

Federal Court



Cour fédérale

Date: 20110727

Docket: IMM-444-11

Citation: 2011 FC 939

Ottawa, Ontario, July 27, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

**JESICA JANNETTE VALENCIA
GUTIERREZ AND JUAN MANUEL
SANTAMARIA CERVANTES**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants, Ms. Jesica Jannette Valencia Gutierrez and her spouse, Mr. Juan Manuel Santamaria Cervantes, apply for judicial review of the decision of the Immigration and Refugee Board's Refugee Protection Division [RPD] finding that the Applicants were not Convention Refugees or persons in need of protection.

[2] Ms. Valencia, the principal Applicant, testified she received death threats from Los Zetas gang members after her attempts to report the murder of her brother-in-law, a police officer, were met with inaction by the local police.

[3] The RPD found the Applicants to be generally credible, but found it implausible that the police refused to investigate the incident on the basis that country documents reported that police forces actively did investigate police murders. The RPD found that the Applicants, being victims of criminality, lacked the required nexus to a ground listed under the *Convention Relating to the Status of Refugees* [the Convention] and that the Applicants had internal flight alternatives [IFA] available to them in Mexico City and Guadalajara. In coming to this conclusion, the RPD found that state protection would be reasonably forthcoming to them in both cities, based on documentary evidence that the government was making serious efforts to address police problems.

[4] The Applicants submit that the RPD erred in finding an IFA in Mexico City or Guadalajara, as the evidence indicates that the Los Zetas criminal gang is very sophisticated and active throughout Mexico. The Applicants take issue with the RPD's state protection analysis. Finally, the Applicants dispute the RPD's implausibility finding, submitting that their personal experience showed that state protection was not forthcoming.

[5] I conclude that the RPD erred in coming to its decision on the question of the availability of state protection in the IFA and grant the application for judicial review for the following reasons.

Background

[6] The Applicants are citizens of Mexico. The principal Applicant's brother-in-law, a police officer, had been approached by Los Zetas gang to work with them but he refused. He then transferred from Michoacan state to Mexicali, but was again confronted by Los Zetas members and was murdered when he again refused to cooperate with them.

[7] At her brother-in-law's funeral, the principal Applicant spoke of her intention to report the murder to the police. Her efforts to report the murder to the police were ignored.

[8] The principal Applicant believed her remarks at the funeral were overheard by gang members and she received death threats. In September 2007, gang members attempted to abduct the principal Applicant. Her father intervened to prevent her kidnapping but was injured as a result. The principal Applicant tried to report the abduction attempt but the local police would not act on her complaint.

[9] The principal Applicant and her husband left Mexico in November 2007 and filed claims for refugee protection in January 2008.

Decision under review

[10] The Immigration and Refugee Board, Refugee Protection Division member refused the Applicants' claim for refugee protection in January 2011.

[11] The RPD found the Applicants credible regarding the events surrounding the murder of the brother-in-law and the threats to the principal Applicant. However, the RPD found implausible the Applicants' claim that the police at all levels refused to investigate the incident because country documents indicated that police forces actively investigate murders of police officers.

[12] The RPD also found that the Applicants' fear of persecution by criminals did not fall into one of the Convention nexus categories, as fear of criminality does not constitute membership of a social group defined under the Convention.

[13] Finding that the Applicants did not meet the requirements for s.96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 [IRPA], the RPD considered s.97 and the question of an IFA in Mexico.

[14] The RPD found that an IFA was available for the Applicants in Mexico City or Guadalajara. The RPD considered the Applicants' claim that they would not be safe anywhere in Mexico from Los Zetas gang members but held that the documentary evidence demonstrates that state protection would be reasonably forthcoming to them in either of the cities.

[15] The RPD relied on national documentation information that Mexico was making serious efforts to professionalize the police and address problems of corrupt officials, and that public officials are punished for misconduct. The RPD listed some of the state protection resources it considered available in particular the both cities specifically identifying the Federal Investigative

Agency, also known as the AFI. As such the RPD found there was no possibility of the Applicants being persecuted or harmed in Mexico City or Guadalajara because of the availability of state protection.

[16] The RPD also found that it would not be unduly harsh for the Applicants to move to Mexico City or Guadalajara, noting that the male Applicant had prior experience as a cabinet maker and would have no significant impediment in finding work in either city.

[17] The RPD concluded the Applicants were neither Convention refugees nor persons in need of protection and rejected their claims.

Legislation

[18] The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 provides:

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

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;

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,

(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,

Issues

[19] The Applicants raise the following issues:

- i. Did the RPD err in dismissing the Applicants' claim that the police at all levels would not investigate the brother-in-law's murder?
- ii. Did the RPD err in its assessment of the internal flight alternative issue?
- iii. Did the RPD err in its assessment of state protection?

[20] The Respondent submits that the findings were supported by the evidence and were not unreasonable.

Standard of Review

[21] The standard of review for findings of an IFA is reasonableness: *Esquivel v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 468 and *Dunsmuir v New Brunswick*, 2008 SCC 9.

[22] Reasonableness is also the applicable standard of review for the RPD's findings on state protection: *Hidago v Canada (Minister of Citizenship and Immigration)*, 2009 FC 707 at para 30; *Perez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1029 at para 25.

Analysis

Implausibility Finding

[23] The Applicants take issue with the RPD's finding that it was implausible that the police would have refused to deal with the Applicants' report of their relative's murder by relying on one document saying that the police would investigate murders of police officers but not accepting the Applicant's sworn testimony regarding the lack of police investigation together with supporting documentary evidence of police corruption.

[24] The Respondent submits that the RPD may make adverse findings of credibility on the basis that the evidence is simply implausible: *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA) at para 4.

[25] The Respondent points out that although the principal Applicant reported in her Personal Information form (PIF) that the family learned of the killing from the police investigation report, she says she was warned that she would be killed if she reported the crime to the police. The Respondent argues that this appears to be a contradiction, given that a police investigation report for the murder already existed at the time of the funeral.

[26] The Court should not re-weigh the evidence. Justice Binnie, speaking for the majority in *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61, stated that

finding it unreasonable for a decision-maker to weigh one factor more heavily than another factor is a form of reweighing the evidence:

[27] The RPD found that Mexican police forces do actively investigate murders of police and security officials. The document on which the RPD relied in coming to this conclusion is a 2007 article by Benjamin Nelson Reames titled “*A Profile of Police Forces in Mexico.*” The article refers to the murders of police officers:

...in early 2005 Fox reorganized and revamped the federal public security apparatus on his own in the wake of three incidents: the lynching of several police officers, a massacre in Cancun (related to police corruption), and narco-related murders of prison officials. (page 117).

Widely seen as responding to the lynchings of federal police officers in the outskirts of Mexico City, President Fox revamped the federal public security apparatus. (page 125)

(emphasis added)

[28] I note that there was evidence before the RPD of a police investigation report of the brother-in-law’s murder. The principal Applicant had stated in her Personal Information Form [PIF] that “The family learned of this event from the police investigation report.” Thus, there is evidence in the principal Applicant’s own PIF statement upon which, in addition to the country documentation, the RPD could find it implausible the principal Applicant’s claim that the police would not investigate the murder of a policeman. The RPD considered the Applicants’ testimony and the documentary evidence.

Internal Flight Alternative

[29] The availability of an IFA is explained in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* [1994] 1 F.C. 589 (FCA) at para 13:

It is not a question of whether in normal times the refugee claimant would, on balance, choose to move to a different, safer part of the country after balancing the pros and cons of such a move to see if it is reasonable. Nor is it a matter of whether the other, safer part of the country is more or less appealing to the claimant than a new country. Rather, the question is whether, given the persecution in the claimant's part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere. Stated another way for clarity, the question to be answered is, would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?

(emphasis added)

[30] The Applicants dispute the reasonableness of the RPD's conclusion of the availability of an IFA in Mexico City or Guadalajara. The Applicants point out that they had testified that:

- the Los Zetas gang is everywhere in Mexico;
- they had heard of Los Zetas gang members being present in Mexico City and Guadalajara; and
- they could not relocate within Mexico due to criminality throughout the country.

[31] In addition, the Applicants submit that the documentary evidence supports their position.

The Immigration and Refugee Board's Response to Information Request [RIR] noted that:

Los Zetas is "the most technologically advanced, sophisticated cartel operating in Mexico" . . . Los Zetas are present in 13 Mexican states and in 43 cities in the US . . . The area they cover extends from El Paso to the US/Mexico border, south through the state of Veracruz and east through the state of Tabasco, and into the Yucatan peninsula. According to NPR, their territory crosses through the State of Chiapas and extends to Guatemala...

[32] The Applicants submit that the RPD did not state why it believed the gang members could not reach the Applicants in the two IFAS despite the Los Zetas gang is reported to have an extensive network and presence in Mexico, and is a technologically advanced, sophisticated and violent gang. The Applicants say the RPD focused on the male Applicant's employment prospects instead of the threat of Los Zetas in the IFA location.

[33] The Respondent submits that the available evidence did not contradict the findings of the RPD. The Respondent submits that the RPD carefully analyzed the Applicants' allegations but found that the evidence presented was not sufficient to rebut the presumption that the state could protect them in the IFA locations.

[34] Essentially, it would appear that the RPD had accepted widespread problems of criminality throughout Mexico, but found that state protection from criminality was available to the Applicants in the identified IFAs of Mexico city and Guadalajara. The gang members threatening the principal Applicant were local members and not likely to locate the Applicants in the large metropolitan IFAs. In that respect the RPD's finding is reasonable aside from the report that the Los Zetas' reach was widespread.

State Protection

[35] The Applicants submit that the RPD erred in only focusing on the efforts of the Mexican government to fight crime and corruption when determining there was state protection. The Applicants submit that “serious efforts” is not the correct test in assessing state protection, and instead, the proper test requires “actual effectiveness of the protection”: *Lopez v Canada (Minister of Citizenship and Immigration)* 2010 FC 1176 [*Lopez*].

[36] The Respondent reminds that the onus is on the Applicant to provide clear and convincing evidence of the state’s inability to protect them: *MPCR v Canada (Minister of Citizenship and Immigration)*, 2005 FC 772 at para 45 and that one must not set too high a standard for state protection: *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1212 at para 7.

[37] In *Rovirosa v Canada (Minister of Citizenship and Immigration)* at para 8, Justice Snider noted that the determinative finding in *Lopez* was not whether Mr. Lopez had made sufficient efforts to seek protection, but rather that the RPD had failed to properly consider the documentary evidence before it. Since it is presumed the RPD is expert in assessing country conditions, the RPD is expected to give proper consideration of country condition documentation.

[38] The RPD is presumed to have considered all the documentation before it even if not referred to: *Khosa v Canada (Minister of Citizenship and Immigration)*, 2010 FC 83, When the

RPD specifically refers to a country condition document, I take it that it is a document upon which the RPD relies.

[39] The RPD specifically refers to two country condition documents. In addition to the cited 2007 article “*A Profile of Police Forces in Mexico*” in paragraph 27 above, the RPD also refers to a 2010 article by Daniel Sabet titled “*Police Reform in Mexico: Advances and Persistent Obstacles*”.

[40] In assessing the 2007 article, the RPD states: “As the country documents cited in Exhibit 5 indicate that police forces do actively investigate murders of police and security officials, I find it implausible that police at all levels would have refused to take any action to investigate this murder.”

[41] What I find significant is that this article refers to the AFI, an agency to which the RPD indicates as a police agency the Applicants may turn to for assistance. The 2007 article stated:

The PGR reconfigured and renamed the Federal Judicial Police which was much maligned for corruption and ineffectiveness. The Federal Investigation Police replaced the Federal Judicial Police and, at least nominally invited comparisons to the U.S. Federal Bureau of Investigation (FBI). In 2004 AFI had a budget of 2.62 billion pesos, thus accounting for about a third of PGR spending. That same year the AFI’s forces consisted of more than 5,000 judicial police officers, 1,600 investigators, and 450 specialists.

[42] The RPD states in its 2010 decision:

If by some chance the claimants were located by those they fear from Michoacan, the documentary evidence demonstrates that state protection would be reasonably forthcoming to them in Mexico City or Guadalajara.”

[43] The RPD reasoned:

I agree with counsel and the claimants that criminality and corruption do exist throughout Mexico. While the claimants fear that the criminals and public officials can commit criminal or corrupt acts with impunity, country documents show that Mexico is making serious efforts to professionalize the police and address problems of corrupt officials. There are many state agencies that address criminality and corruption to assist Mexicans in obtaining state protection. The documentary evidence also shows that public officials, including the police and the army, are punished for their misconduct.

Furthermore, there are many resources available to lodge a complaint in Mexico City or Guadalajara such as the AFI, the Federal Investigative Agency, whose mandate includes dealing with corruption in police and other officials.

(emphasis added)

[44] However, when reading the 2010 article, *Police Reform in Mexico: Advances and Persistent Obstacles*, cited by the RPD, one finds the following passages reporting problems besetting the AFI:

The centerpiece of the Fox era police reform, however, was the dissolution of the scandal ridden PJF and the creation of what was intended to be a new model of professional investigative policing, the Federal Investigations Agency (Agencia Federal de Investigaciones – AFI).

...

... News reports suggest a decline in the AFI's ability to carry out its functions due to a drop in personnel, resources, and infrastructure. Much of the AFI's newer recruits transferred over to the SSP, leaving critics to allege the remaining officers were holdovers from the old and discredited Federal Judicial Police. ...

Second, when the AFI was created in 2001 it was heralded as a new model of policing and the solution to Mexico's policing problems. The subsequent dissolution of the agency seemed to repudiate this message and increased skepticism towards yet another police force.

...

(emphasis added)

[45] The AFI appears to have started out with great promise but by the time the Applicants had need of state protection, the AFI was in serious decline. Reviewing the timeline of events, the attempted abduction of the principal Applicant occurred in 2007 and the Applicants fled Mexico 2008 because they feared the Los Zetas gang and did not believe state protection was available to them. They maintained this belief in 2010 when the RPD issued its decision finding the AFI was a police agency the Applicants could turn to for protection. The 2007 Reames article reported on the 2001 creation of the AFI but by 2010 the Sabet article was reporting on its "dissolution".

[46] It is clear to me that the RPD misinterpreted the country documents it relied upon in its state protection analysis in its IFA analysis. The very country documents cited by the RPD support the Applicants' fears rather than the RPD's assurances of the availability of state protection.

[47] I conclude that the RPD misinterpreted the country documents it relied upon. In such circumstances, the application for judicial review succeeds.

Conclusion

[48] I grant the application for judicial review. The matter is to be referred for re-determination by a differently constituted panel.

[49] Neither the Applicants nor the Respondent proposed a question of general importance for certification and I do not certify any question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted and the matter is remitted for reconsideration by a differently constituted panel.
2. I do not certify a question of general importance.

"Leonard S. Mandamin"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: JESICA JANNETTE VALENCIA GUTIERREZ
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DATED: JULY 27 2011

APPEARANCES:

Mr. Simon Yu FOR THE APPLICANTS

Ms. Camille Audain FOR THE RESPONDENT

SOLICITORS OF RECORD:

Simon K. Yu FOR THE APPLICANTS
Barrister and Solicitor
Edmonton, Alberta

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Edmonton, Alberta