Federal Court		Cour fédérale

Date: 20090331

Docket: IMM-3701-08

Citation: 2009 FC 334

OTTAWA, ONTARIO, MARCH 31, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

CONCEPCION I CRUZ GALDAMEZ,
DOUGLAS MAURICI GARCIA CRUZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The principal applicant and her son, both of whom are citizens of El Salvador, sought refugee protection in Canada under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). In a decision dated July 30, 2008, the Refugee Protection Division (RPD) of the Immigration and Refugee Board determined that she and her son were not Convention refugees and were not persons in need of protection within the meaning of the aforementioned sections of the IRPA. The principal applicant has applied for the judicial review of that decision.

FACTS

[2] The principal applicant claims to have had problems in Santa Ana with a group of young members of the "Maras", a gang with several thousand members that is involved in criminal activities in the United States and Central America. Her husband and her brother-in-law are apparently on bad terms with this group because they refused to join it. They claim to have been subsequently threatened and assaulted in May 2002.

[3] Following these events, the principal applicant allegedly moved to Sacramento, El Salvador with her son, husband and brother-in-law in order to escape violent treatment by that criminal organization. Having learned that the Maras were still looking for them, they all allegedly headed to the United States, where they lived illegally from August 2002 until they attempted to enter Canada on December 28, 2006.

[4] Upon their arrival in Canada, the principal applicant's husband and brother-in-law were returned to the United States; only the principal applicant and her son were determined eligible to seek refugee status.

IMPUGNED DECISION

[5] After analyzing the testimonial and documentary evidence, the RPD determined that the principal applicant's protection claim could not succeed because she was not credible and her narrative was a fabrication. The RPD identified what it considered two important discrepancies between her Personal Information Form (PIF) and her statement to the immigration officer at the point of entry. As for the allegation that her husband and brother-in-law were assaulted and left for

dead in the street, the RPD did not believe it either, since she provided no medical certificate to that effect.

[6] In addition, the RPD determined that, in any event, the principal applicant had not rebutted the presumption that her country was able to protect her. At the hearing, the principal applicant explained that she did not file a complaint because she feared reprisals. This explanation was deemed to be insufficient evidence that she would not have been given state protection if she had requested it.

[7] While acknowledging that the situation in El Salvador is not perfect, the RPD determined that the principal applicant had not exhausted all remedies through which assistance and protection could be obtained. In its opinion, the mere fact that a state does not always succeed in protecting its citizens is insufficient to justify the position that crime victims, or people threatened with crimes, are unable to claim its protection.

[8] The RPD also faulted the principal applicant for failing to request protection from the United States and preferring to live illegally there. In its opinion, this contradicted her allegation that she feared persecution in her country.

ISSUES

[9] The instant application for judicial review essentially raises two issues: (1) Did the RPD err in its assessment of the principal applicant's credibility? (2) Did the RPD commit a reviewable error in determining that she had failed to rebut the presumption that the authorities of her country could have offered her the requisite protection?

ANALYSIS

[10] The question whether a state is able to protect its citizens involves questions of mixed fact and law and is therefore subject to the "reasonableness" standard of review. Questions related to the credibility of the applicant, which raise only questions of fact, are subject to the same standard. This means that this Court's role is to consider the existence of justification, transparency and intelligibility within the decision-making process, and whether the RPD's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, at paragraph 47.

[11] Beginning with the principal applicant's credibility, I am of the opinion that, based on the discrepancies between her statements at the point of entry and her PIF, and on the absence of a medical record, the RPD was entitled to determine that her story was not credible. When confronted with the fact that she had not mentioned important elements during her initial contact with Canadian authorities, the principal applicant tried to explain that the immigration officer had not asked her any questions in that regard. However, these were important elements on which her fear of persecution was based. The fact that her husband was allegedly suspected of reporting the Maras leader's armed robbery of the mayor, and that she herself was assaulted by the Maras and left unconscious, were key elements of her claim. The onus was on her to explain, if only succinctly, the principal reasons

for her fear. The RPD could reasonably conclude that the explanations given by the principal applicant in an attempt to justify her omissions were unsatisfactory; this assessment clearly comes within the RPD's expertise as a specialized administrative tribunal:
Jumriany v. *Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 683 (QL) (F.C.T.D.); *Neame* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 378 (QL) (F.C.T.D.); *Nsombo* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 505.

[12] In addition, the RPD could also take into account the fact that the principal applicant provided no evidence based on which her allegations that her husband and brother-in-law were beaten, and subsequently hospitalized, could be corroborated. The principal applicant did offer the explanation that, upon returning to El Salvador, her husband went to the hospital in an attempt to obtain a copy of his medical record, but that the hospital told him that it did not keep medical records for such a long period. The Board rejected this explanation, after noting that the principal applicant's husband did not refer to any hospital visits in the letter that he sent her a few weeks prior to the hearing.

[13] It should be noted that the onus is on the principal applicant to show that her allegations are well-founded and to provide documents that establish her claim: section 7 of the Refugee Protection Division Rules, SOR/2002-229. It is true that the principal applicant's husband's letter pre-dated the hearing, and that the principal applicant had not asked him to obtain a copy of his medical record. However, the fact remains that the principal applicant could have taken the initiative to obtain, through her husband or otherwise, a document corroborating the care that her husband and her brother-in-law allegedly received at the hospital: *Singh* v. *Canada (Minister of Citizenship and*

Immigration), 2007 FC 62; *Udeagbala* v. *Canada (Minister of Citizenship and Immigration)*, 2003 FC 1507.

[14] Turning now to another concern, the RPD, in concluding that there was no subjective fear, was entitled to take into account the fact that the principal applicant lived in the United States for more than four years without seeking refugee protection. Although this element is not determinative in and of itself, the RPD was entitled to take it into consideration in assessing the principal applicant's credibility: *Conte* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 963; *Manokean* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 111; *Mejia* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 1087.

[15] Lastly, the principal applicant argued that the RPD erred in failing to consider the letters of a neighbour and a lawyer corroborating her narrative. I see no merit to that argument. First of all, the courts have consistently held that the RPD is presumed to have considered all the evidence tendered in the record before rendering its decision, and that it is not necessary, in this regard, for it to refer to each and every item of evidence in its decision. Secondly, the letters in question constitute hearsay to the extent that their authors did not personally witness the events that they recount. Consequently, the RPD was justified in giving them little weight.

[16] At the hearing, counsel for the principal applicant argued that this Court should, at the very least, set aside the RPD's determination that the principal applicant's story was fabricated, not only because there were no reasons for that finding, but especially because the finding was particularly prejudicial to his client. In view of the evidence that was adduced, I am of the opinion that the finding was completely reasonable and finds support in the record. Moreover, it will have no

negative repercussions during any pre-removal risk assessment (PRRA) because Rule 167 of the Immigration and Refugee Protection Regulations, SOR/2002-227, provides that an applicant should be called for an interview if his or her credibility is in issue.

[17] As for the issue of state protection, the principal applicant submits that the RPD erred in applying the wrong test and in failing to objectively assess the situation in El Salvador. Indeed, the principal applicant submits that the RPD imposed the onus on her to show that the Salvadoran government would make no attempt to protect her, rather than showing that the government would not protect her.

[18] However, a careful reading of the decision discloses that the RPD was very much aware of the burden of proof borne by the principal applicant. In this regard, I am of the view that the following two paragraphs of the decision respond fully to the applicant's submissions:

> [TRANSLATION]
>
> Drawing from *Villafranca*, we find it reasonable to conclude that when a state like El Salvador has control over its territory, has well-established military and civilian authorities and a well-established police force, and makes serious efforts to protect citizens who have been threatened, the mere fact that the state does not always succeed in that protection is insufficient to justify the claim that crime victims, or persons threatened with crimes, cannot claim its protection.
>
> The burden was on the applicant to rebut the presumption that the Salvadoran authorities were able to protect them. Although the situation is not perfect in El Salvador, this is insufficient for this Board to conclude that there is clear and convincing evidence that the Salvadoran government would not attempt to protect the claimant if she were to return to her country. More importantly, this particular claimant has not only failed to exhaust all remedies at her

> disposal for obtaining assistance and protection, she has made no requests for such assistance and protection.

[19] Although the evidence submitted to the RPD indicates a rising crime rate and corruption, this is not a basis for concluding that the state would be unable to protect people like the principal applicant. The fact is that there is no indication of a complete collapse of the state and a total inability to act. By taking no steps to obtain the protection of her country's authorities, the principal applicant never even gave its law enforcement authorities the opportunity to come to her aid. As the Federal Court of Appeal reiterated in *Canada (Minister of Citizenship and Immigration)* v. *Carillo*, 2008 FCA 94, at paragraph 30, "a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate."

[20] Although the RPD does indeed refer, in the above-quoted excerpt, to the absence of evidence that the Salvadoran government would not [TRANSLATION] "attempt" to protect the principal applicant, it is my opinion that this statement must be understood in its context. Only by splitting hairs could one possibly question whether the RPD's decision applied the correct burden of proof and the relevant precedents. One must not lose sight of the fact that international protection is available only where there is no alternative for the claimant. The RPD was correct to rely on *Villafranca* in determining that a state that exercises full control over its territory, army, police and civil service, and makes serious efforts to protect its citizens, must be presumed to be able to offer that protection, even if it is not perfect and is not necessarily available the first time it is requested. It is true that it would have been preferable to analyse the documentary evidence regarding the situation in El Salvador more explicitly; however, in the absence of any effort on the principal

applicant's part to obtain the protection of her country, it is clear that she did not rebut the presumption of state protection.

[21] For all these reasons, the application for judicial review is dismissed. The parties submitted no question for certification, and in my opinion this matter raises no such question.

ORDER

THE COURT ORDERS that the application for judicial review is dismissed. No question is certified.

"Yves de Montigny"
Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3701-08
STYLE OF CAUSE:	**CONCEPTION I CRUZ GALDAMES et al. v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 5, 2009
REASONS FOR ORDER AND ORDER:	de MONTIGNY J.
DATED:	March 31, 2009

APPEARANCES:

Michel Le Brun	FOR THE APPLICANTS
Jocelyne Murphy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michel Le Brun 6981 Marie-Guyart Street Lasalle, Quebec H8N 3G9 Fax: (514) 392-9189	FOR THE APPLICANTS

Department of Justice Canada
Guy Favreau Complex
200 René Lévesque Boulevard West
East Tower, 12th Floor
Montréal, Quebec H2Z 1X4
Fax: (514) 496-7876

FOR THE RESPONDENT