

Federal Court



Cour fédérale

Date: 20121022

Docket: IMM-3170-12

Citation: 2012 FC 1228

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, October 22, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

DIEGO ANTONIO CHAVEZ CARRILLO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board, dated March 12, 2012, in which it was determined that Diego Antonio Chavez Carrillo [the applicant] is neither a Convention refugee as defined by section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], nor a person in need of protection under section 97 of the IRPA.

I. The facts

[2] The applicant is the son of Olga Lidia Chavez Carrillo [Ms. Chavez Carrillo], who was granted refugee status in the decision under review.

[3] Ms. Chavez Carrillo is a citizen of Guatemala. She joined the Guatemalan army as a secretary and entered into a relationship with Jorge Vasquez, a senior army officer, who began to struggle with alcoholism and treat her violently. Ms. Chavez Carrillo told Jorge Vasquez that she was pregnant in November 2004, and he beat her. She required medical treatment and then deserted the army and attempted to report Mr. Vasquez. Her attempts were futile, as the senior army officers told her that it was a domestic affair and that they would therefore not intervene. The police told her that her problem was within the military's purview and that they would therefore not intervene.

[4] Ms. Chavez Carrillo arrived in the United States illegally from Guatemala in December 2004 in the early stages of her pregnancy. She gave birth to her child, the applicant, in July 2005. She arrived with her son in Canada on July 27, 2009, and they applied for refugee protection, as she feared violence at the hands of her ex-spouse in the event of her return to Guatemala.

II. The decision under review

[5] The decision maker concluded that Ms. Chavez Carrillo was a refugee because if she were to return to Guatemala, she would run the risk of being subjected to further violence at the hands of Mr. Vasquez. Her ex-spouse is in fact still trying to find her, especially since

Ms. Chavez Carrillo's attempt to avail herself of state protection failed. She is therefore subject to persecution in Guatemala as a member of a social group, that of women.

[6] The decision maker also determined that because the applicant has American citizenship, having been born in the United States, he cannot seek refugee protection in Canada. The decision maker also noted that no evidence was filed to rebut the presumption of state protection with respect to the United States. Furthermore, Ms. Chavez Carrillo did not challenge her child's American citizenship. The applicant did not establish that he would be at risk of torture or cruel and unusual treatment or punishment if he were to return to the United States. The decision maker therefore concluded that the applicant's application for refugee protection must be denied.

III. The applicant's submissions

[7] The applicant acknowledges that he is an American citizen. He submits, however, that if his mother were to return to the United States with him, she would be deported to Guatemala, as she has no status there. The result of this will be that the applicant will be separated from his mother. Moreover, the applicant would find himself alone in the United States and would therefore become the responsibility of the American social services system.

[8] He argues that he is being asked to make a morally unacceptable choice and that the decision maker did not take this into account in making his decision. The applicant is being treated unfairly. The RPD's decision therefore cannot be upheld because it is unreasonable.

IV. The respondent's submissions

[9] The respondent submits that the RPD's decision is reasonable. Because the applicant is an American citizen, the onus was on him to file valid and credible evidence that the United States cannot provide him with the protection sought, given the presumption that a state is able to provide adequate protection to its citizens. The applicant has the burden of establishing that the United States cannot protect him. The absence of such proof is fatal to his application for refugee protection, regardless of the fact that the applicant is a minor.

[10] The respondent adds that it is open to Ms. Chavez Carrillo to apply to sponsor the applicant.

V. The issue

[11] Did the RPD render an unreasonable decision in granting refugee status to the applicant's mother while at the same time denying it to him?

VI. The standard of review

[12] The applicable standard of review is reasonableness, as this is a question of mixed fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 164–66, [2008] 1 SCR 190).

VII. Analysis

[13] The applicant is a minor and is therefore represented by his mother, Ms. Chavez Carrillo, pursuant to a Federal Court order dated August 17, 2012.

[14] The applicant's memorandum contains succinct arguments and does not provide a detailed explanation as to why the RPD's decision is unreasonable. It is therefore not possible for the Court to make such a finding.

[15] It is established that if an applicant has the citizenship or nationality of a country where he or she has no well-founded fear of persecution, protected person status will be denied. In this case, the applicant is an American citizen, and no evidence of possible persecution was filed with respect to the United States. This Court has held on several occasions that there is no concept of family unity incorporated into the definition of Convention refugee (see *Dawlatly v Canada (Minister of Citizenship and Immigration)*, (1998) 149 FTR 310 at paragraphs 13–15, 1998 CarswellNat 1102 (FC Trial Division); and *Williams v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 126 at paragraphs 19–20, 253 DLR (4th) 449 (FCA)).

[16] The RPD's decision is consistent with the case law in such a situation. It can therefore not be considered unreasonable.

[17] However, the human aspect of this case is clear, and it cannot be ignored. At first glance, the RPD's decision seems to have as a direct consequence the separation of the applicant from his mother. In the event of a departure, the mother will have to choose between allowing her son to leave by himself for the United States and accompanying him to a country where she does not benefit from any legal status.

[18] Fortunately, the solution to this problem can be found in subsection 176(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRP Regulations]. It provides that “[a]n applicant may include in their application to remain in Canada as a permanent resident any of their family members.” Therefore, when the applicant’s mother files an application for permanent residence (if she has not already done so), she will certainly include the applicant as a family member. The mother and her minor son will surely not be separated merely because he was not granted refugee status and she was. In the event of such a forced separation, the mother would have recourse to the appropriate proceedings.

[19] The parties were invited to submit a question for certification, but none was submitted.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed and no question will be certified.

“Simon Noël”

Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3170-12

STYLE OF CAUSE: DIEGO ANTONIO CHAVEZ CARRILLO v
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: October 16, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** SIMON NOËL J.

DATED: October 22, 2012

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