

Federal Court



Cour fédérale

**Date: 20091201**

**Docket: IMM-2156-09**

**Citation: 2009 FC 1227**

**Ottawa, Ontario, December 1, 2009**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**MARIA DE LOURDES DIAZ ORDAZ CASTILLO  
CARLO ALBERTO ZAPATA DIAZ ORDAZ**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] Ms. Maria de Lourdes Diaz Ordaz Castillo and her son, Carlo, arrived in Canada from Mexico in 2008. They applied for refugee protection but their application was never heard on the merits because Ms. Diaz Ordaz Castillo withdrew it in January 2009. She later tried to reinstate it but a panel of the Immigration and Refugee Board dismissed her request.

[2] Ms. Diaz Ordaz Castillo maintains that the Board erred in refusing her reinstatement request. She submits that the Board failed to appreciate her personal circumstances, particularly the mental strain she was under at the time she discontinued her claim, which was partly a product of the abusive relationship she had fled in Mexico. She also argues that the Board failed to explain adequately why she was not entitled to a reinstatement “in the interests of justice”. She asks me to overturn the Board’s decision and order another panel of the Board to reconsider her request.

[3] Two questions arise:

1. Did the Board fail to take adequate account of Ms. Diaz Ordaz Castillo’s mental state when she withdrew her refugee claim?
2. Did the Board provide adequate reasons on the “interests of justice”?

I agree that the Board’s reasons were inadequate. Therefore, I must allow this application for judicial review.

## II. Factual Background

[4] Ms. Diaz Ordaz Castillo says she fled to Canada order to escape her abusive ex-partner. She filed a refugee claim, contacted a lawyer, acquired a Legal Aid certificate, and set up an appointment with counsel to fill out her personal information form (PIF). She arrived late for the appointment and could not re-schedule another prior to the due date for her PIF. Nor could she

obtain the assistance of anyone else over the holiday period. As a result, she failed to submit her PIF by the deadline.

[5] Ms. Diaz Ordaz Castillo's ex-partner contacted her at that point and asked her to return to Mexico. Because she was feeling depressed and isolated, and was having difficulty raising her son on her own, she agreed. She formally withdrew her refugee claim at a hearing convened to determine whether she had abandoned it.

[6] However, Ms. Diaz Ordaz Castillo then changed her mind. Her ex-partner continued to contact her and was now becoming verbally abusive, accusing her of having slept with his best friend. She decided that it was not safe for her to return to Mexico after all, so she submitted an application to reinstate her claim. The Board dismissed it.

### III. The Board's Decision

[7] The Board must reinstate a refugee claim if "it is established that there was a failure to observe a principle of natural justice or if it is otherwise in the interests of justice to allow the application." (*Refugee Protection Division Rules*, SOR/2002-228, s. 53(3).)

[8] The Board considered whether there was a failure of natural justice by virtue of the difficulty Ms. Diaz Ordaz Castillo encountered trying to obtain legal advice. It found that, even though she had not actually consulted with him, she was represented by counsel at the time she withdrew her claim and there was no suggestion that he was in any way incompetent or negligent.

[9] The Board also considered Ms. Diaz Ordaz Castillo's state of mind. It found that her circumstances might have provided grounds for concluding that her claim had not been abandoned. However, she had decided affirmatively and voluntarily to withdraw her claim. The Board noted that the withdrawal form was translated to her by an interpreter and that, by signing the form, she acknowledged that she was aware of the consequences. The Board concluded that the process of accepting and considering the application for reinstatement was fair.

[10] In respect of the interests of justice, the Board noted that it offered a hearing at which the issue of abandonment could have been addressed but Ms. Diaz Ordaz Castillo chose to withdraw her application instead. Therefore, to grant the reinstatement request would be to duplicate the process that had already been provided to her and which she had declined. A Board member, a staff person and an interpreter had been assigned to hear and consider her submissions. Accordingly, allowing reinstatement of the claim would prejudice Board's efforts to deal with these matters efficiently and in a timely manner and would not be in the interests of justice.

#### IV. Analysis

1. *Did the Board fail to take adequate account of Ms. Diaz Ordaz Castillo's mental state when she withdrew her refugee claim?*

[11] Ms. Diaz Ordaz Castillo submits that the Board failed to appreciate that her mental state at the point in time when she withdrew her refugee claim was affected by the abusive relationship she

had fled. In effect, she was unable to make a free and informed decision about her claim. Further, Ms. Diaz Ordaz Castillo submits that the Board failed to consider the Gender Guidelines applicable to women making refugee claims, as well as an affidavit she had filed describing, in general terms, why women sometimes choose to remain in abusive relationships.

[12] In my view, the Board did not ignore the evidence of Ms. Diaz Ordaz Castillo's mental state. However, the evidence before the Board member did not suggest that her mental state had prevented her from making an informed decision to withdraw her claim. She spoke of feeling "alone and isolated", "defeated" and "without hope" and that these feelings caused her to agree to return to Mexico. While these feelings were no doubt genuine and perhaps natural in her circumstances, I cannot fault the Board for concluding that there had been no breach of natural justice.

[13] In the cases relied on by Ms. Diaz Ordaz Castillo, the applicants had clearly been under duress. In one, the "pressure on her was such that she was not free to speak about the situation she was in and unable to retain counsel to assist her in her choices" (*Kaur v. Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 209 (C.A.), at para. 32). In the other, the applicant had presented evidence that "the abuse she suffered at the hands of her husband . . . had prevented her from participating in the claim" (*Acevedo v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 496, para. 3). By contrast, Ms. Diaz Ordaz Castillo freely withdrew her claim. She had access to counsel at the time but did not seek legal advice.

[14] In my view, in the circumstances, the Board did not err by failing to discuss the Gender Guidelines or the affidavit on spousal abuse. The Board was clearly aware of Ms. Diaz Ordaz Castillo's situation. It was not obliged to cite all of the evidence before it.

2. *Did the Board provide adequate reasons on the "interests of justice"?*

[15] As described above, the Board considered the effect that allowing reinstatement would have on its own processes. It concluded that it would not be in the interests of justice to permit persons in Ms. Diaz Ordaz Castillo's position to reinstate their claims.

[16] In my view, however, the Board did not include in its reasons an explanation why the particular circumstances faced by Ms. Diaz Ordaz did not weigh in the balance. I agree with Justice Michael Phelan's comments:

The term "otherwise in the interests of justice" are broad words giving the Board a wide discretion to reinstate but which requires the Board to weigh all the circumstances of the case – not just from the vantage point of an applicant's interests. Reinstatement is an exception to the norm and must be interpreted and applied in that context. (*Ohanyan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1078, at para. 13).

[17] Similarly, the interests of justice should not be considered only from the vantage point of the Board. If this were so, few, if any, applications for reinstatement would ever succeed on this ground.

V. Conclusion and Disposition

[18] The Board did not err in concluding that Ms. Diaz Ordaz Castillo had not been under duress when she withdrew her refugee claim and, therefore, that there had been no breach of natural justice. However, the Board's reasons deal only with the "interests of justice" that militate against reinstatement, not those that favour it. On that ground, I must allow this application for judicial review and order another panel of the Board to reconsider the application for reinstatement. Neither party proposed a question of general importance for me to certify, and none is stated.

**JUDGMENT**

**THIS COURT'S JUDGMENT IS that:**

1. The application for judicial review is allowed. The matter is referred back to another officer for reconsideration;
2. No questions of general importance are stated.

“James W. O’Reilly”

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Judge



Annex "A"

*Refugee Protection Division Rules, SOR/2002-228*

*Règles de la Section de la protection des réfugiés, DORS/2002-228*

Application to reinstate a withdrawn claim

Demande de rétablissement d'une demande d'asile retirée

**53.** (3) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice or if it is otherwise in the interests of justice to allow the application.

**53** (3) La Section accueille la demande soit sur preuve du manquement à un principe de justice naturelle, soit s'il est par ailleurs dans l'intérêt de la justice de le faire

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2156-09

**STYLE OF CAUSE:** CASTILLO, ET AL v. MCI

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** November 23, 2009

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** December 1, 2009

**APPEARANCES:**

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