her in Mexico City.

FACTS

[2] The facts and the credibility of the applicant in this case were accepted by the Board. The applicant, born November 11, 1986, is a citizen of Mexico. In July 2004, at the age of 17, the applicant became the girlfriend of a 47 year-old army officer, a Lieutenant Colonel in the Mexican Army based in Mexico City. At the time, the applicant was living with her parents in Mexico City.

[3] On January 8, 2005 the applicant moved to the city of Veracruz to live with the Colonel, who had been transferred to Veracruz with the Mexican Army. She had just turned 18.

[4] The applicant states that at the beginning of their relationship in Veracruz there were no problems. However, on September 19, 2005, (when the applicant was 18 years of age), the Colonel beat her causing her serious injury. After the incident, the Colonel apologized and asked her not to report the incident to the police because he "had had a bad day and would never do it again". However, he soon again lost his temper and beat her. Then, on Christmas Eve, December 24, 2005 the Colonel returned home under the effects of alcohol or drugs and, without provocation, beat her, and strangled her until she lost consciousness. When she awoke, she realized that her clothes had been tattered and that she had been raped. The applicant immediately reported the rape, the assault and the injury to the police in Veracruz on Christmas Eve. She was examined by a doctor at the police station in Veracruz. She then left Veracruz and moved back to her parents' home in Mexico City.

[5] On January 2, 2006 (six days later) the Colonel arrived at her parents' house in Mexico City, pointed a gun at the applicant's head and ordered the applicant to return with him. She refused. The applicant thought that because of the police report that she had made in Veracruz, the applicant

would soon be incarcerated. Following the incident on January 2, the Colonel stalked her around her house, and when she left her house. Then, on January 15, 2006 the Colonel tried to kidnap her while she was shopping. She struggled, kicked and yelled while the Colonel was trying to take her away in his car with the help of two men. This caused the Colonel's car to crash at a busy intersection. The two men in the Colonel's car who were holding her were injured. As people approached the car, she took the opportunity to run away. The applicant took a taxi to the bus station and went to the city of Irapuato to live with her grandparents. The Colonel found her in Irapuato and threatened her with death if she would not return to him. She refused. The Colonel then telephoned her and said that he was outside her house in Irapuato. The applicant called the police and reported that the Colonel was outside her house and wanted to kill her. After 10 or 15 minutes, the police arrived, the Colonel left and the police went after him.

[6] The next day, March 1, 2006, the applicant moved to a distant city in the northern part of Mexico called Torreon to live with a friend of her mother's. During that time she met the son of the friend and started a romantic relationship. This young man was a truck driver and she traveled constantly with him in the truck with the expectation that the Colonel would never find her. Then, on July 31, 2006 while her boyfriend was "trucking" in the city in the city of Guadalajara, she saw her boyfriend running and yelling for help. Behind her boyfriend she saw a van. The driver of the van shot her boyfriend in the head and killed him right in front of her eyes. The applicant recognized the driver of the van as one of the men who had tried to kidnap her six months before in January. Another woman, whom the killers may have mistaken for the applicant, was killed along with the applicant's boyfriend. The applicant escaped through the back door of the hotel and returned to

Mexico City. She went to the airport, bought an airplane ticket to Canada and left Mexico on August 4th, 2006, arriving in Canada that same day.

[7] The applicant stayed in Canada thinking things would calm down back in Mexico and she could return. However, just prior to her refugee claim, the applicant's cousin in Mexico City was kidnapped and brutally beaten. Her cousin was in the hospital in critical condition. The applicant was told that the people who beat her cousin were trying to get information about the whereabouts of the applicant.

Decision under review

[8] The only issue for the Board was the availability of state protection in Mexico City. At the outset of the hearing, the Board member said that the only issue he wanted to consider was whether the applicant could establish on the balance of probability that there was not adequate state protection in Mexico City, the Federal District. The Board member also said at the outset of the hearing that:

> … as counsel and I discussed, much of the basis for my decision on that issue (state protection) will be from the documentary evidence both submitted by your counsel and disclosed by the Board.
>
> (Transcript, page 4, lines 15 to 18)

Counsel for the applicant added on the record that the Board member did not want the applicant to repeat her personal story because her credibility or the facts are not in issue. The only issue is state protection.

[9] The Board held that the applicant had not established that state protection was unavailable to her in Mexico City. He stated in his decision at page 1:

> The claimant never approached any authority in the D.F. concerning incidents that occurred in that jurisdiction.
>
> Counsel submitted that because the claimant made a report in Veracruz, then this should have protected the claimant from the attack in the capital. I have no evidence as to what the police did with the Veracruz report. Counsel submitted the former lover should have been questioned or maybe arrested and if [so], as in Canada, held until released on bail. All of this could have happened.
>
> I note it was eight days later before the former lover approached the claimant in the capital. There is no way counsel or I would know what actions the police actually took in Veracruz.

[10] The Board member stated at page 21:

> In this matter, the claimant made two attempts[,] neither in the D.F. where she had lived and where both the abuse and criminal acts occurred.

[11] The Board member concluded that the applicant had not established that state protection would be inadequate in Mexico City should she return to Mexico City, and therefore rejected her claim.

ISSUES

[12] The applicant raises three issues in this application:

a. whether the Board took the Chairperson's Guidelines on "Women Refugee Claimants Fearing Gender-Related Persecution" into account;

b. whether the Board gave appropriate consideration to the profile of the applicant's abuser as a high ranking army colonel in evaluating whether the police would take action against him; and

c. whether the Board erred in conducting a selective analysis of the evidence, engaging in speculation, and making a decision unsupported by the evidence before it.

The Court raised another issue at the hearing: whether the failure to assess the credibility of the applicant in this case is a reviewable error of law.

STANDARD OF REVIEW

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question."

[14] The Federal Court of Appeal has ruled that questions as to the adequacy of state protection are subject to a standard of reasonableness see *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 362 N.R. 1, at paragraph 38. Accordingly, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir* at paragraph 47).

ANALYSIS

Issue No. 1: Did the Board err by failing to apply the Gender Guidelines?

[15] The applicant submits that the Board failed to consider the Gender Guidelines in concluding that the applicant had not established that state protection was unavailable. In particular, the applicant refers to the following section of the Guidelines:

> … Evaluation of the weight and credibility of the claimant's evidence ought to include evaluation of the following considerations, among others:
> …
>
> 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.

[16] The applicant did report her Christmas Eve rape and assault to the police in Veracruz. The police referred her to a doctor at the station and she was examined. The basis for the finding that she had not established that there was inadequate state protection was that she had failed to report the Colonel's harassment in the D.F., and his attempted kidnapping in the D.F., to the police in the D.F.

[17] When the applicant was kidnapped by the Colonel in Mexico City, she took the opportunity to run away when the Colonel's car was in a traffic accident due to her struggles. Moreover, the two persons helping the Colonel kidnap her were injured. The applicant immediately took a taxi to the bus station and then a bus to her grandparents' house in the city of Irapuato. Applying the Gender-Related Guidelines, the applicant was able to demonstrate that it was objectively unreasonable for

her to seek the protection of the police in Mexico City. She had no time to waste. She had just reported to the police that the Colonel beat her to unconsciousness and raped her in Verzcruz on Christmas Eve. Nothing happened to the Colonel. Moreover, she was only 18 years of age. Accordingly, I agree that the Board did not reasonably apply the sensitivity and understanding required by the Gender-Related Guidelines with respect to understanding why the applicant did not report the kidnapping on January 15, 2006 to the police in the D.F.

Issue raised by the Court: Failure to assess the credibility is a reviewable error

[18] At the hearing of this application, I raised a concern that the Board did not evaluate the credibility of the applicant's evidence and made no negative findings in this regard. Instead, the Board member confined his analysis to whether there was adequate state protection in the D.F., i.e. Mexico City.

[19] Madam Justice Anne Mactavish in *Gutierrez v. Minister of Citizenship and Immigration* 2008 FC 971, 169 A.C.W.S. (3d) 175 held at paragraph 13:

> In the absence of any credibility analysis, the applicant's story must be taken as having been accepted by the Board member as true.
>
> [Emphasis added.]

I agree.

[20] If the applicant's story is taken as true, the applicant may have had no logical or reasonable choice but to escape Mexico because the Colonel would have killed her. The police in Mexico City might not have been able to stop the Colonel. The applicant had already reported the Colonel's

beating and rape of the applicant on Christmas Eve to the police in Veracruz. The applicant had resisted the Colonel when he came to her parents' house in Mexico City and pointed a gun at the applicant. The applicant had struggled and fled Mexico City when the Colonel tried to kidnap her, and lost control of his car. The applicant reasonably left Mexico City as soon as possible to get far away. She went to her grandparents' home a long distance away. Then the Colonel came after her there and she called the police. The police scared the Colonel away and she ran immediately for another distant city whereupon she became romantically involved with a truck driver. After several months of traveling around Mexico with the truck driver, she witnessed one of the Colonel's men murder (her boyfriend) the truck driver and a woman with him. The applicant understandably took a plane out of Mexico as soon as possible. Reporting the Colonel to the police may not have been a logical or reasonable option. The applicant may have had no reasonable option but to flee Mexico to avoid being seriously injured or killed by the Colonel.

[21] In my view, the Board member did not properly execute his duty in conducting a Refugee Board hearing in a case such as this because he did not assess the credibility of the applicant. This is an error of law in the conduct of the hearing and warrants setting aside the decision. This is obvious in the case at bar because if the applicant's story is true, no amount of police protection may be able to stop this Colonel from his fanatical and psychopathic pursuit of the applicant. That decision is for the Board to make after assessing credibility.

Issue No. 2: Did the Board err in failing to consider the profile of the applicant's abuser?

[22] The applicant submits that the Board failed to give sufficient consideration to the profile of the applicant's abuser. The applicant submits that where the abuser is a member of the state, the Board must conduct more than a blanket assessment of the protection available in that country. The applicant relies on *Chaves v. MCI*, 2005 FC 193, 137 A.C.W.S. (3d) 392 wherein Justice Tremblay-Lamer stated at paragraph 15:

> ...where agents of the state are themselves the source of the persecution in question, and where the applicant's credibility is not undermined, the applicant can successfully rebut the presumption of state protection without exhausting every conceivable recourse in the country.

[23] The applicant also relies on *Gallo Farias*, supra, wherein I held that the Board did not adequately address the issue of whether adequate state protection was available to a claimant who had suffered abuse at the hands of a high-profile Mexican politician:

> ¶ 26 …it is important that the Board not merely provide a blanket assessment of whether adequate state protection is available in the Federal District of Mexico City. Rather, having accepted that the applicant suffered significant abuse at the hands of a high ranking and high profile Mexican politician, the Board must account for such factors in determining whether such protection will be available to the applicant.

[24] The respondent submits that in this case, the Board clearly considered the fact that the applicant was being harassed by an army officer, and there is no evidence that the actions of the officer were condoned by the state. The respondent argues that the Court should not reach a conclusion that the Colonel had control or influence over Mexican police or was acting in a government capacity. The respondent states that acts of personal vengeance committed by a state official do not establish state involvement: *Dorado v. Canada (MCI)*, 2006 FC 928, 159 A.C.W.S.

(3d) 564; *Singh v. Canada (M.C.I.)* 2006 FC 136, 289 F.T.R. 34; and that the actions of one or a few police officers do not indicate that the state is unable or willing to protect members of a social group: *Kadenko v. Canada (M.C.I)* [1996]143 D.L.R. (4th) 532; *Soto v. Canada* 2005 FC 1654, 145 A.C.W.S. (3d) 136.

[25] The Board noted at page 12 of the decision that human rights organizations have reported that army abuses are investigated by military authorities, but that in a case such as this, where the officer was acting as a civilian, such problems would not apply. There was no specific evidence that army officers in general exercised any degree of authority over the police or the civilian justice system. Nothing on the record indicates that the applicant's abuser himself exercised influence over the police or had special resources at his disposal that would allow him to abuse her without fear of reprisal. Moreover, when the applicant reported the abuse to the police, action was taken. The authorities in Veracruz took a report, while in Irapuato, the police arrived and gave chase to the applicant. These incidents undermine the applicant's submission that her abuser's position as an army officer affected her ability to seek state protection.

[26] I agree with the respondent that the fact that the applicant's former partner is an army officer is not sufficient to establish him as an agent of the state in relation to his persecution of the applicant. In many of the cases cited by the applicant where successful claimants were the victims of abuse at the hands of high-profile lovers, the applicants were unable to file police reports or were abused by the police themselves when they attempted to seek protection. Here, the applicant was able to access state protection on the two occasions when she attempted to do so. In the absence of

any evidence that the officer was able to influence the authorities or that the police were unwilling to help the applicant, the Board's discussion of the abuser's profile is sufficient.

Issue No. 3: Was the Board's decision supported by the evidence?

[27] The applicant states that the Board engaged in a highly selective analysis of the documentary evidence regarding state protection in Mexico. In particular, the applicant refers to the Board's finding that the conditions in the D.F. are better than the rest of the country in relation to corruption and domestic violence. The panel stated, at page 10 of its reasons:

> The Human Rights Watch Report note few rape victims report the crime to the authorities. I would note that in the D.F. there are a number of initiatives to deal with this reality. The report states that state laws do not adequately protect women but there have been recent policy development at the federal level *(sic)*. It is one of the reasons that I am satisfied that at the federal level, the situation for women is better than in some other areas.

[28] The applicant points to several pieces of evidence contradicting these findings. First, the 2006 Human Rights Watch Report states:

> Ulises Sandal Ramos Koprivitza, human rights director for the attorney general's office in teh Federal District...said that the Federal District since 2004 had employed a policy that encourages all non-serious crimes (of which domestic violence is considered one) to pass through mediation. "Criminal punishment should be the last option. This is in order to open the door for other types of alternatives of conflict resolution," he said. Later in the interview, however, he noted that "the victim [of domestic and sexual violence] comes to us when the aggressor has abused them once too often or is continually abusing them."

[29] The applicant submits that this is crucial evidence that goes toward the behaviour and attitude of those that deal with sexual violence complaints in the Federal District. The applicant submits that such evidence cannot be reasonably ignored when considering whether the applicant could safely return to the D.F.

[30] The applicant also submits that the Board quoted selectively from a 2003 Immigration and Refugee Board report, citing a regulation that requires health professionals to report abuse to the authorities "in special instances." The applicant states that this same report also states:

> ...according to the chairperson of the Committee on Equality and Gender of the Federal District Legislative Assembly, the incidence of violence against women in the Federal District is the same as for Mexico as a whole, which means that it occurs in one in every three households.

[31] Thus, the applicant submits that the Board's statement that the situation is better in the D.F. than in other areas is unfounded, and ignores directly contradictory evidence that not only are domestic violence rates equally high, but the legislative initiatives in the D.F. have not caused domestic violence to be regarded by or dealt with by the authorities as a serious crime.

[32] The respondents state that the Board cited ample evidence to support its conclusions, including evidence that:

a. The Federal Penal Code stipulates a penalty of six months to four years for any person who fails to prevent the use of physical, mental or emotional violence against a member of the family;

b. There were 44 shelter for women nationally, including shelters located in the D.F.;

c. The applicant could have gone to various government agencies for protection from domestic violence, including the Citizens Information and Services Network (SIAC) established by the Minister of Public Security; and the Attorney General's Office's Services for Victims of Crime Branch, among others;

d. The applicant could obtain assistance from the Domestic Violence Assistance Centre (CAVI) in filing complaints with the public prosector's office

e. The applicant could have gone to various agencies if she had experienced problems with the police, (which she did not) including the Attorney General's Office and, in the D. F., the Federal District Human Rights Commission;

f. There are disciplinary measures for police abuses, including suspensions, fines; and

g. The three main offices of the Special Prosecutor for Crimes of Violence Against Women (FEVIM) are located in the D.F.

[33] The respondent submits that the appropriate standard is the adequacy, not the effectiveness, of state protection, but states that the Board also turned its mind to the effectiveness of state protection in the D.F., citing the following statistics:

a. CAVI helps 22,000 persons seeking assistance in the D.F. for domestic-related issues per year, on average;

b. Two SIAC centres were operating in Mexico City, where they provided services to 2,707 clients in 2006; and

c. The government removed 284 federal police commanders and provided rigorous training and evaluation of their replacements.

[34] The respondent further submits that the board acknowledged that state protection in Mexico was not perfect, and noted several ongoing problems including corruption, inefficiency, and poor conditions for women. However, after considering all the evidence, the Board found the applicant had failed to establish that on a balance of probabilities, state protection would be inadequate should she return to Mexico. The respondent submits that this was reasonably open to the Board, that the

Board is not required to refer specifically to all the evidence, and that deference is warranted to the panel's weighing of the evidence.

[35] While I agree with the applicant that there was evidence on the record that contradicted the Board's statement that the conditions were better for victims of domestic violence in the D.F. than in other areas, there was also evidence before the Board that supported its finding that the situation in the D.F. was better than in other areas. Statistics before the Board indicated that reported domestic violence cases in the D.F. had a 56% conviction rate, as opposed to the 28% conviction rate throughout Mexico. The respondent therefore argues that although there is evidence on the record that the rate of domestic violence is the same in the D.F., there is also evidence that the response to domestic violence is substantially different and that women in the D.F. have recourse to many more options in availing themselves of state protection. Accordingly, the Court finds that the Board's decision on this matter is reasonable.

[36] This application for judicial review must be allowed because of the Board's failure to properly apply the Gender Guidelines or to assess the applicant's credibility.

[37] Both parties indicated that this case does not raise any question which ought to be certified for an appeal. The Court agrees and no question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this application for judicial review is allowed and the decision of the Board dated May 14, 2008 is set aside; and
2. the refugee claim is referred to another panel of the Board for redetermination in accordance with these Reasons.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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