Date: 20090316

Docket: IMM-3327-08

Citation: 2009 FC 262

Ottawa, Ontario, March 16, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MARIA DOLORES CANTO RODRIGUEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to s. 72 (1) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (Act) for judicial review of a decision of a Board of the Refugee Protection Division of the Immigration Refugee Board (Board), dated July 7, 2008 (Decision) refusing the Applicant's application to be deemed a Convention refugee or person in need of protection under section 96 and section 97 of the Act.

BACKGROUND

[2] The Applicant claims to have fled Mexico because her ex-boyfriend, Adrian, has repeatedly threatened to murder her.

[3] The Applicant is a citizen of Mexico. She was born on November 1, 1983 in Merida, Yucatan State, Mexico, where she grew up with her parents and older sister and two older brothers.

[4] In 2002, she began studying nutrition at the Yucatan University but quit after one semester. In March 2002, the Applicant found a job at Sears in Merida working as a salesperson. On September 8, 2002, she went to the Eldios Restaurant in Merida with some friends from work where she met the restaurant manager, Adrian Vargas Rubio, whom she began dating shortly after. By March 3, 2003, they had become boyfriend and girlfriend.

[5] On October 2003, Adrian took the Applicant to a big house party where some of the people attending were involved in the drug trade. The Applicant did not feel comfortable with this and told Adrian about how she felt.

[6] On December 18, 2003, the Applicant was at the Sears Christmas party when Adrian came and told her to leave with him. They argued and he became rude. He forced the Applicant in his truck, leaving behind her belongings. He then drove the Applicant around for a half hour arguing with her. He would not let her go and said he suspected that she was seeing another man. He

stopped in a park, took the Applicant out of the car and continued to argue with her. After awhile he calmed down and begged for forgiveness.

[7] On February 5, 2004, the Applicant told Adrian that she wanted to break off the relationship. He pulled his knife out and held it against the Applicant's neck and then cut her.

[8] Over time Adrian became possessive, jealous, abusive and violent. He would also spy on the Applicant. Adrian shook the Applicant violently on many occasions. On one occasion a trusted male friend, Javier Abreu, of the Applicant was waiting outside of her work place with her at the bus stop when Adrian appeared. He struck her friend and warned him that he should stay away from the Applicant. If he did not, bad things would happen. Adrian later sent three men to assault the Applicant's friend.

[9] On September 20, 2005, Adrian had a jealous fit and knocked what the Applicant was carrying out of her hand and hit her in the face, making her nose bleed. The Applicant told Adrian they were through. He threatened the Applicant that if she left him he would hurt her or her family. The Applicant did not speak to him for several days but he persisted until the Applicant gave in again.

[10] The Applicant reported Adrian to the police for physical violence, abuse and injury. A police officer went to Adrian's house and informed him of the charges and that he was under investigation, to which Adrian stated that, "he [did] not give a shit what that bitch did..." Adrian

continued by stating “stupid cop-I am powerful so get out of my house if you do not want me to break you into pieces as I did with that stupid girl and you will lose your job…” The police officer served a subpoena upon Adrian before leaving. It is unclear, based on the information presented, if there were any further developments in relation to this incident with the police.

[11] In the first week of January 2007, the Applicant had another big argument with Adrian and stopped speaking to him for a few days. On Thursday, January 11, 2007, Adrian grabbed the Applicant on her way home from work and took her by force into his car. He held a knife against her neck and threatened that if she did not go back to him he would kill her and hurt her family. He took her back to the same house where they had attended the party involving drug trade people. He kept her there for two days against her will.

[12] Adrian argued with the Applicant and tried to convince her that she should still love him. He locked her in the house. There was no phone. That night he forced the Applicant to have sex with him. He then left her in a room that was locked from the outside. Adrian was gone for the whole next day but returned in the evening and argued with the Applicant and again forced her to have sex with him.

[13] By the third day, the Applicant began agreeing with what Adrian said and promised to forgive him and not tell anyone what happened. They made love and the Applicant pretended that everything was normal. Later that day, Adrian drove the Applicant back to her house. The Applicant did not tell anyone where she had been because she was in shock and ashamed. She told her family

that she had been at a friend's house for a few days. She also did not think she would be believed because everyone loved Adrian.

[14] On January 18, 2007, the Applicant decided she could not tolerate Adrian any more and packed her things and fled to Cancun on a bus. She told her mother that she was leaving for Cancun but made her promise not to tell anyone. The last threat by Adrian was by phone in February 2007.

[15] The Applicant arrived in Cancun and stayed in a hotel. She remained inside most of the time out of fear that Adrian would come and find her. She spoke to her family by telephone. They were worried and told her that Adrian was also worried and was looking for her everywhere. Several friends also told the Applicant the same thing.

[16] The Applicant spoke to her friend, Mara Vivas Novelo, who lived in Merida and who told the Applicant she could flee to Canada and apply for protection based on her problems in Mexico. The Applicant lived in Cancun for one month. She used some of her savings from working at Sears. She bought a plane ticket and flew to Toronto, Canada on March 1, 2007.

[17] The Applicant's friend had given her the phone number of a man named Dante who could help her in Toronto. The Applicant did not know how to apply for refugee protection or that she should apply at the airport. The Applicant called Dante the next day and he assisted her in going to the Immigration Office in Etobicoke on March 5, 2007, where the Applicant applied for protection.

DECISION UNDER REVIEW

[18] The Board rendered its Decision on July 7, 2008. It rejected the Applicant’s claim that she was a refugee or a person in need of protection on three grounds: internal flight alternative (IFA), state protection and credibility.

[19] At the refugee determination hearing, the presiding member exercised his discretion to designate a three-member panel. The Applicant’s counsel objected, but the member maintained that the Board’s Policy on the *Designation of Three-Panel Panels – RPD Approach,* dated January 23, 2003, provides that the chairperson has the authority to designate a three-member panel for all matters that relate to the Board’s adjudication strategy. Three-member panels are permitted to further the Board’s objectives of adjudication strategy and training purposes. In the present case, a three-member panel was permitted for training purposes, and the panel found that it was not inappropriate.

State Protection

[20] The Board found that the Applicant and her boyfriend were in an abusive relationship from December 2003 until January 2007 with “intermittent peaceful periods.”

[21] The Board emphasized how the Applicant repeatedly reconciled with her boyfriend: "it has to be noted that the claimant's erratic relationship with the perpetrator always ended in the claimant reconciling with him."

[22] The Board found that when the Applicant reported the September 20, 2005 incident of abuse to the police, they took action. The police summoned Adrian to the station to answer the charges against him, and when he did not appear in response to the subpoena the police went to his home to pursue the matter. However, the Board notes that "the claimant testified that she was not satisfied with the effectiveness of the police protection."

[23] The Board concluded that "the test for state protection is not effectiveness but adequacy" in accordance with the recent Federal Court cases of *Mendez v. Canada (Minister of Citizenship and Immigration)* 2008 FC 584 and *Samuel v. Canada (Minister of Citizenship and Immigration)* 2008 FC 762.

[24] The Board pointed out that Mexico is a democracy with functioning political and judicial systems. The burden on the Applicant to rebut the presumption of state protection was heavy.

[25] In the Board's view, the response by the police to the Applicant's complaint was evidence of adequate state protection. Moreover, the Board found that "it has to be noted that no further action was required by the police since the claimant and Adrian had reconciled."

[26] The Board found that the Applicant had not rebutted the presumption of state protection by providing “clear and convincing evidence” of the state’s inability to protect her: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 724.

[27] The Board concluded that the Applicant did not complain to the police when she was kidnapped and raped. Her explanation was that Adrian had very powerful connections, so she was afraid he would retaliate against her. The Board rejected this explanation because, despite his alleged connections, the police still issued a subpoena and spoke to Adrian when the Applicant made a complaint.

[28] The Board found that state protection need not be perfect to be adequate: *Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 605 (F.C.A.). The Board rejected the Applicant’s complaint that the government of Mexico has not always been effective at protecting persons in similar circumstances. Mexico has control over its territory, has a military, police and civil authority in place, and makes serious efforts to protect its citizens; therefore, the fact that Mexico is not always able to protect its citizens does not mean that there is no state protection for the Applicant: *Canada (Minister of Employment and Immigration) v. Villafranca*, [1992] F.C.J. No. 1189 (F.C.A.).

[29] The Board found that the letter from the Applicant’s doctor, while consistent with the Applicant’s evidence, did not prove that she had been abused: “The claimant’s evidence is consistent with her PIF narrative and [her] oral testimony in that she purports to be abused, yet there

was nothing persuasive in the findings from the doctor's report to show that the claimant was abused."

[30] The Board gave no weight to the doctor's letter:

> Further, the doctor's only clinical assessment, based on her professional opinion, is that the claimant, while not experiencing clinically significant symptoms that warrant diagnosis, it is likely that she was suffering from symptoms of depression and post-traumatic stress disorder. This is based on the claimant's narration of abuse since the clinical test reports minimal symptoms. The panel assigns no weight to this document as persuasive evidence of this claimant's allegations of domestic abuse. The panel notes that while the doctor interviewed the claimant, the doctor's report does not establish satisfactorily or persuasively that the claimant's experiences are a result of what she is alleging in respect of her refugee claim. This is not persuasive evidence for this panel that the doctor is in any position to state categorically that the claimant is a victim of domestic abuse. As stated in *Rokni,* a psychiatric report submitted as evidence "cannot possibly serve as a cure-all for any and all deficiencies in a claimant's testimony."

[31] Under section 108(4) of the Act, the Board also considered the evidence of the psychologist that the Applicant would experience emotional or psychological harm if she is returned to Mexico:

> I have sympathy for her condition as a result of her anxieties and fear. Accordingly, I have considered whether there is evidence of past persecution or other harm, which gives rise to compelling reasons in this claim under section 108(4) of the Act. Since I have determined that state protection was available to the claimant, therefore the issue of compelling reasons does not arise. Further, my decision is not based on a change of circumstances since the claimant's departure from her country of origin.

[32] The Board found that serious efforts are being made by Mexico to combat the problem of domestic violence, as evidenced by legislation and a procedural framework. The Board noted that

the Applicant only approached the police a few times, and there was no evidence that they denied her protection. The Board emphasized that the Applicant reconciled with Adrian several times "thereby negating a need for help from the authorities."

[33] The Board cited several authorities for the legislative measures Mexico had taken to address domestic violence and concluded that the Applicant had failed to rebut the presumption of state protection with clear and convincing evidence.

[34] The Board also considered the evidence of Guillermo Zepeda Lecouna, a Professional Associate with the Centre of Development Research (CIDAC) in Guadala-jara, Mexico where she coordinates the "Human Rights, Citizen Security and Criminal Justice in Mexico" project. Ms. Lecouna details the difficulties that survivors of domestic abuse face in Mexico. The Board noted that, in paragraph 7 of her affidavit, Ms. Lecouna states that judges do issue protective orders against abusers. However, the Board noted that the Applicant had failed to initiate protective measures against Adrian:

> There is no evidence before the panel that the claimant was not exposed to the outside world. She has more than basic education; she was gainfully employed as a sales person; she escaped from Adrian and lived on her own in a hotel in Cancun for a month; and had also initiated police complaints in the past. Hence, if the situation demanded the procurement of a protection measure the panel sees no barriers for her to obtain it.

[35] Ms. Lecouna's affidavit focuses on the delays in obtaining a protection order, the police attitude toward domestic abuse, and other bureaucratic hurdles in the process. However, the Board

noted that the Applicant never attempted to obtain a protection order. While the plight of survivors of domestic abuse in Mexico is “not perfect,” in the present case the Board “assigns far greater probative value to the documentary evidence than to the testimony of the claimant with regard to the availability of state protection in Mexico”: *Roman v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1311 (F.C.). The Board said it preferred the evidence of the independent sources over that of the Applicant because that evidence was free of bias.

Internal Flight Alternative (IFA)

[36] The Board asked the Applicant if she would be safe in the Federal District or in Mexico City. She said that Adrian is well-connected and could find her wherever she hides.

[37] Based on documentary evidence about the Federal District, the Board was satisfied that there was legislation in place that protected survivors of domestic abuse and provided recourse. In addition, the Board found that the Applicant’s work experience as a salesperson was portable and she could find work in the Federal District.

[38] The Board found that the Applicant had not sought an IFA elsewhere in Mexico before fleeing to Canada: “I am strongly of the view that leaving one’s own country and seeking international refugee protection abroad is a reluctant last resort, and should only be undertaken after other measures, such as the seeking of an IFA within one’s own country, have been tried unsuccessfully or are patently pointless. That is not the case in this claim.”

ISSUES

[39] The Applicant raises the following issues:

1. Did the Board err in law in its analysis of state protection? Specifically:
    a. Did the Board fail to address the adequacy of state protection?
    b. Did the Board selectively use the country condition documentation?
    c. Did the Board misconstrue the Applicant's evidence on efforts to obtain state protection in the past?
2. Did the Board err in law in its IFA analysis? Specifically:
    a. Did the Board erroneously give the psychological report no weight?
    b. Did the Board fail to consider whether the protection measures available in Mexico City are adequate?
    c. Did the Board misconstrue the evidence pertaining to the Applicant's residence for one month in Cancun after fleeing from her former boyfriend?
    d. Did the Board disregard relevant evidence pertaining to the ability of the Applicant to live anonymously in Mexico City?

STANDARD OF REVIEW

[40] The Applicant and Respondent concur that the standard of review with respect to the Board's findings concerning state protection and an IFA is reasonableness.

[41] In *Estrella v. Canada (Minister of Citizenship and Immigration)* 2008 FC 633 at paragraph 9, the standard of review for IFA was addressed:

> The question at issue is factual in nature and falls within the expertise of the Board; and as a result deference is owed as decided in *Dunsmuir*…at paragraph 47:
>
> > …a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational conclusion. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[42] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, “the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review”: *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[43] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[44] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issues of state protection and an IFA to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] 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. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ANALYSIS

[45] The determining issues in this case are state protection and IFA. Although the Board identified credibility as an issue, it seems not to have played a significant role in the Decision.

[46] The Applicant says that the Board made a selective use of the evidence in relation to her own past efforts to seek protection, as well as the country condition documents dealing with the availability of state protection in Mexico.

[47] The Board was clearly of the view that the Applicant had failed to rebut the presumption of state protection on the facts of this case. She did go to the police over the incident that occurred on September 20, 2005. But the Board concluded that, although the Applicant expressed dissatisfaction with the police response, the police did take action and their speedy response was evidence of state protection.

[48] The Applicant did not complain to the police about the kidnapping and rape incidents because she alleged that the perpetrator had powerful connections that would be used to punish her.

[49] In the end, the Board felt that the Applicant should have done more to avail herself of state protection before seeking refugee protection in Canada.

[50] The Applicant says that, in coming to its conclusions on her own efforts to seek police protection, the Board overlooked evidence that clearly demonstrated that the police response to her attempts to gain their assistance was totally inadequate.

[51] It is clear from the Tribunal Record that the Applicant gave clear evidence that, after making her complaint to the police, she followed up and discovered that Adrian had not responded to the

notices he was sent, and that she gave up because, in addition to the apparent inability of the police to make Adrian respond, she was receiving phone calls from Adrian himself. He called her constantly three times per day and taunted her that there was no way she would ever be able to do anything to him and she would have to go back to him or he would harm her. She clearly believed she had no other choice in the matter because the police action was not effective. She just gave up and did the safe thing.

[52] The Applicant's perception of how hopeless the situation was is confirmed by the letter of March 6, 2008 from Rosa Maria Orizco who saw the physical and psychological violence done to her by Adrian.

[53] In addition, Adrian's profile, and the kind of influential person he is, as well as his contempt for the police, is clearly demonstrated in the evidence.

[54] Notwithstanding this evidence, the Board simply decided to concentrate upon what it referred to as "the speedy response to the complaint of the claimant by the police" as "evidence of state protection."

[55] There is no discussion of the Applicant's efforts to follow up, or of the ineffectuality of police action in the face of an aggressive and influential perpetrator. The Board is here building a case for state protection rather than dealing with the full picture as revealed in the evidence.

[56] A similar approach can be seen in the Board's handling of the country condition documents. In the very documents relied upon by the Board to support its conclusions regarding adequate state protection, there are passages which state something entirely different from the Board's own conclusions. And there is also conflicting evidence in the documents that the Board does not even refer to.

[57] The same pattern continues when the Board turns its attention to the IFA in Mexico City. There is less than a full analysis of evidence that reveals just how the justice system really works when it comes to abused women in the Federal District. For example, the Board had before it an affidavit from Francisco Rico-Martinez, the co-director at FCJ Refugee Centre, who traveled to Mexico on a fact finding visit on the cause of the increase in the number of persons from Mexico arriving in Canada to claim refugee status. This is what Mr. Rico-Martinez says happens in Mexico City when a woman is assaulted:

> The criminal code includes various general criminal law provisions which could be applicable in a domestic violence case. Assault and rape, for example, are part of the general criminal code. However the criminal code has many archaic concepts, and is narrowly interpreted by the police in domestic violence cases. In most situations, the police treat threats, abuse and violence within the context of a domestic abuse case as not being their area of concern. If they believe the allegations and are willing to give the woman any guidance, it is only to seek counseling under the domestic violence laws, through the office of the Public Ministry.
>
> Police typically will not treat domestic violence cases as even conceptually valid unless the woman is visibly injured, and even then the procedure they follow is unhelpful. For instance, in Mexico City, if a woman does arrive at a police station visibly bloody and injured, police will refer her to the Public Ministry Office or to the Unit for the Attention for the Prevention of Family Violence. At either of those institutions, a woman can only make a report during normal

> working hours: which is a limitation that discourages female victims of domestic violence from making a report. The procedure which is then followed further discourages complaint.
>
> Once a woman complains at the Public Ministry office or the Centre for Attention to and the Prevention of Family Violence of Mexico City, the man is contacted and invited to enter into a mediated discussion with the woman, in front of the staff from the Centre. The man is then asked to sign a contract promising not to abuse her again. As we were informed by the Centre, this contract is non-enforceable, which means that the agencies do not lay charges against the men for non-compliance. The Centre has to wait for something which would be considered by the police to be a criminal assault to happen to the woman. Then, if the woman comes back to the Centre with forensically verifiable evidence of a recent assault which has injured her, she is referred to the Public Ministry for a criminal investigation, which may lead to criminal charges. A principle problem with this is that the woman may be severely injured or killed, as there is no mid-level of protection or criminal prosecution between threats or assaults and assaults causing recent and provable injury that occur after the Centre has conducted mediation. [Emphasis added]

[58] Of course, the Board does not need to accept such evidence, but I think it is important for the Board to deal with it in its Decision. That did not occur here.

[59] Similar concerns arise with regard to the Board's handling of traceability and its failure to deal with the psychological report in the context of country conditions when assessing an IFA. See *Cartagena v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 289 at paragraphs 10 and 11 and *Javaid v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1730 at paragraphs 7 and 8.

[60] In other words, instead of dealing with the full record, the Board gives the impression that the Applicant just did not do enough to refute the presumption of state protection or to avail herself

of an IFA in a country where, according to the Board, the documentary evidence reveals that state protection is available to abused women in the situation of the Applicant.

[61] The Board found that "when analyzing the issue of state protection in the context of the documentary evidence, the claimant has failed to rebut the presumption of state protection with clear and convincing evidence." My reading of the Decision in the context of the record is that it was the Board that did not do enough to address the Applicant's evidence concerning the ineffectuality of police action in a context where she was under daily threats from an influential perpetrator who, in addition to wanting to harm the Applicant, showed no hesitation in threatening the police themselves. Also, there was important contradictory evidence placed before the Board that women are not protected in Mexico or even in Mexico City by the police and the criminal justice system generally. See *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (F.C.); *Huerta v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 586; and *Mendoza v. Canada (Minister of Citizenship and Immigration)* 2008 FC 387.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed and the matter is returned for reconsideration by a different panel.
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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