Federal Court  Cour fédérale

Date: 20111213

Docket: IMM-2169-11

Citation: 2011 FC 1464

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 13, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ALDO IVAN GANDARILLA MARTINEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] The threshold of reasonableness of an internal flight alternative (IFA) is very high. According to *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA), the onus is on the applicant who is challenging an IFA. According to *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (CA), at paragraph 15, "[i]t

requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions…."

II. Introduction

[2] This is an application for judicial review of a decision by the RPD dated March 1, 2011, that the applicant is neither a Convention refugee as defined in section 96 nor a person in need of protection in accordance with section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

III. Facts

[3] Mr. Aldo Ivan Gandarilla Martinez is a citizen of Mexico who lived in the city of Delicias in Chihuahua State.

[4] During the night of May 25, 2009, Mr. Gandarilla Martinez alleges that he saw three individuals storing firearms in boxes in the yard of the home next door to his.

[5] The next day, Mr. Gandarilla Martinez apparently made an anonymous tip to public prosecutor authorities.

[6] The following day, Mr. Gandarilla Martinez was apparently warned by a friend working at the public prosecutor that two persons identified as brothers Antonio and Oscar Avila, involved in criminal activities, had obtained, with help from a commanding officer at the public prosecutor, a

recording of his anonymous telephone call as well as video footage from a surveillance camera showing the applicant giving the tip. The Avila brothers were apparently able to identify Mr. Gandarilla Martinez because one of the brothers had gone to school with him.

[7] Mr. Gandarilla Martinez, along with his wife and their son, apparently fled immediately to an uncle who lived in Estacion Consuelo, in Chihuhua State. The day after his flight, he allegedly returned home to find that it had been vandalized and his dog killed. A threatening letter was reportedly left on the premises.

[8] For financial reasons, Mr. Gandarilla Martinez, unaccompanied by his family, left his country of origin for Canada on June 7, 2009. He claimed refugee protection there on July 17, 2009.

[9] On April 8, 2010, Mr. Gandarilla Martinez's brother was shot to death and shots were fired at his brother's house, where his sister-in-law, wife and son were located.

IV. Decision under review

[10] The RPD did not question the applicant's credibility and took into account his nervousness and state of anxiety, as attested to by a psychological report adduced into evidence.

[11] The RPD found that there was an IFA in Mexico, specifically in cities far away from the states of Chihuahua, Monterrey or Veracruz, or even Mexico City. The following evidence supports this finding:

a) It is unlikely that the Avila brothers, the applicant's persecutors, would be interested in looking throughout Mexico for the applicant, since he had no evidence about them;

b) No member of the applicant's family or his friends had been threatened or questioned about the applicant's whereabouts;

c) There is no indication that the death of the applicant's brother is connected to his personal situation, since the applicant himself admitted that he could only speculate;

d) The psychological report adduced into evidence by the applicant did not show that his psychological state would be an obstacle to his return to Mexico.

V. Issues

[12] 1) Did the RPD err by finding that there is a viable IFA?

2) Did the RPD err by failing to characterize the applicant as a vulnerable person?

VI. Relevant legislative provisions

[13] The following legislative provisions of the IRPA are relevant:

Convention refugee	**Définition de « réfugié »**
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	*a*) soit se trouve hors de

countries of nationality and is unable or, by reason of that fear, unwilling to avail themself 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.

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.

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

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

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

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

Personne à protéger

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

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

VII. Position of the parties

[14] The applicant submits that the finding of a viable IFA is unreasonable. First, he claims that the RPD did not take into account the documentary evidence showing that the persecutors would be able to find the applicant should he return to Mexico, because information recorded in the databases

of Mexican public institutions is not protected. Second, he also claims that the psychological report was not sufficiently considered by the RPD as evidence of the non-viability of an IFA. Third, he contends that the RPD should have applied the *Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB* (Guideline 8).

[15] The respondent submits that the evidence on which the RPD relied in making its finding of an IFA is reasonable. As regards the documentary evidence, he argues that, in addition to not having been properly filed in support of the affidavit, it is of no help to the applicant because he admitted that his persecutors were not looking for him. In the same vein, the respondent specifies that the RPD has no obligation to comment on all of the evidence in the record. In addition, the analysis of the more recent documentary evidence does not support the applicant's argument.

[16] Moreover, the respondent argues that the psychological report is not contrary to the RPD's findings. In reply to the applicant's argument concerning Guideline 8, he notes that it was up to the applicant to apply for procedural accommodations based on his vulnerability. He also insists that the RPD took the psychological report into account and demonstrated sensitivity and respect when questioning him.

VIII. Analysis

1) Did the RPD err by finding that there is a viable IFA?

[17] The problem concerns the viability of the IFA. Deference must be shown to findings that are based on an assessment of evidence pointing to an IFA finding (*Navarro v Canada (Minister of Citizenship and Immigration)*, 2008 FC 358).

[18] In *Kumar v Canada (Minister of Citizenship and Immigration)*, 2004 FC 601, Justice Richard Mosley summarized as follows the test to be applied to determine whether an IFA is viable:

> [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.

[19] Concerning the first prong of the test, that is, whether the applicant risks being persecuted in another part of the country, the RPD responded in the negative. The applicant states that this finding is erroneous because the RPD did not take into account the documentary evidenced filed in the record.

[20] In *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425 (QL/Lexis), the Court explains as follows the criteria for assessing the evidence:

> [15] The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.

> [16] On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.
> [Emphasis added.]

[21] Thus, to succeed in the argument that the RPD deliberately excluded the evidence, it is not sufficient to claim that this tribunal failed to mention the evidence. Also, the evidence needs to be relevant and important to the outcome of the dispute.

[22] The evidence in question raised by the applicant is part of the National Documentation Package on Mexico dated November 26, 2010.

[23] The first piece of evidence is at tab 3.6 MEX41642.EF, entitled *Information on the Clave Unica de Registro de Poblacion (CURP)*, dated June 24, 2003.

[24] Analysis of this evidence shows that the CURP cannot be used to trace an applicant in Mexico since the individual's address is not information that can be obtained through the CURP as the following passage indicates:

> The information contained in the main CURP database includes the information needed to assign the CURP code (name, birth date, birth place and sex) as well as the registry office and the registry book where the person registered his or her CURP

> code (Mexico 12 June 2003). The address of the person and any other information is not contained in the CURP database (ibid. 18 June 2003a).

[25] The second piece of evidence pertains to tab 14.1, entitled *Mexico: Selected Issues of Internal Flight Alternatives (July 2003 – July 2005)* in the same Documentation Package:

> Jim Hodgson, area secretary for the Caribbean and Latin America at the United Church of Canada, said that the voter's registration card is "necessary for many common transactions involving banks, public offices and the police" (28 June 2005). According to Jim Hodgson, since the voter's registration card is used extensively as a piece of identification and since there is a lack of protection of the information in databases of public institutions in general, it is easy to find someone in Mexico (Hodgson 28 June 2005; ibid. 2 Aug. 2005). Jim Hodgson also stated that the extensive use of the voter's registration card makes it easy for the police to find a person using the IFE's database (ibid.). The Research Directorate could not find concrete examples of this use of the database among the sources consulted.
>
> …
>
> Privacy International, a non-profit human rights group based in London that acts as "a watchdog on surveillance and privacy invasions by governments and corporations" and conducts public awareness campaigns on these topics (PI 5 Jan. 2005), stated that the CURP provides each citizen with "direct access to multiple personal data" (ibid. 16 Nov. 2004). However, no specific case of the CURP's being used to track down a person could be found among the sources consulted by the Research Directorate. [Emphasis added.]

[26] The remainder, still in the same Documentation Package of November 26, 2010, tab 2.4, entitled *Mexico: Situation of Witnesses to Crime and Corruption, Women Victims of Violence and Victims of Discrimination Based on Sexual Orientation,* dated February 2007, section 3.3, Traceability of individuals fleeing violent situations, reveals the following:

> Of all the interlocutors interviewed, none was aware of incidents in which witnesses to crime and corruption were located by their aggressors through the use of government databases or registries (CDHFFV 28 Nov. 2006; PGR 21 Nov. 2006; ibid. 22 Nov. 2006a; ibid. 24 Nov. 2006). In particular, SIEDO's Rosas Garcia, the AFI's Gonzalez Dominguez and the SDHAVSC's Garduno were unaware of any cases in which national registries, such as the Federal Electoral Institute (Instituto Federal Electoral, IFE) database, had been used to track individuals who had relocated to avoid detection by criminal groups (ibid. 21 Nov. 2006; ibid. 22 Nov. 2006a; ibid. 24 Nov. 2006).

> According to the SFP's Diaz Garcia, although much work has been done to improve the level of content within national registries such as the IFE, a comprehensive personal identification database is still lacking in Mexico (21 Nov. 2006). The two most important national registries are the IFE database, which contains, among other things, the addresses of individuals, and the Population Registry's Single Code (Clave Unica de Registro de Poblacion, CURP) database, which features individuals' dates of birth (SFP 21 Nov. 2006).
>
> Public access to national registries, including the IFE database, is prohibited by law (PGR 21 Nov. 2006; ibid. 22 Nov. 2006a). Furthermore, federal police officers can only gain access to the IFE database with a court order and the written permission of the public prosecutor's office (ibid. 21 Nov. 2006). In the case of the government's passport database, federal law enforcement agencies such as the AFI can gain access to it, although they must first submit a request in writing to the corresponding public prosecutor's office (ibid. 22 Nov. 2006a).

[27] These excerpts do not in any way contradict the RPD's finding. In fact, it is important to note that the RPD, as regards the first prong of the IFA test, based much of its analysis on the fact that the applicant's close family (his wife and son), as well as his more extended family, were not threatened or disturbed in any way by his persecutors. In fact, the RPD noted that a connection between the death of the applicant's brother and the applicant's situation was implausible. It also took into account the testimonial evidence as the transcript shows:

> [TRANSLATION]
>
> Q. So why would they waste their time in targeting you, looking for you at the risk maybe of having problems if they did kill someone there…in your opinion?
>
> R. Maybe they wouldn't waste their time in looking for me but one thing I do know is that if they find out I am in my province or my city, then they really will go after me. That is clear.
>
> So, yes, somewhere in my country, it is, it would be easy for them to find me in Mexico.
>
> ...
>
> Q. And why, in your opinion, would they have waited there for so many months after your departure before targeting your brother, if you know but…

> R. I am speculating here. I think that, I think that, seeing as I was not coming back to Mexico, they decided to kill him so that I would be obliged or to make me come back.
>
> Q. But in the meantime, during the entire ten months between the time you left and the time your brother was murdered, did members of your family have problems?
>
> R. No. No.

(Tribunal Record (TR) at pp 192 and 196).

[28] By stressing that "the Avila brothers have very little, if any, interest in wasting their time looking for the claimant, who did not report them directly and who has no evidence against them," the RPD is criticizing the plausibility of the account (Decision at para 15). In fact, it did not focus on the ways of tracing the applicant throughout Mexico, but rather on the very possibility that he was actually being looked for.

[29] In light of the foregoing, the documentary evidence is of no help to the applicant because, as shown, it is non-adversarial and of little probative value (*Yada v Canada (Minister of Citizenship and Immigration)* (1998), 140 FTR 264). Justice Marie-Josée J. Bédard's reasoning in *Villegas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 699, applies to this case:

> [20] The documentary evidence raised by the applicants is based on the opinion of two persons and is contradicted by the more recent documentary evidence. Although it is true that the evidence submitted by the applicants contradicts the Board's finding, the Board's finding is nevertheless consistent with the more recent documentary evidence that is part of and serves to support the excerpt cited by the Board. I therefore consider that the Board was not required to specifically mention the documentary evidence submitted by the applicants. The Board was entitled to sort through the elements favourable to, or not so favourable to, the applicants and it was its responsibility to weigh this evidence. The Board's assessment of the evidence was reasonable and consequently the Court's intervention is unwarranted.

[30] The RPD's analysis is based on reasons that are uncontradicted by the evidence and that support the finding of an IFA, and it is therefore impossible to find that the decision is unreasonable, despite the lack of reference to the documentary evidence.

[31] As for the second prong of the test, that is, whether it would be unreasonable to require the applicant to seek refuge elsewhere in Mexico, the applicant alleges that the RPD erred in that it did not take sufficient account of the psychological report adduced into evidence. The RPD gave the following reasons for its decision on this particular point:

> [17] … In its analysis of whether or not it would be too harsh to expect the claimant to settle in another Mexican city, the panel considered the psychological report entered into evidence. The report concludes that the claimant shows symptoms of intense anxiety and has an extreme reluctance to the idea of returning to Mexico, where he feels that would be unable to maintain the peace of mind that he was able to find in Canada. The panel read that report, and it appears that the psychologist does not specifically discuss the possible deterioration of the claimant's health should he return to Mexico or the practical consequences of his return….

[32] In this paragraph, the RPD seems to be referring to the following paragraph in the psychological report of psychologist Marta Valenzuela, dated February 10, 2011:

> Mr.Gandarilla's symptoms are rising as his hearing date approaches. At present, Mr. Gandarilla manifests a profound reluctance of returning to Mexico. His narrative reflects his experience of a country where criminal individuals have the benefit of impunity related to crimes committed against less powerful citizens. Fear, disappointment and powerlessness in obtaining justice and protection from the authorities contribute to his apprehension that he and his family will continue being the target of persecution and crime in his country of origin he is in serious danger and that, most certainly, he will not be able to maintain the peace of mind he has been able to gain since living in Canada.

(Applicant's Record (AR) at p 54).

[33] The RPD's finding is not contradicted by a reading of the entire report. The RPD even went so far as to say, in its decision, that the evidence submitted regarding the applicant's psychological state does not make it possible to determine whether he would be incapable of earning a living or leading a normal life.

[34] The threshold of reasonableness of an IFA is very high. According to *Thirunavukkarasu*, above, the onus is on the applicant who is challenging an IFA. According to *Ranganathan*, above, "[i]t requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions…."

[35] The RPD's decision must be distinguished from the decisions relied on by the applicant in support of his argument. Thus, the reasoning in *Cepeda-Gutierrez*, above, or in *Javaid v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 233, focused on condemning factual inferences made arbitrarily without regard to the evidence in the record. For example, in *Cepeda-Gutierrez*, the psychological report was not mentioned in the reasons of the trial court. The Court allowed the judicial reviews, because it was necessary to closely examine this evidence which went to the heart of the case.

2) Did the RPD err by failing to characterize the applicant as a vulnerable person?

[36] The main objective of this guideline is to "provide procedural accommodation(s) for individuals who are identified as vulnerable persons by the Immigration and Refugee Board of Canada (IRB)" (section 1.1 of Guideline 8) with a view to taking full consideration of the frailty and

vulnerability resulting from personal and specific circumstances. This guideline allows for accommodations to be made at the hearing in view of the individual's vulnerability to ensure that he or she is not disadvantaged in his or her testimony.

[37] This method of procedural accommodation is similar to the guideline on gender-related persecution. In this regard, Justice Denis Pelletier stated as follows in *Newton v Canada (Minister of Citizenship and Immigration)* (2000), 182 FTR 294:

> [17] The Guidelines are an aid for the CRDD panel in the assessment of the evidence of women who allege that they have been victims of gender-based persecution. The Guidelines do not create new grounds for finding a person to be a victim of persecution. To that extent, the grounds remain the same, but the question becomes whether the panel was sensitive to the factors which may influence the testimony of women who have been the victims of persecution…. [Emphasis added.]

(Also, *Martinez v Canada (Minister of Citizenship and Immigration),* 2010 FC 31 at para 22).

[38] Despite the fact that the applicant did not apply for procedural accommodations in accordance with section 5.1 of the Guideline 8, the RPD, at paragraph 11 of its decision, gave reasons why the applicant is not a vulnerable person, based on the psychological report. In reading the trial transcript of the case, the Court finds that the RPD took care to question the applicant with sensitivity and respect (Decision at para 11). In so doing, it complied with the spirit of the guideline (*Munoz v Canada (Minister of Citizenship and Immigration),* 2006 FC 1273, 302 FTR 67). An examination of the testimony shows that there was nothing to indicate that the applicant's ability to testify was impaired.

IX. Conclusion

[39] The RPD's decision contains no reviewable error. It was reasonable, having regard to the context and circumstances of the case, to make an IFA finding. The documentary evidence was not arbitrarily excluded. In the same vein, the psychological report was considered by the RPD as a means of determining both whether the applicant was a vulnerable person and whether the applicant's psychological condition could be an obstacle to his return to Mexico.

[40] The applicant was not only heard but also listened to. Consequently, the Court cannot substitute its reasoning for that of the RPD.

[41] For all of the reasons set out above, the applicant's application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the applicant's application for judicial review be dismissed. There is no question to certify.

"Michel M.J. Shore"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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