

Date: 20070831

Docket: IMM-510-07

Citation: 2007 FC 863

Ottawa, Ontario, August 31, 2007

Present: The Honourable Mr. Justice Beaudry

BETWEEN:

**MIGUEL CARLOS GONZALEZ MORALES and
MARIA DOLORES GOMEZ BASANTA**

Applicants

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review filed pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), against a decision dated January 12, 2007, by Sylvie Lévesque of the Immigration and Refugee Board, Refugee Protection Division (the panel), dismissing the refugee claim of the applicant and his wife, both citizens of Mexico.

I. Issues

[2] Is the panel's decision patently unreasonable?

[3] The answer to this question is positive. The application for judicial review will therefore be allowed.

II. Factual background

[4] Engineer by profession, the primary applicant is claiming refugee status in Canada following death threats and assaults against him and his wife because he led an environmental project to help a group of Mexican peasants keep their land. This project was led by the environmental agency OLLIN CABAN.

[5] The applicant alleges that Commandant Orozco Mejia asked agents of the Federal Investigation Agency (AFI) to assassinate him as well as his wife in order to protect the economic interests of Deputy Emilio Chuayffet Chemor who wanted to confiscate the peasants' land. Some of these peasants told the applicant that AFI agents had asked them for information about him.

[6] In October 2005, the applicant received three telephone calls threatening to kill him if he did not give up the activities with OLLIN CABAN in regard to Deputy Chuayffet Chemor's purchase of lands belonging to peasants. In November 2005, he received another similar call.

[7] The next day, the applicant filed a complaint with the police. There was no follow-up. He also sent an article to several newspapers for publication in order to explain the problem with the sale of the Mexican peasants' land as well as the death threats he had received.

[8] He reported that on two occasions he had been beaten by AFI members and that he had to be treated for his injuries. On November 18, 2005, two individuals in AFI uniforms arrested him and assaulted him with blows, forbidding him to continue his activities because they displeased Commandant Mejia.

[9] On December 7, 2005, his wife narrowly escaped two individuals who tried to abduct her. Following this last incident, the couple left Mexico and claimed refugee protection upon their arrival in Canada on December 12. The applicants are now parents of a child born in Montréal on December 2, 2006.

III. Impugned decision

[10] The panel refused the refugee claim, finding that the applicants lacked credibility. It said that they invented the story in order to obtain refugee status in Canada. The panel did not believe that Mr. Morales had ties with OLLIN CABAN since there was nothing written on his membership card and because he did not know the address of the environmental group. As a result, it rejected all of the documents filed by Mr. Morales.

IV. Preliminary objections

[11] The respondent submits that the affidavit filed by the applicants is irregular and does not comply with paragraph 10(2)(d) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, (the Rules), which provide as follows:

**PERFECTING APPLICATION
FOR LEAVE**

10. (1) The applicant shall perfect an application for leave by complying with subrule (2)

...

(2) The applicant shall serve on every respondent who has filed and served a notice of appearance, a record containing the following, on consecutively numbered pages, and in the following order

...

(d) one or more supporting affidavits verifying the facts relied on by the applicant in support of the application, and

...

**MISE EN ÉTAT DE LA
DEMANDE D'AUTORISATION**

10. (1) Le demandeur met sa demande d'autorisation en état en se conformant au paragraphe (2):

[...]

(2) Le demandeur signifie à chacun des défendeurs qui a déposé et signifié un avis de comparution un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement:

[...]

d) un ou plusieurs affidavits établissant les faits invoqués à l'appui de sa demande,

[...]

[12] The respondent alleges that paragraphs 4 and 5 do not establish facts but rather present an argument against the impugned decision. According to the case law established by this Court, the parties' arguments are inserted in the memorandum. The affidavits must be limited to the facts to support the allegations raised (see *Bakary v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1418, 2006 FC 1111, at paragraph 5; *Ray v. Canada*, [2003] F.C.J. No. 1226, 2003 FCA 317, at paragraph 14; *Fabiano v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1510, 2005 FC 1260, at paragraph 25).

[13] Relying on the decision by the Federal Court of Appeal in *Metodieva v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 629 (F.C.A.) (QL), the respondent argues that this irregularity is equivalent to the absence of an affidavit. Accordingly, the Court should strike it.

[14] I observe in fact that paragraphs 4 and 5 contain arguments but also state facts regarding the applicant's association with OLLIN CABAN (paragraph 4), and also mention a number of documents filed by the applicant which were rejected in their entirety by the panel (paragraph 5). After analysis, I am satisfied that the affidavit is not irregular and that the circumstances do not warrant the striking of the affidavit as recommended by the Federal Court of Appeal in *Metodieva*, *supra*.

V. Analysis

Standard of review

[15] I agree with the parties that the panel's decision is based on the applicants' lack of credibility. In *Dr Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, the Supreme Court of Canada stated the following on this subject:

38 Finally, however, the need for deference is greatly heightened by the nature of the problem — a finding of credibility. Assessments of credibility are quintessentially questions of fact. The relative advantage enjoyed by the Committee, who heard the viva voce evidence, must be respected.

[16] When it is a matter of credibility, the panel is called to assess the facts and the appropriate standard of review is that of patent unreasonableness. In *Aguebor v. Canada (Minister of*

Employment and Immigration), [1993] F.C.J. No. 732, Mr. Justice Robert Décary wrote this at paragraph 4:

4 There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. In *Giron*, the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, *Giron* in no way reduces the burden that rests on an appellant, of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn. In this case, the appellant has not discharged this burden.

[17] This same principle was adopted in *Aslam v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 264, 2006 FC 189, at paragraph 18, referring to *Aguebor, supra*, and *Grewal v. Canada (Minister of Employment and Immigration)(FCA)*, [1983] F.C.J. No. 129 (Q.L.).

Is the panel's decision patently unreasonable?

[18] In my opinion, the applicants established that there are significant errors of fact in the impugned decision. A careful review of the transcripts indicates that the applicant gave unequivocal explanations with many details regarding his responsibilities as leader of the project of the environmental movement intended to protect the land of the Mexican peasants.

[19] The panel erred when it wrote the following at page 2 of its decision:

Analysis

...

The panel finds that the claimants are not credible. First, the claimant was unable to give the panel the address of the group OLLIN CABAN. He said that he did not have a good memory and that the address was on the card (referring to Exhibit 6).

He could not even provide the name of the street, saying that he did not have a good sense of direction and that it was near the airport road but that he could not remember; he often went there but never paid much attention to street names.

[20] Yet, the primary applicant did not say this. The transcript of his testimony indicates the following at page 178:

[TRANSLATION]

BY THE MEMBER (addressing the claimant)

Q. And what was the address of this group?

A. We had the meetings at Fabian's house, okay, the address is on the card, I don't have a very good memory for . . . addresses. I know how to get there, but . . .

BY COUNSEL (addressing the claimant)

Q. The number of hours?

A. I repeat, I do not have a very good memory for addresses. I know how to get there, I have a good sense of direction, but I have trouble with names.

[21] Since this is a significant error and since the panel relied on this element to find a lack of credibility, the decision must be set aside. The panel then rejected all of the documentary evidence without offering explanations. By rejecting this evidence I consider that this Court's intervention is justified.

[22] No question was submitted for certification and this matter does not involve any.

JUDGMENT

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

“Michel Beaudry”
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-510-07

STYLE OF CAUSE: MIGUEL CARLOS GONZALEZ MORALES and
MARIA DOLORES GOMEZ BASANTA and
MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: August 28, 2007

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

DATE OF REASONS: August 31, 2007

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