

Federal Court



Cour fédérale

Date: 20110708

Docket: IMM-5599-10

Citation: 2011 FC 860

Ottawa, Ontario, July 8, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JANET GRACIELA JARA GUERRERO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, a citizen of Peru, seeks judicial review of a decision made on August 18, 2010 of the Refugee Protection Division of the Immigration and Refugee Board, wherein it was determined that she was not a Convention refugee or a person in need of protection.

[2] For the reasons that follow, the application is allowed and the matter remitted for a fresh determination by a differently constituted panel.

BACKGROUND

[3] The applicant based her refugee claim on persecution by reason of her sexual orientation. She says that in December 1999, she was seen by a male co-worker coming out of a gay bar in downtown Lima. This resulted in her being identified as a lesbian and being ostracized at her place of work.

[4] In March 2003, the applicant came to Canada to visit her family. During her visit, she had an accident and sustained a serious injury that kept her here until September 2006. During that time, the applicant began to live more openly as a lesbian. She applied for permanent residence in September 2006 and returned to Peru awaiting the process of her application. The application was denied in March 2007. That same year the applicant began to socialize more in Peru with women who shared her orientation. In December 2007, the applicant began to receive anonymous threatening phone calls from male callers. She reported the calls to the police but the police referred her to the phone company. She says that she was also harassed at work by her boss.

[5] On July 29, 2008, the applicant was assaulted by four males on her way home from a party where she had been celebrating a small-scale Gay Pride parade. The attackers called her a “dyke” and attempted rape so as to “teach her how to be a woman”. They threatened her sister and nephew. The applicant tried to report the incident to the police the next morning but the police officer laughed and would not initiate any action. The following day, the applicant returned to the police station and reported the incident to the commanding officer. He too refused to take the report. She

contacted a lawyer who advised her she would be wasting her time and money because the courts were homophobic. The claimant had a US visa and her sister helped her purchase an airline ticket to Buffalo. She then re-entered Canada and claimed refugee status on July 29, 2008.

DECISION UNDER REVIEW

[6] The Board held that the determinative issue in this case was one of state protection. In considering the documentary evidence, it concluded that Peru was in a position to offer state protection and that the applicant could have pursued other avenues but chose to leave Peru a month after going to the police. It acknowledged that there was some contradictory evidence in the record with regard to Peru's treatment of homosexuals but found that the Constitutional Court is attempting to address such issues and that the homophobia in Peru is a problem faced by all citizens of Peru.

ISSUES

[7] The issues raised by the applicant are as follows:

1. Did the Board err in determining that the applicant's fear only arose as a result of an incident on June 29, 2008?
2. Was the Board's section 97 analysis reasonable?
3. Did the Board err by failing to address, analyze and distinguish contradictory evidence supporting the applicant?
4. Did the Board err in properly applying the *Gender Guidelines*?
5. Was the Board's finding on state protection reasonable?

[8] In my view, the determinative issues are whether the Board failed to properly consider the documentary evidence relating to the persecution of gays in Peru and whether its finding on state protection is reasonable.

ANALYSIS

[9] Questions regarding state protection are mixed questions of fact and law are to be decided on the reasonableness standard of review: *Zepeda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, [2009] 1 F.C.R. 237 at para. 10.

[10] In the case at bar, the applicant tried to seek protection by going twice to the police but received no assistance and was treated with derision. The applicant pursued the matter further, calling a lawyer and telling him the story. In oral testimony she said she called the lawyer because she wanted more information about what she could do in this situation and how to protect her rights. Because she did not have a police report, the lawyer advised her not to waste her time and money. In addition to stating that the courts were homophobic, he expressed concern in representing her due to the nature of the claim and the effect it would have on his professional reputation.

[11] The Board acknowledged the applicant's effort to contact the police but found "there were other avenues she could have pursued". The Board specifically named the Ministries of Interior and Defence, the Public Ministry and the Ombudsman. It noted also that there are many non-governmental organizations that fight against discrimination based on sexual orientation. That in itself is a telling factor in considering the country conditions. While Peru appears to have made progress in recognizing the place of gay persons in its society, the evidence indicates that discrimination remains a serious problem.

[12] It is difficult to understand the Board's finding that the problem of homophobia is faced by all Peruvian citizens as opposed to those within the class of gays. The Board does not appear to have considered the reaction of the authorities to the applicant's complaints as an illustration of the extent of the problem and how it might limit access to state protection.

[13] In considering the documentary evidence, the Board noted at paragraph 35 of its reasons that "Corruption and impunity remained problems" in the country. In particular, the Board acknowledged that the Ministries of Interior and Defence employ internal mechanisms to investigate security force abuses and are subject to inquiries from the Public Ministry and the Ombudsman. The Board noted that access to evidence in these investigations is not always forthcoming.

[14] It is not clear why the Board considered it necessary to cite these examples to illustrate efforts to counter corruption as the issue was whether state protection would be forthcoming from institutions alleged to be homophobic. In any event, they are the very institutions the Board suggested the applicant seek out for assistance. In light of its findings, it was unreasonable for the Board to deem such options to be viable in securing state protection.

[15] Although the respondent is correct to assert that the Board is not obliged to refer to each and every piece of contrary evidence (*Gavoci v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 207), the letters from the applicant's friend, sister and the psychologist's report should have been more than mentioned in passing. As the decision reads, it is not clear why such pieces of evidence were discounted; there is no analysis to offer an explanation. See: *Cepeda-Gutierrez v.*

Canada (Minister of Citizenship and Immigration) (1998), 157 F.T.R. 35 where Justice John Evans, as he then was, set aside the tribunal's decision when psychological evidence was not considered. This is especially so because they corroborated the applicant's claim and gave contrary accounts of the situation in Peru to that available in some of the documentary evidence. Although not all were necessarily persuasive, they were nonetheless relevant. As such, the Board's rationale for according no weight to this evidence should have been explained.

[16] No questions for certification were proposed.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is granted and this matter is remitted for reconsideration by a differently constituted panel of the Refugee Protection Division. No questions are certified.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5599-10

STYLE OF CAUSE: JANET GRACIELA JARA GUERRERO
and
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 5, 2011

REASONS FOR JUDGMENT: MOSLEY J.

DATED: July 8, 2011

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