Ottawa, Ontario, January 27, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

LAURA GONZALEZ AGUILAR

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I.   INTRODUCTION

[1]   This judicial review contains a difficult twist: while the decision contains almost exclusively

a detailed and reasonable analysis of state protection in Mexico, it states as its conclusion that there

is no nexus between the Applicant's claim and one or more of the Convention grounds under

section 96 of the *Immigration and Refugee Protection Act* (IRPA). The Respondent concedes that

the nexus finding is wrong and attributes it to a "cut and paste" error in the preparation of the decision. The difficulty is that the reasons, which are focussed entirely on state protection, do not accord with the conclusions upon which the application for refugee status and protection were dismissed. The problem faced by the Court is determining whether this application for judicial review should be granted with the likelihood that such a conclusion is likely to be largely a matter of form overtaking substance.

[2]   The substance of this case is an application for review of a decision of the Refugee Protection Division (Board) which determined that the Applicant is neither a Convention refugee nor a person in need of protection.

II.   FACTS

[3]   The Applicant, a citizen of Mexico, alleged that she became targeted by her ex-boyfriend with whom she had an eight-month relationship starting in July 2005. She alleged that he had become physically and psychologically abusive to her. She further alleged that she had been physically assaulted by him in March 2006, which resulted in fractured ribs and bruising which required her hospitalization for two days.

[4]   Although the Applicant refused to see her ex-boyfriend after March 2006, she claimed that he continued to harass and stalk both her and her friends. Even after she fled to another location to live with her grandmother, the ex-boyfriend appeared there and continued to issue threats. The Applicant left Mexico for Canada in September 2006, and made her refugee claim in March 2007.

[5]   The Board, having set out the facts, began its analysis with a consideration of the existence

of state protection in Mexico. The Board first examined the guiding legal principles and the burden

which rests on an applicant.

[6]   The Board then went on to consider the particular aspects of state protection in Mexico,

noting the country's development as a democracy with a relatively independent and impartial

judiciary, that Mexico controls its territory, has a functioning security or police force, and that it has

both a system for and a practice of dealing with complaints against police misconduct. Finally, the

Board examined efforts made by that country to enhance the integrity and training of its police

force.

[7]   Having considered the general evidence of state protection, the Board went on to consider

the Applicant's actions in not making a report to the police other than after the first incident of

abuse, at which point the police had informed her they needed witness verification in order to act.

The Board further considered the absence of evidence that the police would not investigate a

complaint and the Applicant's failure to approach the police again about other incidents where there

were witnesses to buttress her complaint. The Board then considered all of these facts in light of

evidence of other problems with police corruption in Mexico.

[8]   The Board reached a finding that there was adequate state protection in Mexico and that the

problems with police corruption or inaction are being addressed. The Board noted that its

conclusions were supported by decisions of this Court upholding findings of state protection in

Mexico.

[9]   Having set out this analysis of state protection, the Board went on to make its final

conclusions, which created the problem in this case. The conclusion of the decision reads as

follows:

> <u>For all these reasons, the panel finds that there is no objective basis
> for the claimant's alleged fear.</u>
>
> CONCLUSION
>
> Having considered all of the evidence, including the submissions of
> counsel, the relevant provisions of the (<u>IRPA</u>) and to the
> jurisprudence on which this panel has relied, the panel finds that the
> claimant does not have a well-founded fear of persecution pursuant
> to section 96, <u>because she has failed to establish a nexus to one of the
> five convention grounds.</u>
>
> The panel is then tasked with considering the applicability of
> section 97 of the <u>IRPA</u>. The panel, <u>by the same reason</u>, concludes
> that with respect to a risk to life or a risk of cruel and unusual
> treatment or punishment, or danger of torture, this claim must also
> fail.
>
>   [Emphasis added]

[10]   The Court is satisfied that the state protection analysis and finding is reasonable on the basis

of the evidence before the Board, but that the Board's conclusion is not. The Board gave no

consideration to section 96, much less to the issue of a nexus between the Applicant's claim and any

of the Convention grounds.

[11]   The problem with the section 96 conclusion is compounded in the section 97 conclusion by the reference to "the same reason". This is potentially a reference to the nexus issue (because it uses the singular), or potentially a reference to "reasons" (which refers to state protection) in the final paragraph immediately before the "Conclusions". It is therefore unclear on what basis the Board reached its s. 97 conclusion.

[12]   The Respondent's submission that the "Conclusions" were a "cut and paste" error of transposing conclusions from another case to this decision is a plausible one – perhaps the most plausible one. The fact remains that mistakes, if this is one, do have consequences. Left uncorrected, the "Conclusions" stand as the basis for the Board's decision.

[13]   The Court is reluctant to send the matter back in a situation where the result is likely to be the same, where the core of the decision is sustainable, and where one can see what the true intent of the decision maker was. The Court also recognizes that the Board does not have the benefit that courts have of correcting for errors and omissions.

[14]   However, in this case, the errors are so egregious, the explanation for the errors so speculative, and the consequences to the Applicant so important that it is best to avoid any potential injustice by granting this judicial review. This is a case that stands on the very cusp of "form over substance," but the worst mischief that may be done by referring the matter back is to cause some delay in resolving the Applicant's case. The mischief created by letting the decision stand is that

there is a conclusion which bears no resemblance to the analysis in the decision and unfairly reflects the Applicant's case.

[15]   Therefore, this application for judicial review will be granted, the decision of the Board will be quashed and the matter is to be remitted back to the Board for a new determination before a different member. There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is

granted, the decision of the Board is quashed, and the matter is to be remitted back to the Board for

a new determination before a different member.

"Michael L. Phelan"
Judge

DOCKET: IMM-3316-08

STYLE OF CAUSE: LAURA GONZALEZ AGUILAR

                                              and

                                              THE MINISTER OF CITIZENSHIP AND
                                              IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 21, 2009

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

DATED: January 27, 2009

APPEARANCES:

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