

Federal Court



Cour fédérale

Date: 20110211

Docket: IMM-650-10

Citation: 2011 FC 173

Ottawa, Ontario, February 11, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ROCIO ANGELICA FLORES ALCAZAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Rocio Angelica Flores Alcazar (Applicant) applies for judicial review of the Immigration and Refugee Board's Refugee Protection Division (RPD) decision to reject her refugee claim, finding she is not a Convention refugee or a person in need of protection.

[2] Ms. Alcazar is a Mexican citizen who sought protection on the grounds that she feared persecution from her former partner, a police officer who beat her, raped her, and threatened her.

[3] The Refugee Protection Board rejected her claim on the grounds that the Applicant did not make use of the available state protection in Mexico.

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

Background

[5] The Applicant was in a relationship with a Mr. Garcia, a member of the General Headquarters of the Judicial Police of the Office of the Attorney General of Justice in Mexico. The couple began to have problems in July 2006. The Applicant said she wanted to continue her studies but her partner feared that she would meet someone else at university and leave him. He became controlling and violent, beating and forcing sexual relations upon her, as well as locking her in the house.

[6] She was hospitalized on December 2007 for three days from injuries she sustained from his assault. The hospital report noted that the Public Ministry was notified of a “medical legal case.” In March, 2008, she was again hospitalized because of injuries sustained by her partner.

[7] After her hospitalization in 2007, the Applicant went to the Office of the Public Ministry to make a report but they did not take her report because they said they did not have a forensic doctor to examine her and because she did not have a witness. They told her to return another day. She did not. At home, her partner told her the police told him that she had tried to report him. Later, he threatened to kill her if she reported again.

[8] The Applicant eventually fled to live with her aunt in Tamaulipas, but a month later, received a text message from him saying he knew where she was. The Applicant moved to Tula, Hidalgo, but two weeks later saw Mr. Garcia in a nearby park. She then moved to Jalisco, Guadalajara, but learned that Mr. Garcia had told a member of the family that he would be coming to surprise her. She moved again to an aunt's in the Federal District, and then fled to Canada on June 30, 2008, where she made a claim for protection.

Decision under Review

[9] In its decision, rendered on December 31, 2009, the RPD focused on the question of whether there was adequate state protection available in Mexico.

[10] The RPD found that the available documentary evidence indicated Mexico was a democracy with free and fair elections, in effective control of its territory, with no evidence to suggest Mexico was in a state of complete breakdown.

[11] The RPD noted that Mexico had enacted civil, administrative and criminal legislation to prohibit domestic violence. Mexico had also set up various processes for victims to seek protection from their aggressors and to report police misconduct, inefficiency or corruption. The RPD acknowledged that Mexico has had difficulties in the past with addressing domestic violence, but noted:

With respect to the adequacy of state protection for the claimant, however, the Board assigns greater probative value to the documentary evidence. The documentary evidence cited is drawn from a variety of reliable and independent sources, which have no interest in this particular claim. While there are some inconsistencies among sources, the preponderance of the objective evidence

regarding current country conditions suggest that, although not perfect, there is effective and adequate state protection in Mexico, that Mexico is making serious efforts to address the problem of domestic violence and that police are both willing and able to protect such victims.

[12] The RPD found that the Applicant had not exhausted all reasonable courses of action available regarding protection since in a democracy such as Mexico, the Applicant had a responsibility to do more than merely show that she tried to make one report to the police. The RPD also found that the Applicant did not present clear and convincing evidence that the police would not provide adequate protection if called upon to do so.

[13] The RPD noted that even though the Applicant had gone to the Public Ministry once to unsuccessfully attempt to file denunciation, there were processes to seek redress at a higher level. The RPD found that the claimant “did absolutely nothing in the domestic arena to protect herself except to make one attempt at reporting Mr. Garcia at which time she was told to return the next day, but she did not return.” The RPD acknowledged that the Applicant had been scared of Mr. Garcia’s affiliation and influence with the police but noted that it did not stop her mother from making a denunciation against him at a separate time.

[14] The RPD therefore concluded that the claimant did not take all reasonable steps to pursue the available state protection, therefore failing to rebut the presumption of state protection with clear and convincing evidence. As a result, the RPD found that the Applicant was not a Convention refugee or a person in need of protection.

Relevant Legislation

Immigration and Refugee Protection Act, 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,
 (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
 (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,

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 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) 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,

Issues

[15] I would frame the central issue for this application as:

Did the RPD make a reviewable error in coming to its conclusion that the Applicant failed to avail herself of the adequate state protection that was available?

Standard of Review

[16] The standard of review of a decision on the determination of state protection is a matter of mixed fact and law and should be conducted on the standard of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para. 47; *Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 503 at para. 21.

Analysis

[17] The Applicant submits that the RPD made a number of errors in its decision. First, the Applicant submits that the RPD made a factual error in noting that only one attempt to access state protection was made. Second, the Applicant says that the RPD failed to properly address any of the contradictory evidence supporting the Applicant's assertion that adequate state protection was not available. In particular, the RPD was required to look at what was actually happening in the country rather than what the state was endeavouring to put in place; that is, looking at evidence of actual adequate state protection rather than merely looking for evidence of serious efforts. Finally, given

the Applicant's situation as an abused woman, the Applicant submits that the RPD failed to consider the particular circumstances of the Applicant.

[18] The Respondent submits that there is a presumption of state protection, and it is up to the Applicant to provide clear and convincing evidence to rebut this presumption, which she failed to do.

[19] It is clear to me there were two reports made to the Public Ministry regarding the domestic abuse. The hospital report of the Applicant's injuries notes "The P.M. is notified of medical legal case." In addition, the Applicant testified that she also went to the Public Ministry Office once released from the hospital. The RPD made a factual error in ignoring this evidence and concluding that only one report had been made to the authorities when there were two, once by the hospital and once by the Applicant.

[20] The RPD also only noted one incident where the Applicant was hospitalized, despite the evidence showing two separate hospitalizations several months apart.

[21] The foregoing factual errors by themselves are not necessarily determinative. However, the RPD did not consider the Applicant's personal circumstances nor did it properly consider the contrary evidence when it assessed if there was adequate state protection.

[22] The RPD failed to consider important aspects of the Applicant's personal circumstances. The Applicant was a woman who suffered physical and sexual abuse from her partner, a police

officer, and was hospitalized twice. At least two reports were made to the Public Ministry. When she tried to make a report, after the hospital's notice of a "medical legal case", not only was she was told to come back another day but her abusive partner was apparently informed by the police of her attempt to report him. He subsequently threatened her against reporting again.

[23] Jurisprudence has questioned what purpose would be served in requiring abused women to return to the police if the first time is not successful: *Pereyra Aguilar v Canada (Minister of Citizenship and Immigration)*, 2010 FC 216, at para. 36. Here, there arises the issue of further harm to the Applicant by her abuser if she tries to report to the police, and it must be addressed.

[24] The RPD considered it significant that, after the Applicant left, the Applicant's mother filed a denunciation about Mr. Garcia with the authorities because of his continued attempts to locate the Applicant by harassing the mother. The RPD fails to make any distinction between the differing circumstances of the Applicant's mother and the Applicant. The Applicant is the focused target by Mr. Garcia whose abuse and harassment is an indication of his controlling obsession, whereas the mother is not.

[25] While deference is to be given to the RPD in its findings of state protection, the RPD's analysis of the documentary evidence regarding available state protection is problematic. The RPD chose to assign "a greater probative value to the documentary evidence than to the claimant's opinion with respect to the adequacy of state protection." It is an error to discount the Applicant's evidence merely because of her interest in the outcome; the RPD must give reasons for discounting

her evidence: *Torres Sanchez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1336 at para. 56.

[26] More significantly, the RPD must address contradictory evidence that state protection is not adequate: *Toriz Gilvaja v Canada (Minister of Citizenship and Immigration)*, 2009 FC 598 at para. 38. This is especially important in light of the Applicant's evidence the police had apparently leaked to Mr. Garcia information about her attempt to report him. While the RPD did acknowledge there was contradictory evidence, it did not explain why it chose to discount contradictory evidence, included in an IRB's Research Directorate and a 50-page Amnesty International report.

Conclusion

[27] In my view, the RPD relied on generalizations when it found that adequate state protection was available to the Applicant. The RPD failed to assess the Applicant's individual circumstances and chose to rely on the documentary evidence about the state's efforts to provide state protection, rather than evidence of what state protection was actually available to a person in the Applicant's circumstances.

[28] I would grant this application for judicial review

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted.
2. No order for costs is made.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-650-10

STYLE OF CAUSE: ROCIO ANGELICA FLORES v MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 5, 2010

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

DATED: February 11, 2011

APPEARANCES:

Daniel M. Fine FOR THE APPLICANT

Neeta Logsetty FOR THE RESPONDENT

SOLICITORS OF RECORD:

Daniel M. Fine FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

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