Federal Court  Cour fédérale

Date: 20100319

Docket: IMM-1041-09

Citation: 2010 FC 319

Ottawa, Ontario, March 19, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

SILVIA MATA DIAZ

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated January 27, 2009, wherein the applicant was found to be neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the Act.

[2] The applicant seeks:

1. an order setting aside the decision of the Immigration and Refugee Board determining that the applicant is not a Convention Refugee or a person in need of protection; and

2. an order sending the applicant's claim back to the Immigration and Refugee Board for redetermination.

Background

[3] Silvia Mata Diaz (the applicant) was born in the state of Mexico. In 1988, the applicant began a relationship with her former partner, Pedro Penaloza Gonzalez. The applicant had two children before she began her relationship with Mr. Gonzalez and gave birth to two more children during her relationship. One of her sons is in Canada as a refugee claimant.

[4] The applicant alleged that her partner abused her physically, emotionally and sexually. The applicant stated that she made informative reports with the police, but that these reports were never acted upon. In 1998, the applicant states that she left her home and went to live with her family as a result of the abuse suffered at the hands of Mr. Gonzalez. The applicant then states that she returned home approximately four years later, in 2002, until she fled again in 2007 to a friend's house in Villa Del Carbon.

[5] The applicant alleged that Mr. Gonzalez found her in Villa Del Carbon and threatened her again. The applicant claimed that she told Mr. Gonzalez that she would return, but she was able to buy some time in order to flee to Canada, which she did on August 16, 2007. She then made a claim for refugee status on August 23, 2007. The applicant alleges that Mr. Gonzalez still threatens members of her family through telephone calls and she claims that she cannot return to Mexico because of what he may do to her upon her return.

Board's Decision

[6] First, the Board addressed the reasons for denying certain procedural requests made by applicant's counsel prior to the hearing. Counsel had requested permission to submit a psychological report after the hearing as it had been difficult to schedule one due to the holidays prior to the hearing. The Board denied this request, as the applicant had filed her PIF on November 5, 2007 and had also successfully postponed the hearing twice. The first scheduled hearing which was to occur on May 6, 2008, had been postponed to allow the applicant more time to receive documents from Mexico. The Board found it unreasonable that the applicant could not have obtained a psychological report in the seven months when her hearing was postponed for the purpose of obtaining documents, or within the 14 months since her PIF had been filed.

[7] The Board then went on to consider the credibility of the allegations made by the applicant regarding her relationship with Mr. Gonzalez after 1998. The Board noted that there were no documents to establish that she had resumed living with Mr. Gonzalez after 1998. The applicant

stated that she did not have documents because she had fled quickly and Mr. Gonzalez had the important documents. The Board did not accept this because she still had two sons living with Mr. Gonzalez and many family members who could have sworn affidavits. The Board also noted that there was no mention in the letters from her family of the time period during which the abuse occurred. Finally, the Board noted that the addresses listed on her port of entry (POE) notes overlap and this error undermines her claim that she lived with Mr. Gonzalez after 1998. The applicant claimed that it was because someone helped her with the forms and that it was wrong. The Board rejected this explanation as she would have had to provide the information to the person helping her with the forms. The applicant also claimed that she informed someone working for her counsel of the error before submitting her PIF, but the Board found it would have been reasonable to have included those errors in the PIF narrative. Thus, the Board was not persuaded that the applicant had a relationship with Mr. Gonzalez after 1998.

[8] The Board then found that the applicant did not provide sufficient credible or trustworthy evidence that she had been abused. The Board noted that the applicant had provided a document which indicated that she left the marital home because of verbal aggressions. However, when questioned about the report and why it failed to indicate physical abuse, the applicant claimed it was because the police do not put details of abuse in reports unless there are visible marks or if they are offered money and that Mr. Gonzalez beat her in a manner that did not leave marks. The Board rejected this explanation because it was unreasonable for the police to have recorded verbal aggressions if they were not interested in her allegations of abuse. The Board also noted that the applicant claimed she made three police reports, but none were ever acted upon. The Board found

that it was implausible that the applicant would have returned to file two more police reports after the first if she knew that the police were not going to follow up on her allegations.

[9] Next, the Board found that the applicant did not provide sufficient credible or trustworthy evidence to support the claim that she had been physically harmed. The applicant asked to submit a document from a doctor after the hearing because it was late being delivered due to the holidays. The Board refused this request because the applicant had had ample time to arrange for the document. The applicant also claimed that her previous lawyer did not tell her she needed to bring a medical report, but the Board rejected this claim as the same lawyer had been the solicitor of record since the PIF was submitted and because the applicant and counsel were aware that documents should be provided as this was the basis for requesting that the first hearing be postponed.

[10] The Board then considered the applicant's claims that there are ongoing threats to her family and concluded there was insufficient evidence from her family to support these allegations. The Board noted that the letters from family were self-serving and not from uninterested sources. Also, although the applicant claimed her sister was the victim of a kidnapping, there was no evidence of the incident, such as an affidavit from the sister, nor did the sister mention the incident in her letter. The letters from other family members did not include specific details of abuse or any indication that the family witnessed the abuse first hand. The Board acknowledged that the letter from the applicant's cousin indicated that Mr. Gonzalez called often but it did not match the applicant's claim in her PIF that he made threatening calls to the family. Thus, the Board assigned little weight to the letters.

[11] The Board then outlined a number of inconsistencies between the applicant's testimony and the information in the PIF. First, the applicant testified that one of the main motivations for the abuse was that Mr. Gonzalez did not believe that one of the applicant's children was his son. This was not in the PIF and the applicant did not provide a reason for its exclusion. Similarly, the applicant testified that she was raped frequently, but this was also not included in the PIF, so the Board was not persuaded that there was sexual abuse. The applicant testified that the abuse was more sexual than physical, but this did not conform to her descriptions of abuse in her PIF, which indicated the abuse was physical. The applicant testified that she was locked in the house for several days after Mr. Gonzalez found the police reports and that she sought the assistance of a Domestic Violence Prevention and Care Unit, but neither of these claims was included in her PIF. The applicant testified that she left a number of things out. Finally, the applicant testified that Mr. Gonzalez kept her from communicating with her family, but this was also not in the PIF. The applicant explained that she did not narrate her story well. The Board found these omissions to be unreasonable because the applicant affirmed her PIF was complete, she had an opportunity to review and revise it prior to the hearing and the applicant in fact made amendments to the PIF prior to the hearing. In the Board's view, these inconsistencies undermined the credibility of the applicant.

[12] The Board found that the applicant's claim that she was found by Mr. Gonzalez in Villa Del Carbon was implausible. The applicant did not know the date which she was found, except that it was in June of 2007. The applicant claimed that she did not work, she did not call her children, and that she hid in the house. The Board noted that Villa Del Carbon was located 1.5 hours away from

Mr. Gonzalez's home, that he had no relatives in town and when she was asked about how he could have found her simply walking down the street when he had no reason to be there, the applicant claimed that he may have followed someone to the town and found her and that he has many friends in the police. The Board did not accept this explanation as the applicant had earlier stated that she did not know how he found her and that the applicant had never mentioned in her PIF that he had friends in the police, which was an important fact relating to the availability of state protection, the existence of an IFA and Mr. Gonzalez's ability to act with impunity.

[13] Finally, the Board noted that the timing of the applicant's departure from Mexico coincided with her son's surgery in Canada and found that this undermined her credibility. The Board found that given the lack of evidence regarding her alleged abuse, more weight should be placed on the explanation that she came to be with her son.

Issues

[14] I would state the issues as follows:

1. What is the standard of review?
2. Did the Board fail to articulate its reasons in "clear and unmistakable terms"?
3. Did the Board err in its determination that the applicant was not credible, based on the evidence before it?
4. Did the Board err in requiring corroborating documents?

Applicant's Written Submissions

[15] First, the applicant submits that a misstatement of critical or key evidence constitutes a patently unreasonable error of law. While the Board is able to make findings of fact, the Board must get the facts right. The Board stated that it found the letters to be self-serving because the applicant testified that she requested them. However, the applicant notes that in her testimony, she did not say that she requested the letters, only that she told her family why she was in Canada and provided them with her address.

[16] Similarly, the Board states that when the applicant was questioned about the omission of the allegations of rape from the PIF, the applicant responded that she had indicated that he had "checked all [her] body" and that that was the same as rape. The applicant submits that this is a misstatement of the evidence as she said that he would check her body and that she wrote it wrong. It was perverse to say that the applicant would have stated that checking her body was the same as rape. The applicant submits that these misstatements of the evidence were used to make negative inferences regarding the applicant's credibility and that this brings into question the validity of the Board's whole analysis.

[17] Next, the applicant submits that the law requires the Board to provide its findings in clear and unmistakeable terms and that it must be clear to a claimant why she is being rejected. The

applicant notes that the Board made contradictory findings, as the reasons state that "[t]he panel finds that the claimant did not provide sufficient credible or trustworthy evidence to support her allegation that she continued in a relationship with her partner after 1988 [sic]" and goes on to state that the Board found that the applicant was in a relationship with Mr. Gonzalez and that "the claimant left him in November of 1998as per her evidence." The Board appears to make two separate findings that cannot co-exist and it is impossible to determine the Board's findings on the issue.

[18] Similarly, the Board noted that Amparo, an author of one of the letters, is the applicant's cousin and then goes on to state that "Amparo's letter indicates that Pedro has called often; however, the letter does not conform to the claimant's PIF allegations that Pedro has made threatening calls to the claimant's relatives." The letter indicates that the phone calls were of a threatening nature, and therefore it was nonsensical for the Board to find that the applicant's family was not receiving threatening phone calls.

[19] The Board stated in its reasons that the applicant did not note in her PIF that part of Mr. Gonzalez's motivation for abusing her was because he did not believe that one of the applicant's children was his son. However, the Board made this finding without regard to the evidence before it, as the applicant did make a statement to that effect in her PIF.

[20] Similarly, the applicant notes that the Board had questioned her as to why she did not include the fact that Mr. Gonzalez kept her from her family in her PIF. However, there was a statement to that effect as well in her PIF and that the Board disregarded the evidence.

[21] The applicant submits that there is no legal requirement for a refugee claimant to provide corroborating documents for all key pieces of evidence. The applicant cites the Federal Court of Appeal in *Selvarajah v. Minister of Employment and Immigration*, [1994] F.C.J. No. 532, where the Court held that a lack of supporting documentation cannot provide the basis for doubting otherwise credible evidence. The applicant also submits that a failure to provide documentation to corroborate a claim cannot be related to the applicant's credibility in the absence of evidence to contradict the allegations, as the Court stated in *Mahmud v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 729. The Board concluded that by failing to provide documents, there was no credible evidence of the applicant's claims, including:

1. Documentary evidence to establish that she returned to Mr. Gonzalez in 2002;
2. Evidence, such as an affidavit from the applicant's sister, regarding the alleged kidnapping of her sister.

The Board provided no other reason to reject these claims other than the lack of documentation and thus, these findings were made in error.

[22] The applicant submits that the Board engaged in speculation when analyzing the document provided by the applicant that indicated the applicant left the marital home because of verbal aggressions. The Board stated in the reasons that "if officials were not interested in her allegations

of abuse, it would not be reasonable for them to include the fact that the claimant had received verbal aggressions." The Board could not know what the police officers were thinking when the report was issued and had no reason for concluding based on this assumption that the applicant had not been abused, particularly when the country condition evidence shows that Mexican police are regularly unreasonable and apathetic.

[23] Similarly, the Board engaged in speculation when it concluded that it was implausible that the applicant would return to the police twice after there was no action taken on her first police report. Such a finding puts her in a no-win situation because if she had not continued to seek help from the police, then there was a risk that the applicant would have been found to have not made reasonable efforts to seek state protection.

[24] The Board engaged in speculation when it rejected the applicant's explanation for why the addresses on her POE notes overlapped. The Board had no evidentiary basis for refusing to believe there had been a mistake and to decide that the wrong address must be the applicant's partner's address. In *Neto v. Minister of Citizenship and Immigration*, 2004 FC 565, the Court held that it was unreasonable to discount the applicant's testimony that there was a mistake on her POE notes because it could not be known what was said between the applicant and the interpreter.

[25] The Board found that the allegations regarding physical and sexual assaults were not credible because the applicant stated in her testimony that the abuse was more sexual than physical, but the PIF described physical violence. The mere fact that physical abuse occurred does not

preclude the possibility that sexual abuse occurred more often. It was not possible to conclude that the sexual abuse did not occur more often or that the applicant was not telling the truth regarding the abuse on the basis that some physical abuse occurred.

[26] The applicant notes that the Board asked her to explain how Mr. Gonzalez found her when she moved to Villa Del Carbon. The applicant could not be expected to know how he found her and this line of questioning required the applicant to speculate, which the Board then used against her. The applicant submits that this line of questioning and reasoning was made in a perverse and capricious manner and constituted a reviewable error.

Respondent's Written Submissions

[27] In *R.K.L. v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 162, the Court found that failure to mention key evidence in a written statement to the authorities, or the existence of inconsistencies between a written statement and a subsequent testimony can sustain a negative credibility finding. The applicant was accorded significant time to amend her PIF if she wished to ensure its adequacy and completeness, particularly because the hearing had been postponed twice. The applicant did make some amendments before the hearing. The respondent then notes a number of occasions where the transcript indicates that the Board asked the applicant why certain key events were not in her PIF or why the PIF was not amended to include these events. The respondent admits that the transcript indicated that the Board member conceded that the applicant had not failed to mention that part of the motivation for the abuse was because Mr. Gonzalez did not believe he was the father of one of her sons. However, the respondent submits that

this minor error does not warrant a remedy on judicial review, as it was not central to the Board's decision.

[28] The respondent also submits that the applicant should have gone into more detail in her PIF. In *Basseghi v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1867, the Court held that all relevant and important facts should be included in a PIF and the oral evidence should only explain the information contained in the PIF. The Board properly put the omissions before the applicant and considered her explanations. It was open to the Board not to accept these explanations.

[29] The respondent also submits that the Board is properly entitled to use inconsistencies and contradictions in the evidence before it to make negative credibility findings. The respondent notes that the applicant has submitted that the Board misstated her evidence regarding the type of abuse she suffered. However, while the transcript indicates that she did not say that checking her body was the same as rape, it was open to the Board on the basis of all the evidence before it to conclude that the applicant had omitted an important fact from her PIF.

[30] The applicant has submitted that the Board misstated her evidence when it said she requested the letters from her family and that the Board erred by assigning little weight to them. However, the applicant has ignored the fact that the Board made a number of other findings regarding the letters. For instance, the Board found that the letters did not indicate instances of abuse or that the family members had witnessed abuse. Also, the Board found that the letters were

inconsistent with the information in the PIF regarding threatening phone calls. Although the applicant argues that the Board misstated the evidence regarding the phone calls, the respondent notes that the PIF states that the applicant's family had been threatened by anonymous phone calls, while the letter states that Mr. Gonzalez has called and threatened the applicant, not her family. Finally, the respondent notes that while the applicant did not testify that she requested the letters, she did testify that she had provided them with the address and told them why she was in Canada.

[31] The respondent points to a number of instances in the hearing where the Board questioned the applicant regarding documents that could have supported her claims. The Board's finding that the applicant failed to provide credible evidence was not based solely on the lack of documents to corroborate her claims, but instead was based on a number of concerns with the credibility of the evidence. There was inconsistent evidence provided regarding the nature and timing of the abuse, and thus the Board's observations of the lack of corroborating documents are relevant. In *Juarez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 288, the Court said that if there are concerns regarding the reliability of testimony, the decision maker may search for corroborating evidence. The respondent also notes *Muchirahondo v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 546, where the Court stated that the Board is entitled to conclude that evidence is not credible if the applicant does not corroborate her claims. Based on these cases, the respondent submits that the decision is reasonable overall because the Board's decision does not rely solely on the failure to provide corroborating evidence, but on other credibility concerns as well.

[32] The respondent submits that the applicant's submission that the Board's decision is unclear is based on a typographical error regarding the years that the applicant was in a relationship with Mr. Gonzalez. It is clear from the reasons as a whole, that the Board accepted that the applicant was in a relationship with Mr. Gonzalez from 1988 to 1998, and the main issue was whether this relationship was resumed from 2002 to 2007. The respondent relies on *Petrova v. Minister of Citizenship and Immigration*, 2004 FC 506, where the Court held that an overall reading of the decision showed that the mistake was typographical in nature and not a misunderstanding of the material evidence and thus, there was no reviewable issue. The reference to 1988 instead of 1998 in this case was also a typographical error and does not raise a reviewable issue.

[33] The respondent finally submits that there is a high threshold that an applicant must meet when challenging a decision based on credibility and plausibility findings. The Federal Court has repeatedly held that even where there are certain credibility or plausibility findings that are not supported on the record, the decision as a whole may still be upheld where the overall findings were not unreasonable. Also, the Board was entitled to make reasonable findings based on implausibilities, common sense and rationality and may reject evidence if it is not found to be consistent with the case as a whole. Finally, even if the Court finds there is an error, the cumulative effect of the deficiencies is not sufficient to undermine the Board's overall conclusion on credibility.

Analysis and Decision

[34] **Issue 1**

What is the standard of review?

In this case, the applicant has raised a number of issues, all relating to the Board's findings regarding the applicant's credibility and the treatment of the evidence. It is well established that these questions are highly factual and require a high level of deference (see *Ortiz Juarez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 288). The Board is a specialized tribunal that is in the best position to make assessments of credibility and to weigh the evidence presented to it. Thus, the standard of review is reasonableness. The Court should not intervene on judicial review unless the Board has come to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47, *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at paragraph 59).

[35] I wish to first deal with Issue 3.

[36] **Issue 3**

Did the Board err in its determination that the applicant was not credible, based on the evidence before it?

The main basis for the failure of the applicant's claim was that the Board found her not to be a credible witness. The Board gave a number of reasons for this finding. I now wish to look at some of these reasons.

[37] The Board considered letters submitted by neighbours and relatives but the Board assigned little weight to the letters for, among other reasons, they were requested by the applicant and the letters were self-serving. A review of the evidence shows that the applicant did not ask for the letters but only provided her address to the writers. As well, it would seem to me that any letter written to support the applicant's claim would be, by the Board's reasoning, self-serving. This cannot be the case. An applicant has to be able to establish their case.

[38] The applicant testified that things got worse after their second child was born as her husband did not believe he was the father of the child. In the decision, the Board member stated this was not included in the applicant's PIF and that when asked, the applicant could not give any reason for this information not being included. This is not correct as the information was included in the PIF.

[39] At the hearing, the applicant's oral evidence was that Mr. Gonzales prevented her from communicating with her family. The Board asked her why this was not in her PIF. This is another error as these facts are stated in the PIF.

[40] The Board found it implausible that the applicant's ex-partner would find her in a town 1.5 hours away by driving by her on the street. I do not agree that this is implausible, particularly when the evidence shows that Mr. Gonzales was searching for her.

[41] The Board also stated that the timing of the applicant's departure from Mexico coincided with the time when her son, who is also a refugee claimant in Canada, was having surgery. While

this is correct, her testimony also establishes the fact that the applicant formed the intention to flee Mexico in February 2008. The son's surgery was in August 2008. If this evidence in its totality had been considered by the Board, the findings on credibility may have been different.

[42] I would note that there were other credibility findings but in my view, the above mentioned errors are sufficient to cause me to find that the Board's decision with respect to credibility was in error. If the Board had considered all of the evidence on these matters, its decision on credibility may have been different. Based on these findings, I find that the Board made a reviewable error. Its decision was not reasonable and the decision must be set aside and the matter referred to a different panel of the Board for redetermination.

[43] Because of my finding on this issue, I need not deal with the remaining issues.

[44] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[45] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

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	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) 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.	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	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) to a danger, believed on substantial grounds to exist, of torture within the meaning of	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au

Article 1 of the Convention Against Torture; or	sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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,	(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(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) the risk is not caused by the inability of that country to provide adequate health or medical care.	(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.

FEDERAL COURT

SOLICITORS OF RECORD

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