

Federal Court



Cour fédérale

Date: 20110901

Docket: IMM-464-11

Citation: 2011 FC 1041

Ottawa, Ontario, September 1, 2011

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

SERGIO EDUARDO LOYA DOMINGUEZ

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant, Sergio Eduardo Loya Dominguez, is a citizen of Mexico. He fears persecution by persons associated with the National Action Party (PAN) and the La Linea cartel, which has ties to the PAN. He fled to Canada after being abducted and tortured for five days by individuals he believes are members of the La Linea cartel. He believes that those persons were acting on the instructions of a former candidate for mayor in the municipality in which he lived.

[2] Mr. Loya Dominguez's application for refugee protection was rejected by the Refugee Protection Division of the Immigration and Refugee Board of Canada on the basis of the Board's determination that he has a viable and objectively reasonable Internal Flight Alternative (IFA) in Mexico City.

[3] Mr. Loya Dominguez submitted that this determination by the Board was unreasonable.

[4] I agree. For the reasons that follow, this application for judicial review will be granted.

I. Background

[5] Mr. Loya Dominguez lived in Gomez Farias, a small town in the Chihuahua district of Mexico. He worked for the municipality doing paving and pipe installation jobs, and as a large machine operator.

[6] In addition, Mr. Loya Dominguez worked on the mayoral campaign of Benjamin Ortiz, a candidate of the Institutional Revolutionary Party (PRI), who was elected mayor in 2007.

[7] In October 2008, Mr. Loya Dominguez was assigned to check the drainage system near the home of Armando Garcia, a member of the PAN who had unsuccessfully run against Mr. Ortiz in the 2007 election. He alleges that Mr. Garcia came out of his home and demanded that he and his colleagues cease their work as they were blocking the entrance to his home. In response, Mr. Loya Dominguez referred Mr. Garcia to his boss, Rosario Chayo. Shortly thereafter, Chayo was killed.

[8] Approximately a week after his encounter with Mr. Garcia, and a few days after Mr. Chayo's funeral, Mr. Loya Dominguez was abducted on his way home from work. He was held for four days and tortured. He was beaten with a hard blunt object on his head, sustained numerous

stab wounds from a knife and was sexually assaulted. He also heard screams from other rooms in the building where he was being held and believed that some of the people in question were being killed. On the fifth day, his abductors demanded that he kill Mr. Ortiz, or else they would kill him and a member of his family. He was released after agreeing to comply with that demand.

[9] After being dumped in a remote location, Mr. Loya Dominguez made his way home and sought medical treatment with the assistance of his family. He was hospitalized for two days and his stab wounds required surgery. After he was released from hospital, he went to live briefly at his sister's home, before fleeing to Canada in January 2008.

[10] Before his departure, he contacted Mayor Ortiz to alert him about what had happened. Mr. Ortiz warned him not to return to Gomez Farias, as he would be in danger there.

[11] In November 2008, Mr. Loya Dominguez's family came to Canada. However, they had to return to Mexico when their visa expired. Rather than return home to face a risk of death at the hands of the La Linea Cartel or others encouraged by Mr. Garcia, Mr. Loya Dominguez stayed in Canada and filed a refugee claim in January 2010.

II. Decision under Review

[12] At the outset of its analysis, the Board observed that Mr. Loya Dominguez had "testified in a straightforward manner" and that "there were no material inconsistencies in his testimony or contradictions between his testimony and the other evidence" in the certified tribunal record (CTR).

[13] The Board then stated that the determinative issue in Mr. Loya Dominguez's claim is whether he has an IFA.

[14] The Board proceeded to find that it did not have enough corroborative evidence to establish “a connection between Garcia and the kidnapping and [Mr. Loya Dominguez’s] work with PRI and La Linea gang.” In addition, the Board found that “the reason given by the claimant as to why the gang would be after him today, because he did not kill Ortiz, is no longer an important factor as Ortiz is no longer in the position of Mayor within the community.”

[15] After reviewing a psychological report that was prepared by Dr. Hap Davis, and making various observations regarding the nature of available health care in Mexico City, the Board concluded that Mr. Loya Dominguez has a viable and objectively reasonable IFA in Mexico City. Accordingly, it rejected his claims for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA)*.

III. Standard of Review

[16] The Board’s determination that Mr. Loya Dominguez has a viable and objectively reasonable IFA in Mexico City raises questions of mixed fact and law that are reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 51-55). In short, the Board’s determination will stand so long as it falls “within the range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, at para 47), and provided that “the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility” (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 59).

[17] That said, in reviewing the Board’s determination with respect to the availability of an IFA in Mexico City, the Court must be satisfied that the Board applied the correct legal test for determining the existence of an IFA (*Khosa*, above, at para 44).

IV. Analysis

[18] In my view, the Board's decision must be set aside on multiple grounds.

[19] Most importantly, the decision does not fit comfortably with the principles of justification, transparency and intelligibility. The analytical framework of the decision is very difficult to follow, in part because it is not clear whether the Board applied the correct legal test for determining the existence of an IFA, and in part because it is not clear what conclusions the Board reached in respect of the components of that test (*Canada (Minister of Citizenship and Immigration) v Ragupathy*, 2006 FCA 151, [2007] 1 FCR 490, at para 14).

[20] The correct legal test for determining the existence of an IFA has two prongs. In a claim for protection under section 96 of the IRPA, the first prong is whether, on a balance of probabilities, an applicant has established a serious possibility of being persecuted in the IFA area. In a claim for protection under section 97 of the IRPA, the test for that prong is whether the applicant has established a likelihood of being persecuted in the IFA area. For the purposes of both sections 96 and 97 of the IRPA, the second prong is whether in all the circumstances, including circumstances particular to the applicant, conditions in the IFA area are such that it would not be unreasonable for the applicant to seek refuge in the IFA area (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, at 711 (CA); *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, at 597 (CA); *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, at paras 14-15 (CA)).

[21] In its decision, the Board did not make reference to any specific test in assessing whether Mr. Loya Dominguez has an IFA in Mexico City, and it did not employ any language to suggest

that it applied the correct test with respect to each of its two prongs. Indeed, the plain language of the decision suggests that the Board did not apply the correct test.

A. *The First Prong of the IFA Test*

[22] With respect to Mr. Loya Dominguez's claim under section 96, the Board appears to have reached a negative determination on the basis that "there is no corroborative evidence to determine definitely the agent of persecution" (emphasis added). Although the Board stated this conclusion somewhat differently in paragraph 23 of its decision, where it observed that it did "not have enough corroborative evidence before [it] to make these connections [between Mr. Loya Dominguez and the La Linea cartel]" (emphasis added), a reader can only assume from reading these two statements together that the word "enough" meant "sufficient to determine definitively". This was too high a burden. Mr. Loya Dominguez merely had to establish, on a balance of probabilities, a serious possibility of being persecuted in Mexico City by that agent of persecution (*Rasaratnam*, at 710).

[23] The Board also erred by appearing to reject Mr. Loya Dominguez's claim on the basis of insufficient "direct evidence as to the agent of persecution" (emphasis added). In my view, the Board should have specifically addressed whether the circumstantial evidence adduced by him was such as to establish a serious possibility of persecution at the hands of the La Linea cartel, or its alleged affiliate, the Los Zetas cartel.

[24] Moreover, the Board erred by failing to address important evidence that was contrary to its conclusion on this point, namely, the fact that masked men visited Mr. Loya Dominguez's wife in late 2009, five days after her return to Mexico, and searched her residence looking for him. This evidence corroborated Mr. Loya Dominguez's testimony that the La Linea cartel is still interested in him, because he "mocked them by not doing what they wanted [him] to do." It therefore

should have been addressed by the Board (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35; *Canada (Minister of Citizenship and Immigration) v Ryjkov*, 2005 FC 1540; *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1076, at paras 13-15; *Surajnarain v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1165, at paras 6 and 7; *Uluk v Canada (Minister of Citizenship and Immigration)*, 2009 FC 122, at paras 16 and 32).

[25] It was unreasonable for the Board to fail to consider this evidence, together with: (i) the alleged links between the police in Mexico City and the La Linea/Los Zetas criminal network; and (ii) the circumstantial evidence that supported Mr. Loya Dominguez's fear of persecution and future torture at the hands of that criminal network on grounds that at least in part related to his political opinions.

[26] Had the Board considered this evidence and concluded, on a balance of possibilities, that there was a serious possibility that the La Linea cartel has a continuing interest in pursuing Mr. Loya Dominguez, it would then have had to assess whether Mr. Loya Dominguez likely would be able to avail himself of adequate state protection in Mexico City (*Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400, at paras 44-52).

[27] The points made in paragraphs 25 and 26 above are equally applicable to the Board's assessment of Mr. Loya Dominguez's claims under section 97, except that the test would have been whether there was a likelihood that the La Linea cartel has a continuing interest in pursuing Mr. Loya Dominguez.

B. *The Second Prong of the IFA Test*

[28] The Board’s conclusion with respect to this prong of the test was that Mr. Loya Dominguez “will find safety in Mexico City” and therefore Mexico City “is an objectively reasonable IFA in all the circumstances.” Although this is an unusual way in which to state the test, it is consistent with the jurisprudence, which “requires nothing less than [a demonstration of] the existence of conditions which would jeopardize the life and safety of the claimant in traveling or temporarily relocating to a safe area” (*Ranganathan*, above, at para 15).

[29] That said, I find that the application of that test to the particular facts of this case was unreasonable. In particular, in assessing whether it would be reasonable for Mr. Loya Dominguez to return to Mexico and live in Mexico City, the Board appeared to place significant weight on the following considerations:

- i. “Mexico is a highly developed country with a large population of well-educated medical professionals capable of offering treatment to the claimant”;
- ii. “The claimant could go to live in Mexico City where his skills from working abroad would benefit him immensely in finding employment and healthcare facilities would be large, most likely staffed from the university medical programs with students who would be up-to-date on the latest medical health treatments”;
- iii. “The hospitals would be relatively well-funded as it is [*sic*] the capital city and there would be access available to many private health facilities.”

[30] However, there does not appear to be any support in the evidentiary record for these statements. The Board appears to have simply speculated that these things are true. In my view, at

least some of these propositions are questionable and therefore require support. They are not simply matters in respect of which the Board is entitled to rely on its own experience and expertise (*Tran v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1377, at para 31). Given that these considerations were identified as the only reasons for not accepting the psychological assessment prepared by Dr. Hap Davis, and for reaching the contrary conclusion that the Applicant's safety would be "assured" in Mexico City, this aspect of the Board's assessment was unreasonable (*Canada (Minister of Employment and Immigration) v Satiacum* (1989), 99 NR 171).

[31] Finally, as to the Board's treatment of Dr. Davis' report, the Board appropriately addressed Dr. Davis' assessment that Mr. Loya Dominguez "would suffer disproportionately in any return scenario," that his "symptoms would escalate," that "he would not be able to maintain a job" and that "because of his anger he may be of danger to himself or his family". The Board also noted that "the report presents a strong case with respect to the psychological needs of the claimant." In my view, this: (i) reflected the most important points in Dr. Davis' report; (ii) was not an unreasonable treatment of that report; and (iii) distinguished this case from the cases relied upon by Mr. Loya Dominguez. Accordingly, I do not agree with Mr. Loya Dominguez's submission that the Board erred by failing to give sufficient consideration to that report.

V. Conclusion

[32] The Board's decision is unreasonable and will therefore be set aside.

[33] No question was proposed for certification and none arises.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is granted. The Board's decision dated December 24, 2010 is set aside. The matter is remitted to another panel of the Board for redetermination in accordance with these reasons.
2. No question of general importance is certified.

"Paul S. Crampton"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-464-11

STYLE OF CAUSE: LOYA DOMINGUEZ v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: August 17, 2011

**REASONS FOR ORDER
AND ORDER:** Crampton J.

DATED: September 1, 2011

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