

Federal Court



Cour fédérale

Date: 20090630

Docket: IMM-4906-08

Citation: 2009 FC 679

Ottawa, Ontario, June 30, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

**ROSA MENESES
DORIS ILIANNA CESPEDES MENESES**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondents

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 a decision by the Immigration and Refugee Board, Refugee Protection Division (the Board) dated October 15, 2008, where the Board found that the Applicants, Rosa Meneses (Rosa) and Doris Menses (Doris) were not Convention refugees or a persons in need of protection.

Issues

[2] This application raises the following issues:

- a) Did the Board err in concluding that Rosa could be safe in Peru?
- b) Did the Board err in concluding that Rosa and Doris could be safe in Mexico?
- c) Did the Board err in adopting the findings in the Persuasive Decision on Mexico (TA6-07453)?

[3] For the following reasons, the application shall be allowed.

[4] Rosa, a citizen of Peru, and her daughter Doris, a citizen of Mexico, claim refugee protection pursuant to sections 96 and 97(1) of the Act.

[5] Rosa was born in Lima Peru on November 17, 1949, married Jesus Ramon Fernando Cespedes (Ramon) in 1971 and separated from him in November 1997. Doris, who has never married, was born of that union in Mexico City on September 9, 1980. Four other sons of that union also live in Mexico.

[6] Rosa is afraid to return to Mexico because she fears that domestic violence on the part of Ramon will continue. She would be completely dependent upon him and because of her age, it would be impossible for her to find stable employment.

[7] Doris states that if she were to return to Mexico, she would be going back to the same violence. Her siblings have told her that her father is very upset and he considers her an accomplice to her mother in order to get her mother out of Mexico.

[8] The Applicants' hearing took place on August 25, 2008 and their refugee claim was based upon the following evidence:

1. Rosa was a victim of domestic violence at the hands of her husband for many years. Her husband Ramon is a citizen of Peru and a permanent resident of Mexico.
2. The violence occurred during Rosa's marriage and continued after her husband left her for another woman in 1997. After the separation, Rosa's husband continued to be violent towards her as he controlled her movements and visited her for sexual relations. He also continued to exercise financial control over her as he maintained ownership of the family home and he financially supported her. She went to lawyers in Mexico to inquire about divorcing him but learned it was extremely difficult.
3. Doris fears her father, Rosa's ex-husband, as well as her brother Flavio. Though Rosa endured the majority of the abuse from her husband, as Doris grew older, her father began to abuse her verbally and physically too. Doris's brother assaulted her when she was younger and also on one occasion when she was an adult. She called the police and filed a complaint but the police were unwilling to help her.

Impugned Decision

[9] In her Personal Information Narrative (PIF), Rosa alleged that throughout the years, the only relief she had from the abuse were the short visits to her family in Canada. Other than her last visit, Ramon always provided the financial documents to support her application for the Canadian visas. Rosa's cousin in Ottawa paid for her travel costs including air fare.

[10] Rosa stated that she never considered not returning to Mexico because her children were there. She only came to visit with expectations that somehow her husband's attitude towards her might change. Rosa never considered returning to Peru, her country of nationality. She states that it would be worse there than in Mexico because Ramon's family is very influential there. She has no immediate family except half-brothers and half-sisters whom she only met for the first time at her father's funeral. She says she has no way of finding a job as the finances to sustain her life are in Mexico.

[11] The Board noted that for her claim to succeed, the definition of Convention refugee requires that persecution of the Applicant be linked to a Convention ground i.e. race, nationality, religion, particular social group or political opinion (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689). Rosa makes no allegations in her PIF narrative of persecution or risk to her life or risk of cruel or unusual punishment should she return to Peru, which is her country of citizenship. She has a valid passport, she can return to Peru and her inability to find employment does not constitute sufficient grounds to grant her refugee status in Canada.

[12] When she was interviewed by the immigration officer, Rosa stated she was persecuted because of domestic violence. She left Peru and all her children (save for Doris) to come to Canada.

[13] The Board found that there is no reason why Rosa could not return to Peru. She is a relatively young woman in apparent good health. Rosa could organize a new life in Peru in a language she uses and understands. Her children are all adults, and save for Doris who is 28 years old, they are all married and have children.

[14] As for Doris, the Board asserted she is a well-educated young woman who worked full-time in Mexico City from March 2001, following her graduation from Communication University, until she came to Canada in October 2007. She is independent and she can decide her own future without interference from her father or her siblings. Her father's wrath was directed primarily to her mother and peripherally to her because she was living with her mother at that time.

[15] Doris alleges that Ramon sometimes used physical violence towards her. She gave little or no details of this violence, or where or when it occurred. There was no evidence that he continuously or repeatedly mistreated her and the Board had the impression that she was more concerned that he could be involved in an accident if he were driving alone after drinking or that he would be an easy target for robbery while driving drunk. Had she been truly faithful to her father, she would not have accompanied him to the local watering holes to see that he got home safely. Most of her father's violence directed towards Doris was verbal.

[16] The Board recognized that the issue of the availability of state protection has been comprehensively and carefully analyzed in decision TA6-07453 dated November 26, 2007, which the Board determined was a persuasive decision. There is a presumption that a state is capable of protecting its citizens and an Applicant may rebut this presumption by providing clear and convincing proof of lack of state protection in the country of origin. Where a state is in effective control of its country (as is Mexico), has military police and civil authority in place, and makes serious efforts to protect its citizens, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims are unable to avail themselves of protection.

[17] When the state in question is a democratic state, the Applicants must do more than simply show they went saw a member of the police force and that their efforts were unsuccessful. The burden of proof that rests on the Applicant is, in a way, directly proportional to the level of democracy of the state in question. The more democratic the state's institutions, the more the Applicants must have done to exhaust all reasonable courses of action opened to them.

[18] The Board was satisfied that the facts of this case are similar enough to the facts of the decision TA6-07453 and the Board adopted the findings of that decision with regard to the availability of the police protection and other legal institutions which are available to the Applicants in Mexico. The Board found the Applicants failed to provide clear and convincing evidence of the inability or unwillingness of Mexico to help them should they return there.

[19] Finally, the Board dismissed the Applicants' claim on the fact that Rosa could go back to Peru and both claimants had an availability of state protection in Mexico.

Standard of Review

[20] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court established two standards: correctness, and reasonableness.

[21] The issue of adequacy of state protection is a question of mixed law and fact. This attracts the reasonableness standard. Thus, the Board's decision is reviewable with regard to the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible and acceptable outcomes (*Dunsmuir* at para. 47).

a) *Did the Board err in concluding that Rosa could be safe in Peru?*

[22] It has to be noted that the Board made no adverse credibility findings on the domestic violence endured by Rosa. There is no analysis or reference to any country conditions that support the conclusion that Rosa could go back to Peru and obtain the protection of that country. On the contrary, the applicant's representative referred the court to documentary evidence that indicates that the violence against women, spousal abuse was a problem in Peru (Tribunal's record, pp. 324 and 325, with an added page on the morning of the hearing).

b) *Did the Board err in concluding that Rosa and Doris could be safe in Mexico?*

[23] The Board is assumed to have weighed and considered all the evidence presented to it unless the contrary is shown. The mere fact that the Board's reasons do not canvass every piece of evidence does not indicate that the Board did not consider these documents and is not fatal to its decision (*Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.) (QL); *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 at 318; 36 A.C.W.S. (3d) 635 (F.C.A.)).

[24] In the case at bar, the Board did not refer to some important pieces of evidence such as a report to the police on a complaint filed by Doris on her brother's assault in October 2007. It had also in evidence a psychological report that was not discussed. It is an important document because it goes to the heart of Doris claim.

c) *Did the Board err in adopting the findings in the Persuasive Decision on Mexico (TA6-07453)?*

[25] The Board's decision to adopt the findings in persuasive decision TA6-07453 was unreasonable. The facts in that case involved drug trafficking. The applicant in TA6-07453 felt that state protection from Mexican state authorities would not be forthcoming because of corrupt members of the security forces. The Board focused its analysis on state protection on this particular aspect.

[26] In the case at bar, the facts are totally different. There is no analysis or reference to any country conditions on domestic violence. This error warrants the court's intervention.

[27] The parties did not suggest questions for certification and none arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be allowed. The matter is referred back for redetermination by a newly constituted Board. No question is certified.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-4906-08

STYLE OF CAUSE: **ROSA MENESES
DORIS ILIANNA CESPEDES MENESES
and
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: June 29, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** Beaudry J.

DATED: June 30, 2009

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