Federal Court  Cour fédérale

Date: 20100429

Docket: IMM-4006-09

Citation: 2010 FC 457

Ottawa, Ontario, this 29th day of April 2010

Before: The Honourable Mr. Justice Pinard

BETWEEN:

MARI CRUZ HERNANDEZ FUENTES
(a.k.a. MARICRUZ HERNANDEZ FUENTES),
NATALY NAOMI HERNANDEZ FUENTES

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "Act") of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board"), dated July 15, 2009. In that decision, Marlene Hogarth, Board member, rejected the applicants' claims that they were Convention refugees pursuant to section 96 of the Act.

[2] Mari Cruz Hernandez Fuentes, the applicant, is a citizen of Mexico. She was the designated representative of her minor daughter, Nataly Naomi Hernandez Fuentes, also a citizen of Mexico.

[3] The applicant made a claim for protection on behalf of her minor daughter. She fears that her daughter will be the target of sexual abuse and exploitation by the same male relative that targeted the applicant until she left Mexico in 2007.

[4] The Board member accepted the applicant is a victim of gender-based violence and is frightened of her uncle. More specifically, the Board noted that the applicant is frightened of what the uncle will do to her daughter rather than what he could do to her in the future.

[5] Her minor daughter is a member of her family and therefore the applicants were part of a particular social group.

[6] Then, the Board member identified that state protection and the availability of an Internal Flight Alternative ("IFA") were determinative issues in this claim. She held that the applicant had not provided "clear and convincing evidence" to rebut the presumption of the state's ability to protect her and her daughter, and in the alternative, the applicant had an IFA in Guadalajara.

[7] The standard of review applicable to both parts of the Board's decision is reasonableness.

[8] According to Canadian law, a decision must be justified, transparent and intelligible and must fall "within a range of possible, acceptable outcomes which are defensible in respect of the

facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47). In *Dunsmuir*, at paragraph 44, 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".

[9] Recently, the reasonableness standard was further elaborated on in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, where the Supreme Court stated:

> [59] . . . There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.
>
> [My emphasis.]

[10] In the case at bar, upon hearing counsel for the parties and upon reviewing the evidence, I am of the view that the Board reasonably determined that the applicant failed to rebut the presumption of state protection in Mexico. Indeed, the applicant only went to police on one occasion in 2001 to report the sexual abuse at the hands of her uncle. The applicant made no other attempts to seek out state protection, neither approaching other police agencies nor other state agencies set up to protect women who are at risk of abuse. The Board thoroughly canvassed the documentary evidence, and determined that the applicant had not rebutted the presumption of state protection in Mexico, a democracy with resources set up specifically to assist those in the position of the applicant. In particular, the panel noted the following documentary evidence about Mexico:

(a) There are approximately 500,000 officers in the federal, state and municipal police forces.

(b) There is some corruption within the Mexican authorities, but Mexico is making serious efforts to professionalize the police. There are many state agencies that address criminality, and public officials, including members of the police and the army, are punished for their misconduct.

(c) The state has many resources to assist women survivors of abuse including the Office of the Attorney General of the Federal District which provides legal representation for victims, INMUJERES, a federal government institution that is mandated to protect women and runs a phone line providing psychological and legal assistance, and referrals.

[11] The applicant submits that the Board failed to address her claim that she could not get protection from the state because her uncle is a municipal police officer. This is not the case, as the Board's findings clearly do state that while there is corruption within the police forces, police who commit crimes (i.e. her uncle) are punished for their misconduct. The Board noted, based on the documentary evidence, that there were resources specifically set up to assist women in the position of the applicant, but she did not attempt to access them to protect her and to prosecute her uncle. Further, the Board examined the state protection available to the applicant in her home of Mexico City and determined that this area does have more sophisticated laws and adequate protection for women survivors of violence.

[12] As pointed out by counsel for the respondent, the Board member considered the Guidelines on domestic abuse, and accepted the applicant's testimony that on the one single occasion that she attempted to report her uncle to police, the police did not take a police report. However, the Board

found that this applicant failed to even attempt to access any other levels of police or other avenues of protection.

[13] It is well-established that when the state in question is a democracy, the applicant must make concerted efforts to seek out state protection before claiming international protection. In *Kadenko v. Canada (Solicitor General)*, 143 D.L.R. (4th) 532, the Federal Court of Appeal stated:

> . . . Once it is assumed that the state […] has political and judicial institutions capable of protecting its citizens, it is clear that the refusal of certain police officers to take action cannot in itself make the state incapable of doing so. . . .
>
> No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation.
>
> When the state in question is a democratic state, as in the case at bar, the claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. . . .

[14] Furthermore, the applicant is required to seek protection from protective agencies other than police because those agencies are set up to protect women in the position of the applicant. The law is now settled that local failures to provide effective policing do not amount to a lack of state protection, and that an applicant may seek redress and protection from protection agencies other than police. In *The Minister of Citizenship and Immigration v. Maria Del Rosario Flores Carrillo,* 2008 FCA 94, the Federal Court of Appeal, applying the proper principles to the case before it, stated as follows:

[31] The Board acknowledged the prevalence of domestic abuse in Mexico. It then reviewed the various steps taken by the authorities to address the issue: see the Board's reasons at pages 43 to 49 of the appeal book.

[32] It proceeded to review the law governing the presumption of state protection. It stated that local failures to provide effective policing do not amount to a lack of state protection. Relying upon the findings of this Court in *Kadenko v. Canada (Solicitor General)* (1996), 143 D.L.R. (4th) 532, leave to appeal to the Supreme Court of Canada refused on May 8, 1997, it stated that "the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her". It found that Mexico is a fledgling democracy governed by the rule of law.

[33] The Board found that the respondent had failed to make determined efforts to seek protection. She reported to police only once during more than four years of alleged abuse.

[34] In addition, the Board concluded based on the evidence before it that the respondent did not make additional effort to seek protection from the authorities when the local police officers allegedly did not provide the protection she was seeking. She could have sought redress through National or State Human Rights Commissions, the Secretariat of Public Administration, the Program against Impunity, the General Comptroller's Assistance Directorate and the complaints procedure at the office of the Federal Attorney General.

[35] Finally, the Board noted the respondent's omission to make a complaint about the involvement of the abuser's brother, who allegedly is a federal judicial police officer, when the evidence indicates that substantial, meaningful and often successful efforts have been made at the federal level to combat crime and corruption.

[36] Considering the principles relating to the burden of proof, the standard of proof and the quality of the evidence needed to meet that standard defined as a balance of probabilities against the factual context, I cannot say that it is an error or unreasonable for the Board to have concluded that the respondent has failed to establish that the state protection is inadequate.

See also *Florea v. Minister of Employment and Immigration*, [1993] F.C.J. No. 598 (C.A.) (QL); *Ortiz v. Minister of Citizenship and Immigration*, [2002] F.C.J. No. 1558 (T.D.) (QL); *Pal v. Minister of Citizenship and Immigration*, [2003] F.C.J. No. 894 (T.D.) (QL); *Nagy v. Minister of Citizenship and Immigration*, [2002] F.C.J. No. 370 (T.D.) (QL); *Zsuzsanna v. Minister of Citizenship and Immigration*, [2002] F.C.J. No. 1642 (T.D.) (QL), and *Szucs v. Minister of Citizenship and Immigration*, [2000] F.C.J. No. 1614 (T.D.) (QL).

[15] The applicant in this case made no timely attempt to seek out the protection of police or other state authorities before claiming international protection.

[16] I find, therefore, that the Board's conclusion that the applicant had not rebutted the presumption of state protection in Mexico is entirely reasonable and should not be disturbed.

[17] As this finding is determinative of this application for judicial review, it will not be necessary to deal with the question of an IFA.

[18] Consequently, the application for judicial review is dismissed.

JUDGMENT

The application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board, dated July 15, 2009, rejecting the applicants' claims that they were Convention refugees pursuant to section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4006-09
STYLE OF CAUSE:	MARI CRUZ HERNANDEZ FUENTES (a.k.a. MARICRUZ HERNANDEZ FUENTES), NATALY NAOMI HERNANDEZ FUENTES v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 8, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	April 29, 2010

APPEARANCES:

Me Clifford Luyt	FOR THE APPLICANTS
Me Alison Engel-Yan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Clifford Luyt Toronto, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT