

Federal Court



Cour fédérale

Date: 20110615

Docket: IMM-5936-10

Citation: 2011 FC 703

Ottawa, Ontario, June 15, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

**TEODORO CORDOVA HERNANDEZ
AMALIA VALLE GARCIA
ERIC CORDOVA VALLE
EDUARDO CORDOVA
EVELYN CORDOVA
ERNESTO CORDOVA VALLE
EMANUEL CORDOVA
ELIZABETH CORDOVA
ERIKA CORDOVA**

Applicants

and

**THE MINISTER OF CITIZENSHIP &
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated September 20, 2010, wherein the Board determined that the applicants were not Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

[2] The applicants request that the decision be set aside and the claim remitted for redetermination by a different member of the Board.

Background

[3] Teodoro Cordova Hernandez (the applicant), born April 1, 1961, is a citizen of Mexico. With his wife, Amalia Valle Garcia (the female applicant), he has nine children who are all citizens of the United States.

[4] In August 2007, the applicant returned to Mexico after living in the United States for approximately 27 years. He bought a restaurant in El Limon from Alejandro Jimenez (Mr. Jimenez). The applicant alleges that several times he saw Mr. Jimenez unloading drugs from a jeep behind the restaurant in El Limon.

[5] After three weeks, Mr. Jimenez locked the applicant out of the restaurant. The applicant commenced an action against Mr. Jimenez and after he failed to appear at the courthouse three

times, a judge issued an arrest warrant for Mr. Jimenez and eventually ordered him to pay the applicant for the restaurant.

[6] The applicant alleges that Mr. Jimenez also threatened him with a gun and tried to hit him with his car.

[7] The applicant left Mexico in March 2008 and claimed refugee protection in Canada in July 2008. His wife and children arrived in Canada in July 2009.

Board's Decision

[8] The Board found that the applicants have a viable internal flight alternative (IFA) anywhere in Mexico outside of a five hour radius from El Limon and, in particular, in Mexico City.

[9] The Board disagreed with the applicant's characterization of Mr. Jimenez as a powerful and influential man in El Limon. The Board noted that when Mr. Jimenez did not attend court three times, a judge issued an arrest warrant against Mr. Jimenez and then ruled in favour of the applicant. The Board found that this is not consistent with someone who has influence over the authorities.

[10] The Board, however, assessed whether an IFA existed, assuming that Mr. Jimenez is powerful in El Limon. The Board found that according to the applicant, Mr. Jimenez's power does not go beyond a five hour radius of El Limon.

[11] The Board found that when questioned on what would happen if the applicant moved to Mexico City, the applicant stated that Mr. Jimenez would know where the applicant was located because everyone knew him. The Board also found, however, the applicant admitted that it would be difficult for Mr. Jimenez to find the applicants in Mexico City.

[12] The Board concluded that the applicants would not face a serious possibility of persecution or danger of torture, risk to life or cruel and unusual punishment if they moved five hours from El Limon, such as to Mexico City.

[13] The Board also found that it would not be unreasonable for the applicants to relocate to Mexico City. This was because they both spoke Spanish and had some work experience in Mexico and the United States. The female applicant's entire family lived in Mexico.

Issues

[14] The issues are as follows:

1. What is the appropriate standard of review?
2. Did the Board's failure to note the applicant's illiteracy materially affect the decision?
3. Did the Board err by basing the refugee determination on a finding of an IFA alone?
4. Was the Board's IFA finding reasonable?

Applicants' Written Submissions

[15] The applicants submit that the Board made no negative credibility findings against them and therefore their allegations are deemed to be true. This includes the applicant's testimony in his Personal Information Form (PIF) that Mr. Jimenez is a member of the organized criminal group "Los Zetas."

[16] The applicants submit that it was unreasonable to find that they would not face persecution from Mr. Jimenez in Mexico City. The applicant's testimony was that there was a failed attempt at mediation in the courts and that Mr. Jimenez in fact had little fear of the authorities. This is contrary to the Board's finding that Mr. Jimenez's influence over the authorities was non-existent. The applicants submit that the Board's finding is speculation and unreasonable.

[17] The applicants take issue with the fact that the Board did not cite any country condition material and submit that this alone is a reviewable error. The country documentation shows that Los Zetas are a powerful drug cartel and have influence in Mexico City, including over police forces there.

[18] According to the applicants, the Board also erred in failing to address the applicant's testimony that he would not be safe anywhere in Mexico. The applicants submit that the Board erred by finding that they would be safe in Mexico City simply because of the size of the city.

[19] The applicants submit that the Board erred in finding that it would be reasonable for the applicants to relocate to Mexico City. The Board ignored how the applicant's illiteracy would affect relocation. The Board over-exaggerated the applicants' work experience. The Board erroneously considered the female applicant's family in Mexico as a positive, although her family lives within the five hour radius from El Limon. Finally, the Board ought to have considered the best interests of the children in assessing the reasonableness of the IFA.

[20] The applicants also submit that the failure to conduct a separate section 96 and 97 analysis was an error.

[21] Further, they argue that there was a breach in procedural fairness because the Board did not deal appropriately with the applicant's illiteracy.

Respondent's Written Submissions

[22] The respondent emphasizes that a refugee claimant bears the onus of establishing risk throughout the country and demonstrating that an IFA does not exist or is unreasonable. The Board's IFA finding is reasonable and supported by the evidence before the Board, including evidence that Mr. Jimenez would have a difficult time finding the applicants in Mexico City.

[23] The respondent submits that the Board's disagreement with the applicant that Mr. Jimenez was not a powerful man was based on the applicant's testimony that a judge ruled in the applicant's favour against Mr. Jimenez. In addition, even if this was unreasonable, the Board considered the

possibility of an IFA accepting that Mr. Jimenez is powerful in El Limon. The Board determined that Mr. Jimenez did not have power outside of a five hour radius based on the applicant's own testimony.

[24] The respondent admits that the Board erred in considering that the applicant had read his PIF, given his admission of illiteracy, but that this error did not transfer to the IFA finding.

[25] The respondent submits that the Board was not required to assess the best interest of the children because they are U.S. citizens and not claiming protection against the United States. As such, they are not Convention refugees. The interests of affected children need not be considered in every provision of the Act. The respondent notes that the Federal Court of Appeal has held that sections 96 and 97 do not contemplate a broad-ranging consideration of the best interest of the children.

Analysis and Decision

[26] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[27] Upon judicial review, it is established that decisions of the Board concerning the existence of an IFA are reviewed against the standard of reasonableness (see *Rueda v Canada (Minister of Citizenship and Immigration)*, 2009 FC 828 at paragraph 58).

[28] **Issue 2**

Did the Board's failure to note the applicant's illiteracy materially affect the decision?

The respondent has conceded that the Board erred in asking the applicant if he had read and understood his PIF. I agree with the respondent's submission that this error did not affect the Board's analysis on the issue of an IFA, as the applicant was comfortable with the information he presented and his testimony remained close to the narrative of the PIF. I do not consider the Board to have handled the applicant in a manner that was not sensitive to his illiteracy.

[29] **Issue 3**

Did the Board err by basing the refugee determination on a finding of an IFA alone?

The applicants submit that the Board erred in basing the determination of the refugee claim on a finding of an IFA alone, without assessing the fear of persecution or state protection.

[30] First, I disagree that the Board did not consider the applicant's fear of Mr. Jimenez. The Board noted the applicant's belief that Mr. Jimenez was linked to organized crime and had influence over police officers in El Limon. The Board disagreed with the applicant's characterization of Mr. Jimenez as having influence over all authorities because a judge had issued an arrest warrant for Mr. Jimenez and had ordered Mr. Jimenez to pay the applicant. This was a transparent assessment of the

testimony of the applicant. Nonetheless, the Board assessed the possibility of an IFA in the alternative, accepting that the Mr. Jimenez was a powerful and influential man in El Limon.

[31] Second, while it may have been preferable for the Board to conduct a full analysis of the risks alleged, the rejection of a refugee claim may stand alone on a finding of a viable IFA.

[32] As Madam Justice Judith Snider held in *Sarker v Canada (Minister of Citizenship and Immigration)*, 2005 FC 353 at paragraph 7:

The question of the existence of an IFA is a separate component of the Board's analysis that can stand alone (*Tharmaratnam v. Canada (Minister of Citizenship & Immigration)*, [1995] F.C.J. No. 92 (Fed. T.D.)). Put simply, where an IFA is found, a claimant is not a refugee or a person in need of protection (*Zalzali c. Canada (Ministre de l'Emploi & de l'Immigration)*, [1991] 3 F.C. 605 (Fed. C.A.), *Rasaratnam v. Canada (Minister of Employment & Immigration)* (1991), [1992] 1 F.C. 706 (Fed. C.A.)).

[33] Mr. Justice James Russell agreed with this conclusion in *Khokhar v Canada (Minister of Citizenship and Immigration)*, 2008 FC 449 at paragraph 39, holding that:

...the Board made a separate and alternative finding regarding the availability of an IFA and, in my view, that finding is sufficient to support the Board's overall conclusion that the Applicant's are not Convention refugees and they are not at risk if returned.

[34] Likewise in *Del Real v Canada (Minister of Citizenship and Immigration)*, 2008 FC 140 at paragraph 12, Mr. Justice Michel Shore held that:

The central issue to examine in this case bears on the merits of the RPD's finding that the applicant, who would be at risk in the city of San Juan, "has a viable IFA in Mexico." This finding alone was sufficient to dismiss her refugee claim.

[35] Consequently, I do not consider the Board to have committed an error by determining the claim on the IFA analysis.

[36] **Issue 4**

Was the Board's IFA finding reasonable?

The legal principles of IFA determinations are well settled. In applying for refugee status, a claimant must seek protection from an entire state. If the country in question is able to provide protection somewhere in its territory, the claimant must seek protection in that location (see *Zalzali c Canada (Ministre de l'Emploi et de l'Immigration)* (1991), 14 Imm LR (2d) 81(FCA)).

[37] Mr. Justice Richard Mosely aptly summarized the test for an IFA in *Kumar v Canada (Minister of Citizenship and Immigration)*, 2004 FC 601 at paragraph 20:

In order for the Board to find that a viable and safe IFA exists for the Applicant, the following two-pronged test, as established and applied in *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.) and *Thirunaukkarasu, supra*, must be applied:

(1) the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the proposed IFA; and

(2) conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of all the circumstances, including consideration of a claimant's personal circumstances, for the claimant to seek refuge there.

[38] Madam Justice Eleanor Dawson reviewed the additional legal principles pertaining to IFAs in *Saldana v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1092 at paragraph 22:

The law with respect to the existence of an internal flight alternative was recently and succinctly reviewed by my colleague Justice Kelen in *Farias v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 1035 (F.C.) at paragraph 34. There, he noted that:

- It is the applicant who bears the burden of proof to demonstrate that an internal flight alternative does not exist or is unreasonable.
- A high threshold must be met in order to establish that an internal flight alternative is unreasonable.
- The fact that a refugee claimant may not be able to find suitable employment in his or her field of expertise may or may not make an internal flight alternative unreasonable.

[39] The Board's determination that the applicant would not face persecution or risk of life, torture or cruel and unusual punishment in Mexico City was reasonable. As shown below, the applicant stated that he was not sure whether Mr. Jimenez had any power or influence outside of a five hour radius surrounding El Limon. He also stated that it would be more difficult for Mr. Jimenez to find him in Mexico City. The Board based its determination of the existence of an IFA on the applicant's own testimony. At page 354 of the certified tribunal record:

Q Do you know if his power is extended to what levels of the authority?

A Well, here we have a village called El Limon, then we have another town that is larger called Al Telan (phonetic) and there's also Cocula (phonetic).

Q These are towns nearby?

A Yes. That one that is the farthest away is five hours.

Q Okay.

A All the police officer that tend to these villages come from Cocula and that's where his power resides.

Q So with the police force in that town.

A In all of these towns in this areas.

Q All the towns within a radius of five hours.

A This is according to what I know, but I do not know anything beyond this.

[40] At pages 357 to 358 of the certified tribunal record:

Q ...What will happen to you if you move to a city or village in Mexico outside of the five-hour radius?

A I think that, given time, he would realize where I was located because everyone there knows him.

Q If you go to Mexico City, a city of 20 million, how would he know?

A I think that in such situation or in this case it would be somewhat more difficult.

Q You mean it will be difficult for him to find you in Mexico City?

A Yes, it could be that it would be somewhat more difficult.

[41] Further, the applicant stated in his testimony that the reason why he could not return to Mexico to a different location was his desire to keep his children away from the dangers of alcohol and drugs in Mexico.

[42] The applicant bore the onus to establish that no IFA existed. However, he testified that he did not know whether his agent of persecution, Mr. Jimenez, had power or influence farther than five hours from El Limon. He further testified that he thought it would be difficult for Mr. Jimenez to find him in Mexico City. It was unnecessary for the Board to refer to the country condition

materials after these admissions by the applicant. The Board considered the personal characteristics of the applicant and his agent of persecution and reasonably found that this did not meet the burden of demonstrating that an IFA did not exist.

[43] The applicant also did not meet the high threshold of proving that it would be unreasonable to relocate to Mexico City, under prong two of the IFA test (see *Saldana* above). The Board did not exaggerate that the applicant's wife has some work experience in the United States and Mexico. Further, the ability to find work in the proposed IFA is not essential to a finding that the IFA is reasonable (see *Saldana* above). Nor was it necessary for the Board to find that the applicant had family in Mexico City for it to be a reasonable IFA (see *Saldana* above). In addition, the Federal Court of Appeal has held that the best interests of the children do not apply to every provision of the Act, including sections 96 and 97 and, moreover, the children in this case are American citizens and not claiming protection against the United States (see *Varga v Canada (Minister of Citizenship and Immigration)* 2006 FCA 394 at paragraph 13). The applicant has not demonstrated that the Board's finding that the applicants could relocate to Mexico City was unreasonable.

[44] The application for judicial review is therefore dismissed.

[45] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[46] **IT IS ORDERED that** the application for judicial review is dismissed.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions*Immigration and Refugee Protection Act, SC 2001, c 27*

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

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,

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) 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

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) 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.

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.

97.(1) A person in need of protection is a person in 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

97.(1) A qualité de personne à protéger la personne qui se 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) 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,

(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.

(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.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5936-10

STYLE OF CAUSE: TEODORO CORDOVA HERNANDEZ,
AMALIA VALLE GARCIA, ERIC CORDOVA
VALLE, EDUARDO CORDOVA, EVELYN
CORDOVA, ERNESTO CORDOVA VALLE,
EMANUEL CORDOVA, ELIZABETH
CORDOVA, ERIKA CORDOVA

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: March 30, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: June 15, 2011

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