

Federal Court



Cour fédérale

Date: 20131223

Docket: IMM-8533-12

Citation: 2013 FC 1284

Ottawa, Ontario, December 23, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

**BRENDA MILAGROS CORDOVA
CALOGGERO**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is seeking judicial review pursuant to section 72.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *Act*) of a decision made by the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated August 3, 2012, whereby it was decided that Brenda Milagros Cordova Caloggero was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97(1) of the *Act*.

[2] For the reasons that follow, I have found that this application ought to be dismissed. The Applicant has failed to convince the Court that the Board erred in finding that she is not a credible witness, that she lacks subjective fear of persecution, and that she did not rebut the presumption of state protection.

FACTS

[3] The Applicant is a woman of Peruvian citizenship born in 1985 who alleges a fear of persecution and a risk to her life at the hands of her former boyfriend, Alberto Pazos, and her mother's former partner, Cesar Saldana Alvarez, if she were forced to return to Peru.

[4] In October 2007, the Applicant moved in with her mother and Cesar, who became abusive towards her mother and herself. Both women fled Cesar's home in Lima in May 2008 and stayed for two weeks with a friend in Ica, a city five hours away from Lima. Cesar found them and convinced them to return home. The abuse continued thereafter.

[5] In August 2008, the Applicant and her mother once again left Cesar's home and sought refuge with another friend in Trujillo, eight hours away from Lima. Two weeks later, Cesar found them and again convinced them to return. On the evening of August 30, 2008, Cesar attempted to sexually assault the Applicant. Her mother intervened, and was stabbed by Cesar in the abdomen. She spent more than two weeks in the hospital and reported the incident to the police. The Applicant herself never reported the attempted sexual assault.

[6] When the Applicant's mother was released from hospital, she and the Applicant went to live with an aunt in Lima. In December 2008, Cesar and two other men came to that house and threatened to kill them for having made a complaint to the police. The police were contacted and arrived after Cesar had already left the premises. The police said they were still looking for Cesar and that the stabbing incident was still under investigation.

[7] The Applicant's mother then left Peru and claimed refugee status in Canada. Her current status in Canada is unknown.

[8] In May 2009, Cesar assaulted the Applicant at a shopping mall in Lima. The police were called and the Applicant made a formal complaint.

[9] The Applicant went to the USA in September 2009 in an attempt to reach Canada and join her mother. She was in fact refused a Canadian visa and returned to Peru three weeks later, when she learned that her uncle had become critically ill.

[10] She then met a man named Alberto Pazos, to whom she looked for protection. They became romantically involved. Alberto became abusive when the Applicant tried to leave him. On more than one occasion he locked her up in a room and sexually assaulted her for days. The Applicant never reported Alberto to the police.

[11] On April 28, 2011, the Applicant left Peru and went to the USA. She made her way to Canada approximately four weeks later. She claimed refugee status on June 1, 2011.

THE IMPUGNED DECISION

[12] The determinative issues before the Board were credibility, subjective fear and state protection.

[13] At the outset of its reasons, the Board noted that it has considered the Chairperson's Gender Guidelines on gender-related persecution.

[14] On the issue of credibility, the Board found that the Applicant had presented inconsistent statements with regard to what transpired after the incident of May 2009. The Applicant testified that Cesar had run away and that police told her they would contact her once he was caught. However, the complaint submitted by the Applicant indicates that Cesar had been brought to the police station. The Applicant also testified that she heard the police say they had captured Cesar. The Board concluded that the Applicant "deliberately attempted to mislead the panel with regard to her allegations that the Peruvian police were not able to provide her with adequate state protection". The Board assigned little weight to a psychological report from a Canadian therapist as it relied in part on the Applicant's narrative, which was found to be not credible.

[15] With regard to subjective fear, the Board took issue with the fact that the Applicant provided no reasonable explanation for her failure to claim asylum in the United States on two occasions. The Board further found that the Applicant had provided inconsistent statements concerning her knowledge of the asylum system in the USA.

[16] Finally, the Board found that the Applicant had not rebutted the presumption of state protection. The Board considered that Peru is a functioning democracy and must be presumed capable of protecting its citizens. In such cases, a refugee claimant must provide clear and convincing evidence that the state is unable to provide adequate protection. The Board noted that the police had adequately intervened when their help was solicited by the Applicant or her mother on three separate occasions, and that Cesar was arrested and detained in May 2009. The Board further noted that the Applicant had withheld key information from the police on two occasions and made no reasonable efforts to seek protection with regard to Alberto's abuse.

[17] The Board addressed the objective evidence and found that Peruvian law requires police to investigate domestic violence complaints within five days, and that penalties for domestic violence against women vary from one month to six years. The Board also mentioned the Women's Emergency Program, which combines police prosecutors, counsellors and public welfare agents to help victims of domestic abuse. The Board recognized that Peru faces corruption and difficulties in addressing criminality, but concluded that in the circumstances, the police had effectively responded when they were given a chance to do so.

ISSUE

[18] The Applicant has raised a number of issues in her written and oral submissions, including the reasonableness of the Board's findings with respect to her credibility and her subjective fear. I am of the view, however, that the determinative issue in this case is the reasonableness of the Board's assessment with respect to the availability of state protection.

ANALYSIS

[19] It is well established that the Board's conclusions on state protection are findings of fact and law reviewable on the deferential standard of reasonableness: *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, at para 38.

[20] When reviewing a decision under the reasonableness standard, the Court must determine whether the decision-making process is justified, transparent and intelligible, and whether the 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 para 47.

[21] The Applicant submits that the Board wrongly considered the state's efforts to protect, as opposed to the effectiveness of these efforts on the operational level. The Applicant further argues that, contrary to the Board's finding, there is no evidence that Cesar had even been arrested or charged. Indeed, the documentary evidence that was before the Board allegedly corroborates the Applicant's experiences and belief that women in Peru are not given adequate protection.

[22] It is well established that a refugee claimant has the burden of rebutting the presumption of state protection by presenting clear and convincing evidence that the state is unable to provide protection. The protection afforded by authorities need not be perfect, but only adequate: *Minister of Citizenship and Immigration v Flores Carrillo*, 2008 FCA 94. On the other hand, the protection offered by the state cannot be only theoretical, it must also be available in practice: *Aguirre v Canada (Minister of Citizenship and Immigration)*, 2010 FC 916, at para 20; *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 101 at para 37; *Cervenakova v Canada*

(*Minister of Citizenship and Immigration*), 2012 FC 525, at para 73. Failure to seek protection from authorities can be fatal to a claim, unless the claimant can establish that the protection would not be forthcoming: see, inter alia, *Pineda v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1543 at paras 16-17. As Justice Sexton stated in *Hinzman*, above, at para 57, “a claimant coming from a democratic country will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status”.

[23] I note, first of all, that the Board did apply the appropriate test of state protection. It states from the outset that both the claimant and her mother “were given adequate state protection on at least three occasions while they resided in Peru” (Decision, para 25; emphasis added). Moreover, there is no proof that the documentary evidence cited by the Applicant has not been reviewed and assessed by the Board. It noted that, although domestic violence remains a problem in Peru, that country has a functioning security force. The Board also took into account that Peruvian law prohibits domestic violence and requires police to investigate incidents of domestic violence within five days. It also mentioned that the Ministry of Women and Social Development has established the Women’s Emergency Program, which helps victims of domestic abuse through the services of police, prosecutors, counsellors and public welfare agents, and received a monthly average of 1,543 calls in November.

[24] Having said that, the Board acknowledged that violence against women remains a problem in Peru, and did not paint a rosy picture of the situation. The Board quoted from the DOS Country Report on Human Rights Practices for 2010 which showed that violence against women remains a

problem in Peru, and reported that a 2009 ombudsman study highlighted that police officers react indifferently to charges of domestic violence despite legal requirements to investigate such complaints. The Board went on to state the following:

The panel accepts that the documentary evidence indicates that Peru has had some difficulties in the past with addressing the criminality and corruption that exist within the security forces in that country. As well, the panel notes that there are some inconsistencies among several sources within the documentary evidence since the Overseas Security Advisory Council (OSAC) indicates that Peru has one of the highest reported crime rates in Latin America, but Freedom House, a non-government organization (NGO), contends, by regional standards, the incidence of crime is low in Peru and, in fact, that it remains far below the level found in many Latin American countries. The objective evidence regarding current country conditions suggests that, although not perfect, there is an adequate state protection in Peru for victims of crime, that Peru is making serious efforts to address the problem of criminality and domestic violence.

[25] What was crucial, in the Board's view, was that in the circumstances of this case, the Applicant had failed to rebut the presumption of state protection with clear and convincing evidence, and that the police had provided her adequate protection on three separate occasions, and in one case, leading to the arrest and detention of Cesar. The Board further found that the Applicant had withheld information from the police and failed to take any steps to seek protection in relation to Alberto's abuse. In light of the foregoing, it cannot be said that the Board applied the wrong test in focussing on theoretical protection.

[26] The Board was correct in emphasizing that the effectiveness of the protection offered by a state cannot be put in doubt when one has not really tested it. In the present case, the police did take a report following the stabbing incident in August 2008 and initiated an investigation. Notwithstanding the fact that the police did interview the Applicant's mother and a complaint was

filed by her against Cesar, the Applicant admitted she had deliberately withheld information from the Peruvian police with regard to the alleged attempted sexual assault by Cesar.

[27] The authorities also intervened when Cesar came to the home of the Applicant's aunt, and when Cesar attacked the Applicant at a shopping mall in May 2009. It is true that there was no specific indication on the record that Cesar was arrested or charged on that last occasion, as the complaint states that he was "driven to this Police Station for the investigations on the case". It is clear, however, that Cesar was apprehended, and the Applicant reported no incidents involving Cesar after the mall incident, until she left in June 2011.

[28] In light of all the facts of this case, the Board could reasonably conclude that state protection was adequate and available. The police responded every time the Applicant or her mother asked for help. The Applicant has not clearly demonstrated that she has exhausted all courses of actions to avail herself of the protection she could have sought from the Peruvian authorities before claiming refugee protection in Canada. This finding, in and of itself, is sufficient to dismiss the application for judicial review.

[29] The Applicant also submitted that the Board failed to accord proper attention to the Gender Guidelines. It was contended that the Board was not sensitive to the hesitation of women victims of domestic violence, to seek protection from the authorities and to the Applicant's desire to reunite with her mother in those circumstances.

[30] I do agree with the Applicant that the Board failed to give proper consideration to the Gender Guidelines when assessing whether the Applicant had taken reasonable steps to seek police protection. Although the Board did note at the outset of its reasons that it had considered the Gender Guidelines, it appears that it was not sensitive to the Applicant's situation as a woman victim of domestic violence when it faulted the Applicant for not reporting Alberto's abuse and for withholding information from the police. The only reference to the Gender Guidelines in the Board's reasons deals with the Board's comments during the hearing, to the effect that it did not mean to embarrass the Applicant through questioning. However, the Gender Guidelines are not only procedural. In *Bibby-Jacobs v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1176, Justice Martineau wrote (at para 8):

In the case at bar, the Board also fails to mention in the impugned decision the Gender Guidelines. While a failure to consider the Gender Guidelines is not necessarily a prelude to a successful judicial review, I find that in this case, the Board member did not demonstrate the sensibility and understanding of gender related persecution. It is apparent that key findings were made without any regard to the applicant's cultural, social and personal circumstances. It is not sufficient to claim today that the Board member accommodated the applicant at the hearing. The sensitivity must also be reflected in the rationale for refusing the refugee claim. (emphasis added)

[31] In the case at bar, the Board apparently paid only lip service to the principles enunciated in the Gender Guidelines. Notably, the Board made no mention of the Applicant's psychological report, which indicates that the Applicant suffers from Post Traumatic Stress Disorder, and significantly minimizes her symptoms. The report also cites the Applicant as saying that in Peru it is considered "weird to talk to other people about your problems". The report also suggests that, for the Applicant, her mother's problems are more pressing than her own. The information contained in this report could have explained, in part, why the Applicant did not tell the police that Cesar had

tried to rape her before attacking her mother, and why she never reported Alberto's abuse to the police.

[32] That being said, the failure to give more weight to the psychological report and to give fuller consideration to the Gender Guidelines does not render the Board's entire state protection analysis unreasonable. Even if the Board had found that the Applicant had established her subjective fear (despite the lack of a reasonable explanation for her failure to claim asylum in the USA), it would not assist in relation to the objective issue of state protection. The Board's determinative conclusion was based on the adequacy of actual police intervention on three separate occasions and the objective documentary evidence, two findings that remain undisturbed by the Board's failure to address the Gender Guidelines or the psychological report. Considering the principles relating to the burden of proof, the standard of proof and the quality of the evidence needed to rebut the presumption of state protection, I cannot say that it was unreasonable for the Board to have concluded that the Applicant has failed to establish that the state protection is inadequate.

[33] As a result, this application for judicial review ought to be dismissed. Neither party wished to submit a proposed serious question of general importance, and none is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8533-12

STYLE OF CAUSE: BRENDA MILAGROS CORDOVA CALOGERO v
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: July 16, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** de MONTIGNY J.

DATED: December 23, 2013

APPEARANCES:

Meera Budovitch FOR THE APPLICANT

Norah Dorcine FOR THE RESPONDENT

SOLICITORS OF RECORD:

Patricia Wells Immigration Lawyers FOR THE APPLICANT
Toronto, ON

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, ON