

Federal Court



Cour fédérale

Date: 20111125

Docket: IMM-5113-10

Citation: 2011 FC 1368

Ottawa, Ontario, November 25, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

CATALINA AVELDANO GARCIA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Catalina Aveldano Garcia applies for judicial review of an August 18, 2010 decision of a Member of the Immigration and Refugee Board's Refugee Protection division (RPD) refusing her refugee claim because her claim to fear kidnappers had no credible basis and that state protection was available.

[2] The RPD identified inconsistencies in Ms. Garcia's claim and disbelieved her testimony. The RPD found there was no credible basis for the claim. The RPD also concluded, while there

was conflicting documentary evidence regarding the situation of domestic abuse victims, that there is effective and adequate state protection in Mexico as the government is making a serious effort to address domestic abuse. The RPD was satisfied that should Ms. Garcia return to Mexico and seek protection from the authorities, protection would be reasonably forthcoming.

[3] Ms. Garcia submits the RPD made a number of errors in fact finding. She also submits the RPD erred in analysing the adequacy of state protection from a domestic abuse perspective when she was a target of criminals seeking to compel her unwilling cooperation in criminal activity by threats and express kidnapping.

[4] For reasons that follow, I am granting the application for judicial review.

Background

[5] Ms. Garcia is a citizen of Mexico from Mexico City. She had three children with her partner, Moises Sanchez Cedillo (“Moises”) before separating in 2006. She worked briefly as a police officer, and then began working as the manager of collection, accounts, and payroll in her ex-partner’s office, which oversaw the administration of condominiums where wealthy residents lived.

[6] Moises told Ms. Garcia that he was kidnapped on July 26, 2008 while he was out with their daughter. He told Ms. Garcia she would have to co-operate with the kidnappers or her family would be in danger. She began receiving threatening phone calls and her car was

vandalized. On July 28, 2008, she met “El Chato” and another man whom she believed may have been Daniel Venegas Martinez, the criminal gang leader. The men demanded she provide financial and banking information concerning the buildings she managed.

[7] Ms. Garcia says she was kidnapped on August 7, 2008, stripped of outer garments, assaulted, and locked in a room. When she regained consciousness, she escaped and went to the police, wearing only a blouse and underwear. She had previously reported the threatening calls but not the damage to her car. After making her report about the kidnapping, the police drove her home. She was kidnapped again on August 10, 2008, at which time she was forced into a car and again threatened if she did not comply. The kidnappers left her off in a far away location.

[8] During the course of these events, Ms. Garcia sought counselling from her psychologist in Mexico to help her deal with the trauma. After the second kidnapping, Ms. Garcia went into hiding and fled Mexico on September 16, 2008.

[9] Ms. Garcia’s hearing took place over two hearings on April 29, 2010 and July 15, 2010. She claimed that she believed she was targeted because she was a woman and vulnerable to be extorted, threatened and victimized. She claimed that women are vulnerable in Mexico and not protected by the police.

Decision Under Review

[10] The RPD found problems with Applicant's credibility, as it found she had given different answers at different times, specifically:

- Her escape from her first kidnapping: the RPD noted that the details as described during the counselling sessions only mentioned her waking up on the ground, whereas her testimony and Personal Information Form (PIF) described an escape through a window;
- Her claim of a lack of state protection: the RPD found that the police were willing to help her by taking her report and driving her home, but the Applicant had not properly waited to see whether the police would help. As such, the RPD found that this diminished the Applicant's credibility;
- Whether she had met Martinez;
- Whether her daughter had been kidnapped as well as her ex-husband since the Applicant had not mentioned in her written narrative that her daughter had been kidnapped as well;
- Whether the IFE database could be used to track Ms. Garcia anywhere in Mexico. The RPD found that the documentary evidence indicated the IFE

information was strictly confidential, and therefore rejected the Applicant's claim that other people could access the IFE. The RPD found that this also diminished her credibility;

- Whether her car had been damaged. The RPD found it unbelievable the Applicant would not report this to the police and would only report it to the insurance company.

As a result, the RPD found there was no credible basis for the Applicant's claim.

[11] The RPD also considered the availability of state protection and found that the Applicant did not provide clear and convincing evidence that state protection in Mexico is inadequate. The RPD noted that the Applicant only made one police report and the police co-operated with her and were willing to support her by filing the report and driving her home. The RPD noted that she did not report the three incidents of vandalism to her car or her second kidnapping to the police. The RPD found that "there is no information to suggest that police were not making genuine and earnest efforts to investigate the claimant's allegations and apprehend the claimant's perpetrator. The claimant's choice to go into hiding and leave Mexico shortly thereafter has diminished any further state protection that may have been forthcoming."

[12] Although the Applicant claimed that women in Mexico are not taken seriously and the police do not protect them, the RPD found that the documentary evidence indicated otherwise. Mexico had enacted civil, administrative, and criminal legislation prohibiting domestic violence

against women. The RPD also briefly noted that Mexico had enacted federal legislation: *The General Law on Women's Access to a Life Free of Violence*. The RPD then extensively discussed the legislation put in place by Mexico to address domestic abuse.

[13] As such, the RPD found no persuasive evidence that the Applicant would face persecution or a risk to her life or to cruel and unusual treatment or punishment or a risk of torture if returned to Mexico.

[14] The RPD therefore concluded that the Applicant was not a Convention refugee or a person in need of protection.

Relevant Legislation

[15] The *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] provides:

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,

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

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) 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

(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.

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 themselves 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...

107. (1) The Refugee Protection Division shall accept a claim for refugee protection if it determines that the claimant is a Convention refugee or person in need of

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 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,

107. (1) La Section de la protection des réfugiés accepte ou rejette la demande d'asile selon que le demandeur a ou non la qualité de réfugié ou de personne à protéger.

protection, and shall
otherwise reject the claim.

No credible basis

(2) If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim.

(Emphasis added)

Preuve

(2) Si elle estime, en cas de rejet, qu'il n'a été présenté aucun élément de preuve crédible ou digne de foi sur lequel elle aurait pu fonder une décision favorable, la section doit faire état dans sa décision de l'absence de minimum de fondement de la demande.

The Refugee Protection Division Rules, SOR/2002-228 provides:

7. The claimant must provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them.

28. (1) All documents used at a proceeding must be in English or French or, if in another language, be provided with an English or French translation and a translator's declaration.

(Emphasis added)

7. Le demandeur d'asile transmet à la Section des documents acceptables pour établir son identité et les autres éléments de sa demande. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour s'en procurer.

28. (1) Tout document utilisé dans une procédure doit être rédigé en français ou en anglais ou, s'il est rédigé dans une autre langue, être accompagné d'une traduction française ou anglaise et de la déclaration du traducteur.

Standard of Review

[16] The standard of review is reasonableness for findings on credibility: *Jiang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 775 at paras 9-10; *Higbogun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 445 at para 21. Reasonableness is also the standard for findings of state protection: *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 at para 10.

[17] Procedural fairness questions are reviewable on a standard of correctness: *Pacheco Silva v Canada (Minister of Citizenship and Immigration)*, 2007 FC 733 at para 8.

Issues

[18] I would frame the issues as follows:

1. *Did the Board err in its credibility finding?*
2. *Did the Board err in its analysis of state protection?*

Analysis

[19] The Applicant says she was the subject of threats and two kidnappings. She says she escaped from the first kidnapping and was released on the second kidnapping. She was the accounts manager of collection, accounts, and payroll in her ex-partner's office, which oversaw the administration of condominiums where wealthy residents lived. She says the purpose of the

kidnappings was to force her to cooperate in providing information from the condominium accounts she managed.

[20] To understand the context of the Applicant's claim of being twice kidnapped, it is necessary to appreciate the phenomenon of express kidnappings in Mexico. The *2009 US Department of State Human Rights Report: Mexico* describes 'express kidnapping' as involving detaining a victim for a short period usually to extract payment. It reported many kidnapping cases are unreported for fear of repercussions and remains a serious problem in Mexico.

[21] The RPD did not believe the Applicant because it decided her testimony about the first kidnapping was not consistent with a translated psychologist's report (Spanish to English). The Applicant had been seeing the psychologist to cope with the trauma of the kidnappings and threats.

[22] The RPD stated:

In essence, the claimant has provided conflicting information related to her kidnapping. Although I did not ask the claimant to explain this contradiction, it is evident that the probative value of this information is diminished to the misinformation provided either in her psychology report or through her testimony and as such is given little credence by me.

[23] The RPD also found other inconsistencies leading to its conclusion of no credible basis.

[24] I consider the RPD's finding with respect to the psychologist's report to be crucial to its finding of no credible basis. The report is important in that it is a report by a professional of what the Applicant said shortly after her kidnapping.

Did the Board err in its credibility finding?

[25] The Applicant takes issue with the RPD's conclusion of no credible basis and vigorously challenges each finding of fact by the RPD.

[26] The Respondent outlines the jurisprudence on section 107(2) of the *IRPA* concerning findings of 'no credible basis' and points out that the Applicant bears the onus of providing credible or trustworthy evidence in support of their refugee claim which the Applicant has failed to do so.

[27] The Respondent submits that the RPD properly met its obligations; the discrepancies were not minor and dealt with the very events central to the Applicant's refugee claim.

[28] The Respondent does not dispute the psychological report that was not fully translated. The Respondent points out that the onus is on the Applicant to provide accurate and complete documents to the RPD, and it is the Applicant's responsibility to provide the translated documents under the *Refugee Protection Division Rules*.

[29] The Respondent concludes that the RPD reasonably determined on the evidence before it there was no credible or trustworthy evidence on which a favourable decision could be made.

[30] In *Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238 (CA),

the Court wrote:

The concept of "credible evidence" is not, of course, the same as that of the credibility of the applicant, but it is obvious that where the only evidence before a tribunal linking the applicant to his claim is that of the applicant himself (in addition, perhaps, to "country reports" from which nothing about the applicant's claim can be directly deduced), a tribunal's perception that he is not a credible witness effectively amounts to a finding that there is no credible evidence on which the second-level tribunal could allow his claim.

(Emphasis added)

[31] *Ouedraogo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 21 also

provides a useful description of no credible evidence. At paragraph 18 the Court sated:

18 In *Rahaman v. Canada (Minister of Citizenship and Immigration)*, the Federal Court of Appeal stated that, if there is no credible evidence on which the Board can rely in acknowledging refugee status, a determination that there is no credible basis is justified:

Finally, while I have not been able to accept the position advanced by counsel for Mr. Rahaman in this appeal, I would agree that the Board should not routinely state that a claim has "no credible basis" whenever it concludes that the claimant is not a credible witness. As I have attempted to demonstrate, subsection 69.1(9.1) requires the Board to examine all the evidence and to conclude that the claim has no credible basis only when there is no trustworthy or credible evidence that could support a recognition of the claim.

For these reasons, I agree with Teitelbaum J. that, having considered the oral and documentary evidence before it, the Board committed no reviewable error in stating that Mr. Rahaman's claim lacked a credible basis. Accordingly, I would dismiss the appeal and answer the certified question as follows:

Whether a finding that a refugee claimant is not a credible witness triggers the application of subsection 69.1(9.1) depends on an assessment of all the evidence in the case, both oral and documentary. In the absence of any credible or trustworthy evidence on which each Board member could have determined that the claimant was a Convention refugee, a finding that the claimant was not a credible witness will justify the conclusion that the claim lacks any credible basis.

[Emphasis in original]

[32] The RPD read the Applicant's description in the psychologist's notes of her escape in a way to believe the Applicant was left injured on the ground which differed from her testimony about escaping through a window. However, the translation was obviously incomplete. The psychologist's notes continue in Spanish to account the details of her escape corresponding to the Applicant's testimony.

[33] The error in translation is obvious on its face. The English translation of the Applicant's August 8, 2008 session with the psychologist is approximately one page in length and ends in mid-sentence. The Spanish original is two and one half pages in length.

[34] The RPD discounted the occurrence of the kidnapping, the core element of the Applicant's claim, on the basis of an incomplete translation and found a non-existent inconsistency since the Spanish report corresponds to the Applicant's testimony. Moreover, the RPD acknowledges its failure to bring the contradiction to the Applicant's attention.

[35] I find the Applicant was not given the opportunity to explain this apparent contradiction.

[36] In *Muthusamy v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 1333 at paragraph 4, Justice Cullen wrote:

Moreover, the Board drew an adverse inference from the lack of proper translation of the Applicant's identification documents. During the course of the hearing, it failed to bring this matter to the attention of the Applicant. It is a well-settled principle of natural justice that one must know the case to meet. If the Board was to rely on the translated identity documents but had concerns about the accuracy of the translation and their authenticity, they had a duty to alert the Applicant. To not do so and then base their decision on an issue to which the Applicant did not reply, is a breach of natural justice.

(Emphasis added)

[37] In *Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937 at paragraph 18, Justice Mosley also found that the RPD should have alerted the Applicant to concerns that it had about the reliability of the Applicant's documentary evidence, which was significant to the Applicant's claim.

[38] The RPD attempts to excuse this error by claiming it to be a minor inconsistency which it could have accepted but not for other inconsistencies, but clearly the RPD used this to show the Applicant's claim lacks a credible basis. The RPD cannot rely on this to ground an adverse finding against the Applicant and then claim that it is too minor to constitute an error in procedural fairness.

[39] The RPD's failure to confront the Applicant with the contradiction and provide her with an opportunity to remedy the error in translation is a reviewable error.

[40] I also find problematic the RPD's use of the "no credible basis" provision. The record, in matters such as the security of the police IFE system, discloses contrary evidence was submitted to the RPD. The RPD must weigh the evidence, choosing one over the other. This does not mean that there is a complete absence of credible evidence for the claim made, particularly given that the substantial aspects of the Applicant's story are corroborated in her PIF, her oral testimony, the police denunciation and the psychological report taken mere days after the reported kidnapping.

State Protection

[41] The Applicant challenges the RPD's finding there is adequate state protection.

[42] The Respondent responds that the Applicant has not met her burden to show that she was unable to obtain state protection. The Respondent points out that the one time the Applicant sought state protection, it was forthcoming because the police registered a report and drove the Applicant home. Instead, the Respondent argues, that the Applicant made no effort to follow up with the police. She went into hiding just one week after she made the police report and left Mexico one month after that. The Applicant must make reasonable efforts to seek state protection: *Romero v Canada (Minister of Citizenship and Immigration)*, 2008 FC 977 at para 25.

[43] The test for state protection is described in *Flores v Canada (Minister of Citizenship and Immigration)*, 2008 FC 723 at paragraph 10:

As noted by the Federal Court of Appeal in *Carillo*, the decision of the Supreme Court in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 stressed that refugee protection is a surrogate for the protection of a claimant's own state. When that state is a democratic society, such as Mexico, albeit one facing significant challenges with corruption and other criminality, the quality of the evidence necessary to rebut the presumption will be higher. 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: *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.).

(Emphasis added)

[44] The Applicant submits that the threshold for state protection is not the same for all democracies, especially in the case of Mexico. The Applicant argues that it is only incumbent on claimants to seek protection if it is seen as being reasonably forthcoming: *Chagoya v Canada (Minister of Citizenship and Immigration)*, 2008 FC 721 at para 5; *Shimokawa v Canada (Minister of Citizenship and Immigration)*, 2006 FC 445 at para 21; *Mendoza v Canada (Minister of Citizenship and Immigration)*, 2008 FC 795 at para 16.

[45] It is unnecessary for me to assess the question of the degree of state protection in Mexico as I conclude the RPD failed to examine whether the police can offer adequate protection to a woman targeted by a criminal kidnapping gang such as the Applicant claims.

[46] The RPD instead focused on Mexico's efforts to assist women who have been subjected to domestic abuse from their spouses. This analysis does not address the Applicant's situation since her persecutors are organized criminals.

[47] The RPD made only cursory reference to *The General Law on Women's Access to a Life Free of Violence* which requires federal and local authorities to prevent, punish, and eradicate violence against women. It failed to have regard to evidence about whether that law has been implemented or delayed notwithstanding there was documentary evidence on that subject. Nor did the RPD consider the problems of kidnapping in Mexico which the *2009 US Department of State Human Rights Report on Mexico* describes as a serious problem in Mexico.

[48] I find the RPD misdirected itself on the question of state protection and failed to conduct a state protection analysis relevant to the Applicant's claim and circumstances.

Conclusion

[49] I conclude the RPD breached procedural fairness when it failed to provide the Applicant an opportunity to explain the apparent contradiction between the incomplete translation of the psychologist's report and her testimony.

[50] I further find the RPD's analysis of state protection was unreasonable as it focused on the issue of state protection with respect to domestic abuse instead of state protection against criminal activity as claimed by the Applicant.

[51] The application for judicial review is granted and the matter will be remitted back for re-determination by a different decision maker.

[52] Neither the Applicant nor the Respondent has proposed a question of general importance and I certify none.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter will be remitted back for re-determination by a different decision maker.
2. I do not certify any question of general importance.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: CATALINA AVELDANO GARCIA v. THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 13, 2011

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

DATED: NOVEMBER 25, 2011

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