Federal Court  Cour fédérale

Date: 20090810

Docket: IMM-281-09

Citation: 2009 FC 806

Ottawa, Ontario, this 10th day of August 2009

Present: The Honourable Orville Frenette

BETWEEN:

LIZBETH ADRIANA GOMEZ ESPINOZA
LUIS DANIEL GOMEZ ESPINOZA
EVA ESPINOZA CASTILLO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "Act") of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board") rendered on November 28, 2008,

determining that the applicants were not Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the Act.

II. The facts

[2] The principal applicant, Lizbeth Adriana Gomez Espinoza, her mother, Eva Espinoza Castillo, and her brother, Luis Daniel Gomez Espinoza, are all Mexican citizens. The latter applicants are relying on the principal applicant's claim and their Personal Information Form ("PIF").

[3] The principal applicant claims to have a well-founded fear of persecution at the hands of her ex-partner Cesar Vargas Martinez ("Vargas").

[4] The principal applicant was licensed in the field of Communication Sciences in Journalism and worked as a news reporter for a local television station in Guererro, Mexico. She related having met Vargas in October 2006, in a hotel in Acapulco where they both worked. She became pregnant in January 2007. They lived together for one and a half months in February 2007. She then moved to her mother's house in Tampico, Mexico. Vargas came to see her in Tampico, caused a scene and assaulted her physically. He also wanted her to obtain an abortion.

[5] She sought support and protection from a government agency (Integral Development of the Family, "DIF") and a family court, but received no support. DIF recommended her to seek help from the police. She did not report the threats or assaults in 2007 to the police or an alleged kidnapping attempt on June 4, 2007 because she feared them. She claims Vargas threatened to reach

her, because he was in the drug trafficking business and had contacts through which he could find her. She fled to Canada on June 6, 2007 and claimed refugee protection on June 25, 2007. [During her testimony she said she did not report the assaults and attempted kidnapping to the police but admitted she went to the police once, to obtain information about Vargas (page 668 of the Tribunal Record).]

[6] The applicant declared that Vargas threatened to kill her and her family.

III. The impugned decision

[7] The Board found that the applicants had a viable Internal Flight Alternative ("IFA") in Guadalajara, Mexico, and that if state protection is needed, the authorities of that city would be able to offer protection to the applicants.

IV. The issue

[8] The only issue in this matter is whether the Board erred in finding that the applicants had a viable IFA available to them in Guadalajara or elsewhere in Mexico.

V. Pertinent legislation

[9] Sections 96 and 97 of the Act read as follows:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VI. The standard of review

[10] To determine a claimant's risk of return to a particular country is a fact-driven inquiry which calls into play paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which provides this Court may grant relief if it is satisfied a tribunal "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it".

[11] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, and *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, has established that questions of fact or mixed fact and law, are to be governed by the standard of reasonableness. In judicial review, reasonableness is concerned mostly with "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*, *supra*, at paragraph 47).

[12] Questions of law are reviewable on a standard of correctness as are questions of procedural fairness (see *Chrétien v. Canada (Commission of Enquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)*, [2008] F.C.J. No. 973 (QL)).

[13] Questions of credibility are to be assessed on the standard of reasonableness (see, for example, *Malveda v. Minister of Citizenship and Immigration*, 2008 FC 447; *Aguirre v. Minister of Citizenship and Immigration*, 2008 FC 571; *Khokhar v. Minister of Citizenship and Immigration*, 2008 FC 449, and *Tovar v. Minister of Citizenship and Immigration*, 2009 FC 600).

VII. Analysis

[14] The applicants contest the part of the respondent's submission that the "applicant's evidence was suspect", and argued that she made insufficient efforts to seek state protection, neither of which was a finding of the Board. The applicant argues that she would not add these grounds, since the "Board's decision and reasons must stand on their own". She draws support on this point from the following jurisprudence: *Ako v. Minister of Citizenship and Immigration*, [2005] F.C.J. No. 5, at paragraph 12, and *Pankou v. Minister of Citizenship and Immigration*, [2005] F.C.J. No. 247, at paragraph 10.

[15] The above authorities are not contested but a reading of the Board's decision reveals that it discussed and considered the availability of state protection and the legislation against gender violence in general and in this case (at pages 4 to 9), with special emphasis on the reasonableness of an IFA in Guadalajara. It is clearly inherent in the Board's reasons that it considered the principal applicant had not made sufficient efforts to seek state protection (in general) but especially a viable IFA in Guadalajara, Mexico. Therefore, the applicant's submission on this point is unfounded. The case turns on this IFA.

[16] The applicants argue that the Board erred in finding that they had a viable IFA in Guadalajara. They fear living anywhere in Mexico because Vargas is a drug trafficker who has connections and can find them anywhere in Mexico. They submit that Vargas found the principal applicant at her aunt's house in Tampico yet no one from the family told him where she was. The applicants add that there is no evidence of "police response" to the principal applicant's claims of domestic abuse, and Mexico has a corrupt, ineffective police response to domestic violence against women (*Garcia v. Canada (Minister of Citizenship and Immigration)*, [2007] 4 F.C.R. 385, at paragraph 14).

[17] The respondent answers that the applicants have not adduced evidence of the inadequacy of an IFA in Guadalajara, that the state of Jalisco, where Guadalajara is located, has laws to protect women since 2003 plus a federal law since February 2007, and has an interdisciplinary team offering free services for women victims of violence. This is based upon up-to-date documentation.

[18] The respondent pleads that there is no persuasive evidence that Vargas is involved in drug trafficking or that he has means to find the applicants in Guadalajara or another city of Mexico.

[19] Finally, the respondent argues the applicants have not discharged the burden of establishing that an IFA was not open to them in Guadalajara, Mexico.

[20] In principle an applicant must prove on a balance of probabilities that he or she cannot reasonably obtain safety in another part of the country of origin (*Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.); *Thirunavukkarasu v. Canada (Minister of*

Employment and Immigration), [1994] 1 F.C. 589 (C.A.); *Munoz v. Minister of Citizenship and Immigration*, 2009 FC 478; *Vargas v. Minister of Citizenship and Immigration*, 2008 FC 1347 and *A.T.V. et al. v. Minister of Citizenship and Immigration*, 2008 FC 1229).

[21] An IFA is subject to a two-pronged test: (a) the Board must be satisfied that there is no serious danger of persecution in the city where the IFA is located, and (b) the Board must consider whether the claimant can reasonably, without undue hardship, seek refuge in that city.

[22] The respondent submits that in this case, seeing the evidence, the Board was justified to suggest Guadalajara as an accepted IFA.

[23] The applicants argue that notwithstanding the fact that Mexico has federal and state laws declared to protect citizens from domestic violence plus declared good intentions, women in Mexico are left unprotected because either the police or other authorities of the state, do not consider domestic violence a police matter but rather a private one and no effective action is taken to prevent it. The applicants claim that the Board's analysis that the police in Mexico respond to complaints of domestic violence is erroneous and constitutes an error of law.

[24] The applicants' counsel relies heavily on the following statement found in *Garcia*, *supra*, at paragraph 16:

> . . . The same test applies to the help that a woman might be expected to receive at the complaint counter at a local police station. That is, are the police capable of accepting and acting on her complaint in a credible and earnest manner? . . .

[25] The principal applicant claims that when she approached the police in Acapulco with her complaint, they did not respond “in a credible and honest manner”.

[26] The respondent submits that the above argument is incorrect because when the principal applicant approached the police in Acapulco it was not to lodge a complaint but solely to obtain the whereabouts of Vargas. In fact, she did not report the threats of violence, assaults or kidnapping.

[27] Even in a case where an alleged victim of domestic violence lodges a complaint with the appropriate state authorities, the complainant must later show to the Board some evidence which is sufficient to rebut the presumption of state protection, *i.e.* clear and convincing evidence (see *Montesinos Hidalgo v. Minister of Citizenship and Immigration*, 2009 FC 707, at paragraph 22).

[28] Furthermore, the Board did discuss and analyse the issue of the violence against women in Mexico and the state’s laws and efforts to counter such violence (at pages 4, 5 and 6 of its decision).

[29] The principal applicant claims the Board did not follow the gender guidelines which exist to help it in domestic violence cases against women. In fact, the Board did consider in general the issues covered by these guidelines.

[30] I reiterate that to rebut the presumption of state protection, an applicant must present clear and convincing evidence that the state protection is either non-existent or inadequate (*Flores Carrillo v. Canada (Minister of Citizenship and Immigration)*, [2008] 4 F.C.R. 636 (F.C.A.), at paragraph 38). It is insufficient for a claimant to successfully rebut the state protection presumption

simply to allege or show that the state has not always been effective in protecting its citizens in their particular circumstances (*Canada (M.C.I.) v. Villafranca* (1992), 150 N.R. 232 (F.C.A.); *J.C.M.G. et al. v. Minister of Citizenship and Immigration*, 2009 FC 610). As long as the state provides adequate "not necessarily effective" protection, the criterion required in law is satisfied (*Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 605 (F.C.A.)).

[31] An analysis of the Board's decision leads to the conclusion that it considered adequately the issue of state protection and particularly the issue of an IFA and concluded the applicants had a viable, acceptable IFA by moving to the city of Guadalajara, Mexico. Finally the impugned decision falls well within the range of acceptable outcomes that flow from the facts and the law.

VIII. Conclusion

[32] The application must therefore be dismissed.

JUDGMENT

The application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "Act") of a decision of the Refugee Protection Division of the Immigration and Refugee Board rendered on November 28, 2008, determining that the applicants are not Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the Act, is dismissed.

No question is to be certified.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-281-09
STYLE OF CAUSE:	LIZBETH ADRIANA GOMEZ ESPINOZA, LUIS DANIEL GOMEZ ESPINOZA, EVA ESPINOZA CASTILLO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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