

Federal Court



Cour fédérale

Date: 20110615

Docket: IMM-5739-10

Citation: 2011 FC 684

Ottawa, Ontario, June 15, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**MARISA RODRIGUEZ OSORNIO,
CARLOTA AGUILERA RODRIGUEZ,
REGINA AGUILERA RODRIGUEZ,
VALENTINA AGUILERA RODRIGUEZ,
ROMINA RENEE AGUILERA RODRIGUEZ,
GUSTAVIO JAVIER AGUILERA
RODRIGUEZ, MARIA JOSE AGUILERA
RODRIGUEZ, LUCILA IVETTE RODRIGUEZ
OSORNIO, GUSTAVIO JAVIER AGUILERA
RODRIGUEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicants claim a fear of unknown persons who allegedly targeted them for unknown reasons and obliged them to cooperate for an unknown purpose. The Immigration and Refugee

Board (IRB) determined that the Applicants were not credible. Had the Applicants been found to be credible, no clear or convincing evidence was provided by which to demonstrate inadequate and ineffective state protection.

II. Judicial Procedure

[2] The Applicants, Mr. Gustavo Javier Aguilera Rodriguez (Mr. Rodriguez), his wife, Ms. Marisa Rodriguez Osornio (Ms. Orsonio), their six children, Carlota Aguilera Rodriguez, Regina Aguilera Rodriguez, Valentina Aguilera Rodriguez, Romina Renee Aguilera Rodriguez, Gustavo Javier Aguilera Rodriguez, Maria Jose Aguilera Rodriguez and Ms. Lucila Yvette Rodriguez Orsonio, sister to Ms. Orsonio, all of whom are Mexican citizens, have filed an Application for judicial review against a decision of the IRB, dated September 1, 2010, determining that they were not Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA)*.

III. Background

[3] The Applicants claim that they have been persecuted by unknown persons. In January 2006, Mr. Rodriguez, a distributor of corn oil, allegedly began to receive anonymous threatening telephone calls targeting both himself and his family. Their home was then burglarized and vandalized, their car was stolen, and their 14-month-old daughter, Romina Renee Aguilera Rodriguez, was abducted and subsequently found by the police hours later.

[4] Mr. Rodriguez also alleges that he was attacked in August of 2006. His injuries were treated by a doctor; however, he did not report the incident to the authorities.

[5] The Applicants also allegedly fear an individual, Mr. Roberto Jesus Mandujano, a lawyer who had previously worked for Mr. Rodriguez, based on a non-descript call the latter supposedly made.

[6] The Applicants state that they have filed several complaints with the Attorney General's Office between March 2006 and March 2008 (IRB Decision, Applicant's Record (AR) at p 9, para 22).

[7] Mr. Rodriguez arrived in Canada on May 25, 2007. His wife, children and sister-in-law arrived in June 2008.

[8] All of which, as described by the IRB, identify very little, if anything, by which to attribute anything of substance, whatsoever to any allegation.

IV. Decision under Review

[9] After having considered and weighed the Applicants' testimony, as well as the evidence adduced, the IRB determined that the Applicants did not provide credible or trustworthy evidence in support of their allegations of risk. Specifically, the IRB's decision was predicated on the following conclusions:

- a. The Applicants had no claim under section 96 of the *IRPA* because their fear of criminality had no nexus to one of the five grounds for fear of persecution enumerated in the "Convention Refugee" definition and they did not fear torture by

the State or its agents; thus, their claim could only be based on paragraph 97(1)(b) of the *IRPA*;

- b. The Applicants were not credible; and,
- c. Alternatively, the Applicants did not rebut the presumption that effective and adequate State protection was available to them in their country.

V. Position of the Parties

[10] The Applicants claim to be persons in need of protection and to have a well-founded fear of persecution. The Applicants further submit:

- i. The IRB erred and made unreasonable findings of fact in concluding that the Applicants were not credible; the IRB erroneously held that the Applicants' explanations are outside the realm of what could reasonably be expected and that it unreasonably drew negative inferences from conjecture or speculation;
- ii. The IRB erred by failing to address the primary issue before it;
- iii. The IRB's conclusions regarding the availability of State protection are unreasonable and drawn without proper regard for the evidence before it.

[11] The Respondent submits that the assessment of the Applicants' claim conducted by the IRB is reasonable, and that the Applicants have not demonstrated that the IRB's conclusions were rendered in a perverse or capricious manner or without regard to the material before it. According to the Respondent, at this stage, the Applicants cannot attempt to better their evidence by offering *ex post facto* explanations and repeating explanations that were dismissed by the IRB.

VI. Issues

- [12] (1) Did the IRB err and make unreasonable findings of fact in concluding that the Applicants were not credible?
- (2) Are the IRB's conclusions regarding the availability of State protection unreasonable and drawn without proper regard for the evidence before it?

VII. Relevant Legislative Provisions

- [13] The following provisions of the *IRPA* are applicable in these proceedings:

Convention refugee

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 themselves 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.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if

Définition de « réfugié »

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.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi

they do not have a country of nationality, their country of former habitual residence, would subject them personally

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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

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

(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) the risk is not caused by the inability of that country to provide adequate health

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

or medical care.

médicaux ou de santé
adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VIII. Standard of Review

[14] According to the jurisprudence, it is clear that the applicable standard of review of credibility and plausibility findings is the standard of reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, 42 ACWS (3d) 886 (FCA), at para 4). As for State protection, the standard of review is also reasonableness (*Huerta v Canada (Minister of Citizenship and Immigration)*, 2008 FC 586, 167 ACWS (3d) 968, at paras 14-15).

IX. Analysis

[15] In a 19-page decision, the IRB provided a most comprehensive and extensive set of reasons in support of its clear findings.

(1) Did the IRB err and make unreasonable findings of fact in concluding that the Applicants were not credible?

[16] The IRB's opinion is well-explained, exhaustive, and its conclusion on the subject of plausibility of the Applicants' story is reasonable considering the important inconsistencies of their submissions. The IRB is entitled to make reasonable findings based on implausibilities, common

sense and rationality and may also reject uncontradicted evidence if it is not consistent with the probabilities affecting the case as a whole. The Court will not intervene with regard to the IRB's implausibility findings unless an overriding error has been made by the IRB, which is not the case. The IRB is a specialised tribunal; and the common sense, associated with the reasonableness under the circumstances, is not to be discouraged as it is a corollary of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190:

[22] Based on its knowledge and its expertise, a specialized tribunal may draw inferences from the evidence without this necessarily meaning that such inferences result from bias, as the applicant suggested. The persons who preside over tribunals are not containers to be filled with any sort of story. They have a right to use their common sense in determining whether a story stands up, is true or is simply improbable.

(*Goulongana v Canada (Minister of Citizenship and Immigration)*, 2008 FC 421, 169 ACWS (3d) 1118).

[17] The inconsistencies noted by the IRB were central to the Applicants' claim; the Applicants, themselves, put into question their own version of events underlying their alleged fear of persecution:

[75] The panel is of the opinion, in light of the claimant's testimony, their respective PIFs and accounts of the interviews each claimant had with an immigration officer, that the claimants are not credible with regards to their allegations against the individuals they identified as the perpetrators of the harm they suffered.

...

[82] In light of the fact that the claimants mentioned neither who they were afraid of nor why they were afraid of them, upon their arrival in Canada, and that they all maintained later that they did not know who they feared, the panel is of the opinion that the reasons given and persons feared were subsequently added by the claimants to improve their story. The panel finds that the claimants are not credible on this point.

[83] Moreover, the panel finds it unlikely that the claimants knew the names of the alleged agents of harm, had gone to the police on more than one occasion to file complaints, specifically when the female claimant's 14-month-old daughter was found by the police, but still did not reveal the identities of their pursuers. All of this undermines the claimants' credibility.

[84] The claimants may have had problems in Mexico, but the panel is of the opinion that the name Jesus Mandujano Sandoval and Alejandro and the reason given for the fight over the oil business, were subsequently added in order to embellish their story.

[18] The IRB's decision was based on a thorough and comprehensive analysis of the facts and it is not for the Court to substitute its opinion for that of the IRB, recognizing that the IRB is a first-instance decision-maker and as a result members of the IRB are finders of fact.

(2) Are the IRB's conclusions regarding the availability of State protection unreasonable and drawn without proper regard for the evidence before it?

[19] The IRB reasonably determined that the Applicants have failed to rebut the presumption of State protection, because they chose never to disclose the identities of the individuals that they suspected were targeting them or to provide reasonable leads to the authorities, nor afford officials a real opportunity to protect them or to avail themselves of any of the recourses available to them in Mexico. It is not reasonable for the Applicants to expect the police to seek out and arrest the Applicants' persecutors when they did not provide their identities or any leads for the police (*Villasenor v Canada (Minister Citizenship and Immigration)*, 2006 FC 1080, 157 ACWS (3d) 818, at paras 19-20). The IRB concluded that the evidence showed that the Applicants failed to provide any assistance to the police:

[89] And yet, when the male claimant was beaten in August 2006 and left with contusions observed by a doctor, he failed to present any evidence to the police, such as document P-4, a certificate from the treating physician confirming his injuries.

[90] The female claimant, although able to identify the callers and her daughter's kidnappers, chose never to disclose the identities of the perpetrators of the crimes to the police; according to her, she wished to protect her family.

[91] The same is true of Lucila Yvette Rodriguez Orsonio.

...

[94] The Honourable Justice Heneghan of the Federal Court states in *Peralta* that a refugee protection claimant must demonstrate that he has taken all reasonable steps in the circumstances to seek protection, given the context of the country of origin, the steps taken and the interaction with the authorities.

(IRB Decision, AR at pp 20-21).

[20] The IRB determined that the Applicants did not take all reasonable steps in identifying their persecutors. The IRB's findings of facts are all within the range of possible options and is better-placed than the Court to assess the credibility of an applicant as well as the existence of persecution or a risk referred to in the *IRPA*. Reviewing courts are not to re-weigh the evidence before an administrative tribunal in order to come to different conclusions.

X. Conclusion

[21] For all of the above reasons, the Applicants' application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicants' application for judicial review be dismissed.

No question for certification.

Obiter

Although the matter in question is not one for refugee status of the Applicants, the objective country condition evidence is not as straightforward as it is made out to be in a decision of the panel member in respect of state protection, due to country condition excerpts in that regard that demonstrate a much more problematic and challenging situation. Nevertheless, that would not have changed the Court's decision above, due to the actual evidence of the Applicants, which evidence simply did not meet the burden of proof necessity by which this Court could state that the IRB's decision was unreasonable in the circumstances. The principal Applicant, the father, an executive of a well-established company; a mother, who is a medical doctor, and, in addition, an aunt, who was employed by an international company, together, do not simply appear to have left their country of origin with six minor children for an adventure. It would seem, rather that, it is to embark on a better life and a more protective society for the six children (due to inherent significant dangers in that society to each one of them).

Therefore, the three adults, due to their qualifications, may be eligible for another form of status under a different immigration program, dependent on their present whereabouts in Canada, whether a H&C or, such as, a Quebec selection certificate, as per their professions or occupations; and, thus, provide a more promising life for their children. That is not for this Court to decide but for the relevant instances and jurisdictions that may recognize the benefit of such aspirant newcomers to Canada (arising under a different form of status).

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5739-10

STYLE OF CAUSE: MARISA RODRIGUEZ OSORNIO, CARLOTA AGUILERA RODRIGUEZ, REGINA AGUILERA RODRIGUEZ, VALENTINA AGUILERA RODRIGUEZ, ROMINA RENEE AGUILERA RODRIGUEZ, GUSTAVIO JAVIER AGUILERA RODRIGUEZ, MARIA JOSE AGUILERA RODRIGUEZ, LUCILA IVETTE RODRIGUEZ OSORNIO, GUSTAVIO JAVIER AGUILERA RODRIGUEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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