

Federal Court



Cour fédérale

**Date: 20121126**

**Docket: IMM-3249-12**

**Citation: 2012 FC 1365**

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

**Ottawa, Ontario, November 26, 2012**

**PRESENT: The Honourable Justice Simon Noël**

**BETWEEN:**

**OMAR OSCAR MARTINEZ BAUTISTA  
MARIA LUISA VALDIVIESO PORTILLA**

**Applicants**

**and**

**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 Protection Board dated March 13, 2012, finding that Omar Oscar Martinez Bautista and Maria Luisa Valdivieso Portilla are not refugees within the meaning of

section 96 of the *Immigration and Refugee Protection Act*, RS 2001, c 27 [the IRPA], and do not have the status of "person in need of protection" under section 97 of the IRPA.

**I. Facts**

[2] The applicants are a Mexican couple. They arrived from Mexico on October 24, 2008, to seek refugee status in Canada, which they did the day they arrived.

[3] The couple owned an Internet café in Mexico City. Around mid-February 2007, members of the Zetas, a well-known criminal organization, went to their business asking for 2,000 pesos per month and to sell discs labelled "Z", with a contribution to their group

[4] In March 2007, someone named El Piojo went to the Internet café to collect the 2,000 pesos, but decided to increase the amount to 3,000 pesos per month. The applicants noted that many people had closed their businesses in the neighbourhood.

[5] On May 10, 2008, 14 months after the events, the applicants went to the police to give a statement. There was no follow up to their complaint and they claim they were laughed at. Members of the Zetas warned the applicants that they risked death if they complained again.

[6] On May 20, 2008, a group of eight people under the influence of drugs entered their business and stole from clients. They asked the applicant for money and hit him. A few days later, individuals came to their business to collect the amount requested but when the applicant refused they hit him.

[7] On May 29, 2008, 20 individuals entered the business and destroyed everything. They took the applicant by force after hitting him. The female applicant was sexually assaulted. On June 1, 2008, the captors phoned the female applicant asking for a 100,000 pesos ransom. On June 7, 2008, she sent 85,000 pesos to the captors and her spouse was released two days later. He had clearly been mistreated by the captors.

[8] The couple then moved to Veracruz to open another Internet café at the end of June 2008. On August 13, 2008, three armed individuals entered their business, destroyed everything and demanded 8,000 pesos. They threatened the applicants with death and said they could never escape.

[9] On September 15, 2008, they moved in with the female applicant's mother in Comalcalco. The applicants claim an aunt told them the Zetas criminal group was still looking for them. The decision was then made to leave the country for Canada.

## **II. Revised decision**

[10] The RPD found that the applicants were neither refugees nor persons in need of protection because their testimony is not credible and their claims are full of contradictions. Moreover, the RPD feels that during the hearing, they added certain details about the events at the basis of their refugee claim.

[11] For the RPD, the fact the applicants did not complain until one year after the extortion began shows that they did not truly fear for their safety. Moreover, when additional assaults took place and their business was destroyed, they did not complain to the police. The RPD dismissed their

explanation that they feared future reprimands from the group if they complained, and they only thought it was appropriate to react when they noticed that business was dropping at their establishment.

[12] Overall, the RPD came to an unfavourable finding for the applicants because they lacked credibility in their description of the events of May 29, 2008. The RPD found that the two testimonials about the sexual assault of the female applicant and the kidnapping of the male applicant were not reliable.

[13] As for the applicants' moving to Veracruz, the RPD feels it was unreasonable for them to not complain to the authorities of this city, despite the fact the applicants expressed fear about the possible consequences of doing so.

### **III. Applicant's submissions**

[14] The applicant claims that the RPD decision that the applicants are not credible is unreasonable since the applicants did not present contradictory testimony.

[15] According to the applicant, under the circumstances, it was not unreasonable for them to not complain because after the report of May 2008, the police did not take any action. The evidence also shows that the Zetas have a presence in the State of Veracruz.

[16] Regarding the events of May 29, 2008, the applicant claims that it was unreasonable for the RPD to find that the applicants did not provide reliable and non contradictory testimony. The RPD

also erred by not considering *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* [the Guideline] when it dealt with the female applicant's credibility about her sexual assault.

[17] Lastly, according to the applicant, it was unreasonable to find that the applicants had a flight alternative since they moved twice and both times the Zetas found them.

#### **IV. Respondent's submissions**

[18] The respondent claims that the RPD finding that the applicants were not credible was fair because there were contradictions in their testimony and it is the RPD's responsibility to address the credibility of witnesses and assess the value of the explanations provided to justify such contradictions.

[19] According to the respondent, the additions at the hearing before the RPD argue in favour of the finding that the respondents attempted to increase the intensity of the events they experienced. Their testimony about their decision to not report the events to the authorities is not coherent and it is therefore not unreasonable for the RPD to come to a finding against the applicants.

[20] Lastly, the respondent feels that the RPD's findings on the female applicant's testimony about her sexual assault are fair; although the Guideline was not mentioned, this does not mean the RPD did not consider it in its decision or approach regarding the refugee claim.

#### **V. Issues**

[21] Did the RPD render an unreasonable decision by finding the applicants were not credible?

**VI. Standard of review**

[22] The standard of review for the issue of assessing the credibility of testimony is reasonableness since it is a question of fact (*Aguebor v Canada (Minister of Employment and Immigration)*, 160 NR 315 at para 4, 1993 CarswellNat 303 (FCA)).

[23] The RPD decision raises some concerns. The RPD's negative finding about the vocabulary the applicants used in their PIF noting that the applicant was [TRANSLATION] "taken" whereas in their testimony they say he was [TRANSLATION] "kidnapped" is inappropriate. The events as described in the PIF show that the applicant was taken by force, against his will. The facts certainly describe a kidnapping. The RPD criticizes the applicants for not using the word "kidnapping". This is an unreasonable finding and should not have been used against the applicants.

[24] Criticism was directed towards the female applicant, noting that [TRANSLATION] "the board finds it curious, to say the least, that she had an AIDS test because to her knowledge, the virus only develops a few months later, after an organism is infected." The applicant testified that following her sexual assault, she went to have an AIDS test at a friend's suggestion. She was told to come back three months later because the virus takes time to develop. The evidence shows that it was not "to her knowledge" but rather something she was told. It was therefore inappropriate to criticize her for this.

[25] Are these observations enough to qualify the overall decision as unreasonable?

[26] The RPD decision noted that the applicants' credibility was compromised by the following observations:

[TRANSLATION]

1. The applicants only filed a complaint with the police 14 months after the March 2007 assaults.
2. Although they experienced other violent and aggressive events, they did not go to the police.
3. They noticeably exaggerated the events of May 2009 during their testimony in comparison to their PIF and in response to question 31.
4. After the sexual assault, the female applicant consulted her doctor but did not confide in him fearing she would then have to file a complaint. The RPD finds this situation a paradox and feels that the priority was to be reassured about her health rather than worry about potential legal consequences.
5. The female applicant, while concerned about her health after the events, did not request a gynecological exam or other tests. The RPD was surprised by this behaviour.

6. The RPD did not find the events in Veracruz to be credible; this city is five hours from Mexico and the RPD found the explanations that members of the Zetas continued to persecute them unlikely.

[27] The RPD also considered an internal flight alternative [IFA] elsewhere in Mexico. It took into consideration the Zetas group and its importance and noted it was localized and there were other places in Mexico to which the applicants could have relocated.

[28] The jurisprudence of this Court recognizes that a decision may be incorrect in certain aspects but overall, it has well-articulated findings that lead to a reasonable result, no intervention is warranted (see *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 56, [2003] 1 SCR 247; *Stelco Inc. v British Steel Canada Inc.*, 2000 CanLII 17097 at para 22, [2000] 3 FC 282 (FCA)).

[29] Having studied the case, the RPD decision and the findings including those that raise concerns, I find that overall, the decision is reasonable and no intervention is warranted.

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



**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES** that the application for judicial review be dismissed and no question shall be certified.

"Simon Noël"

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Judge

Certified true translation  
Elizabeth Tan, Translator

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3249-12

**STYLE OF CAUSE:** OMAR OSCAR MARTINEZ BAUTISTA et al  
v THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** November 15, 2012

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

**DATED:** November 26, 2012

**APPEARANCES:**

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