Federal Court | Cour fédérale

Date: 20111219

Docket: IMM-2726-11

[UNREVISED ENGLISH CERTIFIED TRANSLATION] **Citation: 2011 FC 1443**

Ottawa, Ontario, December 19, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

MACIEL MARTINEZ LUCAS
MARIA MARTHA OSORNO DE SOSA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), of a decision dated April 1, 2011, in which the Refugee Protection Division of the Immigration and Refugee Board (the panel) determined that the applicants were neither refugees nor persons in need of protection within the meaning of sections 96 and 97 of the Act.

I. Background

A. Factual Background

[2] The principal applicant, Maria Martha Osorno de Sosa (the female applicant) and her spouse, Maciel Martinez Lucas (the male applicant) are Mexican citizens who are seeking refugee protection.

[3] The female applicant claims she is the victim of assault and of repeated sexual harassment by an officer of the Mexican Federal Police who frequented her tortilla stand located in Mexico City. The female applicant identified this individual as “Benito”.

[4] On May 27, 2007, the female applicant alleges that, following sexual advances on the part of Benito, she threw a hot cauldron of tortillas containing a small amount of oil between Benito’s legs, burning him. Benito purportedly reacted by insulting and threatening the female applicant. After the incident, the female applicant claims that Benito continued to visit the stand, becoming increasingly vulgar and threatening towards her.

[5] The female applicant states that, on June 28, 2007, a drunken Benito came to the stand and fondled her. She claims that Benito wanted her to get into his vehicle. The male applicant came to the aid of the female applicant, but Benito took out a firearm, fired shots in the air and threatened the male applicant.

[6] Fearing for her life, the female applicant fled to her mother’s.

[7] On July 14, 2007, after making a cash withdrawal, the female applicant was assaulted and robbed by two men. An hour after the robbery, the female applicant alleges that the same two men came to her home, identified themselves police officers and asked to speak with the male applicant.

[8] On July 15, 2007, the same police officers – this time accompanied by Benito – visited the female applicant's mother's house. They insisted upon seeing the female applicant. She also claims that they threatened her mother and said they would return with a search warrant to search the house.

[9] On July 16, 2007, the female applicant went to the public prosecutor and reported these incidents. The following day, she alleges that Benito called her, accused her of having reported him, and threatened to kill her.

[10] Consequently, the female applicant fled to the male applicant's mother's house. The two of them left Mexico for Canada, the male applicant on July 4, 2007, and the female applicant on August 4, 2007. Maciel Martinez Lucas and Maria Martha Osorno de Sosa claimed refugee protection upon their arrival at the airport of Montréal.

B. Impugned Decision

[11] In its decision dated April 1, 2011, the panel determined that the determinative issues were the applicants' credibility and state protection.

[12] On the one hand, as far as credibility is concerned, the panel noted a number of contradictions and omissions in the female applicant's testimony and determined that she was not credible.

[13] On the other hand, with regard to the issue of state protection, the panel found that there was adequate state protection. The panel noted that democratic states are presumed to be able to protect their citizens. Pursuant to *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, [1993] SCJ No 74, this presumption can only be rebutted by means of "clear and convincing" evidence of the state's inability to provide protection. The panel determined that the applicants did not submit any evidence to that effect. In addition, the panel adopted the reasoning of the persuasive decision by the Refugee Protection Division in file TA6-07453 (November 26, 2007).

[14] The panel further noted that the female applicant filed a complaint with the public prosecutor on July 15, 2007, and subsequently left the country on August 4, 2007 – only a little more than two weeks later. The panel observed that she did not follow up, she did not consult a superior officer, and she did not go to the federal police or file a complaint at the Human Rights Commission. Although the female applicant had explained that she had not taken these steps because she was afraid, the panel was of the view that she could not rely on subjective fear to rebut the presumption of adequate state protection. Consequently, the panel decided that the female applicant had not made the requisite efforts to seek protection in her country. The panel therefore rejected the claim.

II. Issue

[15] The only issue in this application for judicial review is the following:

> *Did the panel err in its assessment of the principal applicant's credibility and of Mexico's state protection?*

III. Applicable Statutory Provisions

[16] Sections 96 and 97 of the *Immigration and Refugee Protection Act* read as follows:

REFUGEE PROTECTION, CONVENTION REFUGEES AND PERSONS IN NEED OF PROTECTION	NOTIONS D'ASILE, DE REFUGIE ET DE PERSONNE À PROTEGER
Convention refugee	Définition de « réfugié »
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 themself 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.	**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.
Person in need of protection	Personne à protéger
97. (1) A person in need of protection is a person in	**97.** (1) A qualité de personne à protéger la personne qui se

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 themself 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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

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,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au

as being in need of protection is also a person in need of protection.	Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

IV. Applicable Standard of Review

[17] It is settled law that the panel's findings with regard to credibility and state protection are reviewable on a reasonableness standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]; *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] FCJ No 584 [*Hinzman*]; *Aguebor v Canada (Minister of Employment and Immigration)* (FCA), (1993) 42 ACWS (3d) 886, 160 NR 315 [*Aguebor*]). Accordingly, it is up to the Court to assess whether the panel's decision has "qualities that make it reasonable", given that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at para. 47).

V. Arguments

[18] The applicants argue that the panel's findings with regard to the female applicant's credibility and state protection are unreasonable.

[19] First, regarding the issue of credibility, the applicants submit that the panel failed to consider some of the evidence in the record, including the complaint filed by the female applicant with the public prosecutor in Mexico. In addition, the applicants assert that the panel's decision was solely based on minor and peripheral details in the female applicant's testimony and that these details were

not malicious omissions, but were innocent omissions. Pursuant to *Djama v Canada (Minister of Employment and Immigration)* (FCA), [1992] FCJ No 531, the applicants maintain that "[i]n making findings of adverse or lack of credibility the Member must be certain that the evidence is inconsistent, rather than just vague" (Applicant's Record, p. 45). The female applicant argues that the respondent clearly exaggerated the import of a few apparent contradictions, hesitations or vague statements in her testimony, given her lack of education. Moreover, the applicants suggest that the panel failed to take into account the poor quality of the translation of the female applicant's narrative in her Personal Information Form (PIF), particularly her answer to question 31, and the inherent difficulties of translating specific Mexican slang expressions ("Chingara") into French.

[20] As to the issue of state protection, the applicants claim that the panel's analysis is patently wrong in light of the information found in the National Documentation Package on Mexico. The female applicant cited the lack of protection for women victims of sexual violence in Mexico, and the fact that the panel omitted to address this evidence, particularly Exhibits 2.4, 5.2, 9.1 and 10.1. The female applicant also alleges that she could not have followed up on her complaint without putting her life at risk. She also challenges the panel's finding that Mexico is a fully democratic state. Finally, the female applicant also takes issue with the fact that the panel adopted the reasoning of the decision in file TA6-07453 because that case did not involve a situation in which an officer of the judicial police and his accomplices were the persecutors of a woman who was being sexually harassed.

[21] For its part, the respondent argues that the panel's decision was entirely reasonable. On the issue of credibility, the respondent asserts that the female applicant had not demonstrated that she

had been threatened and assaulted by an individual identified as “Benito” because there were a number of flaws in her PIF and in her narrative. The respondent reiterates the panel’s findings to the effect that the female applicant’s testimony was contradictory and confused on several key points. The respondent claims that the explanations given by the female applicant with regard to some of her omissions were not reasonable. In addition, in opposition to the female applicant’s argument that the panel had an obligation to address the issue of the [TRANSLATION] “problem” with the translation of the first PIF, the respondent explains that this subject was dealt with at length at the hearing before the panel (Tribunal Record, pp. 193 *et seq.*) and that the panel was aware of the changes to the female applicant’s narrative and the reasons for those corrections.

[22] Regarding the issue of state protection, the respondent states that the female applicant, by filing a single complaint without following up on it, failed to avail herself of the protection of the Mexican authorities before leaving the country for Canada (see *Castillo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 134, [2011] FCJ No 191, at para. 29). Moreover, the respondent notes that the applicants did not follow up on this complaint during the three (3) and a half years prior to the hearing on August 1, 2011. Although the applicants claim that the panel [TRANSLATION] “failed to take into account” the complaint filed with the public prosecutor, the respondent argues that this argument has no merit and refers to paragraphs 11, 24, 28 and 30 of the panel’s decision. The respondent maintains that the female applicant has not succeeded in rebutting the presumption of adequate state protection. The respondent notes that Federal Court jurisprudence indicates that Mexico is recognized as a democratic country that is capable of protecting its citizens, in spite of the fact that such protection may not always be perfect. The respondent reiterates the panel’s finding that subjective belief is insufficient to rebut the presumption of state protection.

Finally, the respondent argues that it was open to the panel to cite and to adopt the reasoning of TA6-07453, dated November 26, 2007 (*Mendoza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 648, [2010] FCJ No 788, at para. 38, [*Mendoza*]).

VI. Analysis

[23] The parties debated the credibility issue at the hearing. The Court notes that the credibility of evidence is a question of fact and the Court must accord considerable deference to the panel's findings on this issue (*Aguebor*, above). However, the deference owed by the Court is not absolute. In fact, if the panel makes unreasonable findings, the Court's intervention would be warranted. However, if the panel's findings are reasonable, the Court will not intervene. It should be kept in mind that the mere fact that the applicant disagrees with the panel's findings is not sufficient to warrant the Court's intervention.

[24] In the present case, the Court is of the opinion that, in light of the record, the evidence and the parties' findings, the panel's determination on the issue of credibility, in spite of the male applicant's disagreement, is reasonable for the following reasons:

1. The female applicant stated that the judicial police officers had addressed Benito as commandant. However, this fact appears nowhere in her first narrative. She explained this inconsistency by saying that she did not think this was important and that it was her former counsel's fault. On another occasion, she stated that it was her former counsel's interpreter's fault.

2. The female applicant testified that police came to her mother's house and made death threats against her as well as references to "Chingara". However, this fact also appears nowhere in her narrative. The female applicant had no reasonable explanation on this point and the Court did not find the arguments by the respondent's counsel to be convincing.

> 3. The following question was put to the female applicant by the immigration officer and the panel: [TRANSLATION] "What is it that you fear if you were to return to your country of origin?". She answered that she feared the judicial police. The panel noted that she did not mention Benito. The panel questioned her on this point and she could not provide an explanation for this omission.
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> 4. Finally, the panel made the observation that the female applicant had testified that Benito had a radio and a pistol and that his car had no licence plate. However, she also neglected to include these facts in her narrative. Once again, the female applicant did not provide an explanation.

[25] Having said that, the Court is of the view that the panel did err in its analysis of the issue of state protection for the reasons that follow.

[26] At paragraph 31 of the decision, the panel wrote that [TRANSLATION] "the panel reviewed the reasons in the persuasive decision by the Refugee Protection Division (RPD) in file TA6-07453, dated November 26, 2007, and adopts its reasoning with regard to the availability of state protection". In fact, the panel simply incorporated by reference the decision in file TA6-07453 (Tribunal Record, p. 33). In so doing, the panel failed to explain the content of the decision in file TA6-07453, failed to draw any parallels between that case and the present case and/or failed to provide the balanced approach that was required. The panel erred by taking this shortcut and adopting such an expeditious approach.

[27] In *Badilla v Canada (Minister of Citizenship and Immigration)*, 2005 FC 535, [2005] FCJ No 661 [*Badilla*], Madam Justice Layden-Stevenson, as she then was, citing the Federal Court of Appeal, stated:

> [30] In *Koroz v. Canada (Minister of Citizenship and Immigration)* (2001), 261 N.R. 71 (F.C.A.), the Federal Court of Appeal determined that a panel may

> "adopt the same reasoning of another panel" faced with the same documentary evidence as a basis for finding the existence of an internal flight alternative in the same country. The Court noted that this "does not mean that a panel can blindly adopt factual findings of other panels". Where the question is one of fact-finding "concerning general country conditions of approximately the same time, however, a panel may rely on the reasoning of an earlier panel on the same documentary evidence". Finally, the Court stated that where "the analysis of one panel on the same evidence on such a question commends itself to a later panel, there is no legal bar to the second panel relying on it".
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> [31] This reasoning has been held to apply equally to the issue of objective fear or state protection: *Olah v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 382; *Piber v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 769; *Zambo v. Canada (Minister of Citizenship and Immigration)* (2002), 23 Imm. L.R. (3d) 267 (F.C.T.D.).
>
> [Emphasis added.]

[28] Similarly, in *Canada (Minister of Citizenship and Immigration) v Abdul*, 2009 FC 967, [2009] FCJ No 1178 [*Abdul*], the same reasoning was adopted by Justice Kelen:

> [50] Case law reveals that appending part of the reasons of one panel to the reasons of another panel is a shortcut that should not be used (*Koroz v. Canada (MCI)*, (2000) 261 N.R. 71, 9 Imm. L.R. (3d) 12, per Justice Linden, at para. 4). Boilerplate-type reasons may give rise to some suspicion (*Mohacsi v. Canada (MCI)*, [2003] F.C.J. No. 586 (QL), per Martineau, at para. 64).
>
> [51] Before a panel can safely rely on the findings in another panel on state protection, the panel must first be satisfied that the facts are sufficiently similar and it must make sure that no evidence that was overlooked in the other panel's decision will be similarly overlooked in the current decision (*Ali v. Canada (MCI)*, 2006 FC 1360, 58 Imm. L.R. (3d) 202, per Justice Gauthier, at para. 25).
>
> [52] On the other hand, a panel may adopt the reasoning of another panel with respect to country conditions or internal flight alternatives when the documentary evidence is identical, but care must be taken to avoid blindly following the factual findings of other panels (*Koroz*, *supra*, at para. 3).
>
> [53] A panel may also adopt the structure of another panel's decision and make some clerical errors with respect to the subject person's qualification and personal details, as long as those mistakes are corrected in later part of the decision, and as long as "the specific factual circumstances of the respective claimants in each case are fully explored and considered in the board's reasons"

(*Gil v. Canada (MCI)*, 2005 FC 1418, per Justice Layden-Stevenson, at para. 13).

[Emphasis added.]

[29] More specifically, in cases where the issue also involves the persuasive decision in TA6-07453 (*Castillo; Mendoza*), the Court has stated that there has to be "similar factual evidence" in order to be able to apply the reasoning of persuasive decisions:

> [38] In my view, the Board's decision is in error because it cannot be reconciled with the Board's persuasive decision on the availability of state protection in Mexico (TA6-07453) and with the many Board decisions that explicitly or implicitly rely on it. In that decision, the Board found that Mexico is a democracy, with a functioning "preventive" police force and judiciary, that it faces issues relating to corruption and narco-trafficking, but that the state is taking "serious efforts" to combat these issues. In the decision under review, the Board held that kidnapping and extortion by police, is such a "prevalent problem in Mexico" that the risk of being victimized by the police, as the applicants were in this case, is a risk faced generally by others in Mexico.
>
> …
>
> [40] Decisions of one Board member are not binding on another; however, the laudable goal of administrative consistency requires that similar factual and legal situations should be treated in a consistent manner. This is especially so in the case of "persuasive decisions." The board states that "[t]he use of persuasive decisions enables the IRB to move toward a consistent application of the law in a transparent manner." The Board does not require its members to explain why a persuasive decision was not used. Nonetheless, if a persuasive decision is relevant to a material aspect of a case and the Board, faced with similar factual evidence as in the persuasive decision, departs markedly from the conclusion in the persuasive decision, then some level of explanation is required for that departure. None was provided in this case.
>
> [Emphasis added.]

[30] Therefore, *a contrario*, where there are relevant differences between a persuasive decision and the panel's decision, but where the panel refers to the same persuasive decision, it must provide an explanation for its decision.

[31] If we compare the decision in file TA6-07453 with that of the panel, the Court notes that the context in the decision in file TA6-07453 (Tribunal Record, p. 33) is different from that in the present case. In actual fact, the decision in file TA6-07453 deals with state protection in Mexico in the context of corruption, while in the present matter, the context is sexual harassment.

[32] Thus, given this significant factual difference between the decision in file TA6-07453 and the present case (corruption and sexual harassment), it was not open to the panel to disregard certain documents in the record on violence against women in Mexico. For example, document 2.4 entitled "Canada. February 2007. Immigration and Refugee Board of Canada (IRB). Mexico: Situation of Witnesses of Crime and Corruption, Women Victims of Violence and Victims of Discrimination Based on Sexual Orientation" and document 5.2 of the package entitled "Amnesty International (AI), August 2008. Women's Struggle for Safety and Justice: Violence Against Women in the Family in Mexico. (AMR 41/021/2008)" are not referred to at all in the panel's decision or in the decision in file TA6-07453.

[33] Consequently, the Court is of the view that the panel erred by simply incorporating by reference the TA6-07453 decision without any mention of the circumstances specific to both the TA6-07453 decision and the panel's decision. The panel therefore erred by overlooking evidence that was similarly overlooked in the TA6-07453 decision, - i.e. the context of violence against women in Mexico – evidence that was important.

[34] In fact, while a refugee claimant cannot rely solely on documentary evidence of flaws in the justice system of their country of origin to claim refugee protection on the basis of inadequate state protection or on the basis of subjective fear alone (*Castaneda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 393, [2010] FCJ No 437), a panel is not exempted from its obligation to mention or acknowledge important and relevant documents in its decision (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264) and to take a balanced approach in a reasoned decision to which the female applicant was entitled.

[35] In the circumstances, the Court concludes that by simply and automatically incorporating by reference the decision in file TA6-07453 – without more – the panel's finding with regard to the availability of state protection is unreasonable and cannot stand.

[36] For all these reasons, the Court's intervention is therefore warranted. There are no questions for certification.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be allowed and that the matter be referred back for redetermination before a differently constituted panel. No question is certified.

"Richard Boivin"
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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