

Federal Court



Cour fédérale

Date: 20120530

Docket: IMM-6527-11

Citation: 2012 FC 664

Ottawa, Ontario, May 30, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

**FLORA LEYDI SANCHEZ CRUZ and
CARLOS DE JESUS AMOROSO SANCHEZ,
MIA REGINA SANCHEZ CRUZ
(BY THEIR LITIGATION GUARDIAN
FLORA LEYDI SANCHEZ CRUZ)**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review by Ms. Flora Leydi Sanchez Cruz (Ms. Cruz) and her two minor children, Carlos de Jesus Amoroso Sanchez and Mia Regina Sanchez Cruz (all

together the Applicants), submitted in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of the decision of the Immigration and Refugee Board (the Board), dated August 31, 2011. The Board concluded that the Applicants are neither Convention refugees nor persons in need of protection under section 96 and subsection 97(1) of the *IRPA*.

[2] For the following reasons, this application for judicial review is allowed.

II. Facts

[3] The Applicants are all citizens of Mexico.

[4] Ms. Cruz married Mr. Luis Amoroso Antele on June 1, 2001. Their son Carlos was born on December 24, 2002.

[5] In June of 2003, Mr. Antele started to verbally and physically abuse Ms. Cruz. Despite her father's insistence, she refused to go to the police.

[6] On October 2, 2006, Ms. Cruz filed a divorce and received sole custody of their son.

[7] In November 2006, Ms. Cruz and her son moved to a friend's house in Monterrey. Four months later, Mr. Antele found them and forced her back to their marital home and abused her.

[8] Ms. Cruz' father purchased a ticket for her to flee to Canada on April 18, 2007. Ms. Cruz left her son with her parents since she did not have Mr. Antele's permission to take her son out of the country.

[9] While in Canada, Ms. Cruz met Jose Alfredo Vasquez Dominguez. She became pregnant with his child.

[10] While pregnant, Ms. Cruz returned to Mexico at her parent's request because they feared Mr. Antele would kidnap their son. She resided with her parents.

[11] On November 4, 2007, Mr. Antele assaulted Ms. Cruz at her parent's house. She was hospitalized for five days. She filed a police report. He was arrested and detained for two days but released after he paid a fine.

[12] Ms. Cruz remained at her parent's house until she gave birth to her daughter Mia on January 29, 2008.

[13] Mr. Antele threatened Ms. Cruz and her daughter over the phone. She refused to report the incident to the police because Mr. Antele allegedly had contacts with the authorities, his brother being a police officer.

[14] Ms. Cruz left Mexico and arrived in Canada on August 16, 2008 with her son, having arranged to obtain a passport for her son by falsifying Mr. Antele's signature. She made her refugee claim on September 8, 2008.

[15] In Canada, Ms. Cruz resumed her relationship with Mr. Dominguez.

[16] Ms. Cruz amended her narrative on May 12, 2010. In her amended narrative, Ms. Cruz explained that Mr. Dominguez, the father of her daughter Mia, abused her. On September 19, 2010, Ms. Cruz called the police and Mr. Dominguez was arrested, charged and sentenced.

[17] She left Mr. Dominguez who was granted visitation rights to see his daughter Mia but solely in a public park.

[18] Ms. Cruz' son went to live with relatives in Saskatchewan for fear of Mr. Dominguez.

[19] On September 19, 2010 while exercising his visitation rights in a public park, Mr. Dominguez stabbed Ms. Cruz several times. The aggression occurred in front of their daughter. Mr. Dominguez was charged and convicted.

[20] Ms. Cruz is afraid that Mr. Dominguez will be deported to Mexico. She is afraid that Mr. Antele, her former husband, and Mr. Dominguez will hurt her and her children if she returns to Mexico.

[21] In its decision, the Board determined that the Applicants were not Convention refugees as they do not have a well-founded fear of persecution. The Board also determined that the Applicants were not persons in need of protection in that their removal would not subject them personally to a risk to their lives or to a risk of cruel and unusual treatment or punishment if they return to Mexico.

III. Legislation

[22] Sections 96 and 97 of the *IRPA* provide as follows:

Convention refugee	Définition de « réfugié »
<p>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,</p> <p style="padding-left: 2em;">(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</p> <p style="padding-left: 2em;">(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.</p>	<p>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 :</p> <p style="padding-left: 2em;">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;</p> <p style="padding-left: 2em;">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.</p>
<p>Person in need of protection</p> <p>97. (1) A person in need of protection is a person in Canada</p>	<p>Personne à protéger</p> <p>97. (1) A qualité de personne à protéger la personne qui se</p>

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

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,

(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.

IV. Issues and standard of review

A. Issues

1. *Did the Board err in determining that Ms. Cruz was not credible?*
2. *Did the Board err in finding that state protection was available to the Applicants in Mexico?*

B. Standard of review

[23] The first issue, the Applicants' credibility, is a question of fact that is reviewable on a standard of reasonableness (see *Lawal c Canada (Minister of Citizenship and Immigration)*, 2010 FC 558, [2010] FCJ No 673 at para 11).

[24] As for the second issue, state protection involves questions of fact and mixed fact and law. They concern the relative weight assigned to evidence, the interpretation and assessment of such evidence, and whether the Board had proper regard to all of the evidence presented in reaching a decision (*Hippolyte v Canada (Minister of Citizenship and Immigration)*, 2011 FC 82). Issues of fact and issues of mixed fact and law are also reviewable on the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12).

[25] “In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* cited above at para 47).

V. Parties’ submissions

A. The Applicants’ submissions

Credibility findings

[26] In its decision, the Board found that “[Ms. Cruz] testified that she and her father [felt] that Luis paid a bribe to be set free... Further, the panel finds that there was insufficient credible and trustworthy evidence to indicate that a bribe had been paid for his release. The panel finds [Ms. Cruz]’ allegations speculative” (see para 43 of the Board’s decision).

[27] Ms. Cruz testified that the police would never admit they accepted a bribe from Mr. Antele and explained that she did not believe the police had charged him since there was no follow up.

[28] Ms. Cruz argues that the Board failed to explain why it speculated on her story. She affirms that her testimony is presumed to be true unless there are clear reasons to reject it relying on *Sukhu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 427; and *Camargo v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1434).

[29] Ms. Cruz alleges that she made a statement to the police but was not afforded the opportunity to ratify it as she was in the hospital when she was told that Mr. Antele had been released. She claims that the Board's decision to reject her claim based on a lack of credibility is unreasonable and contrary to its own documentation.

[30] Furthermore, the Board found that "[Ms. Cruz] testified that Luis' brother is a police officer and, therefore, Luis would have helped with his release. The Panel finds that there was insufficient credible and trustworthy evidence provided to indicate that Luis's brother first of all was a police officer, and, if he were, there is insufficient evidence to indicate that he was involved with Luis' release" (RF Board's decision at para 43). Ms. Cruz affirms that the Board is entitled to make credibility findings, but its findings must be reasonable and based on the evidence adduced by the Applicants. She claims that in her case the board failed to provide reasons for its decision and merely made negative credibility findings without any justification, which is unreasonable.

State protection

[31] The Applicants submit that the Board unreasonably expected they would pursue state protection under extraordinary circumstances denouncing corruption would not have brought Ms. Cruz and her children protection. The Applicants further argue that such an expectation is insensitive to her condition as an abused woman, thus not consistent with the *Gender Guidelines*.

[32] Ms. Cruz alleges that her complaint was futile as it resulted in the subsequent release of Mr. Antele. The Applicants rely upon *Vargas v Canada (Minister of Citizenship and Immigration)*, 2008 FC 709 at para 23, where the Court held that “the analysis in relation to state protection is similarly flawed... While this observation is not lacking justification, it nonetheless ignores the fact that the alleged threats arose as a result of the filing of the lawsuit”.

[33] The Applicants further argue that the Board misapplied *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*], as it does not require that an applicant continues to seek state protection when it was not originally forthcoming. The Board imposes too high a burden on the Applicants without regard to the circumstances of the case and the *Gender Guidelines*.

[34] In addition, the Applicants claim the Board ignored the evidence adduced, which demonstrated the state’s ineffectiveness towards domestic violence.

[35] More importantly, the Applicants allege that the Board ignored the children’s own claim while assessing the issue of state protection. Ms. Cruz asserts that she provided evidence that the

children were themselves victims of domestic abuse. Since the Board did not make any adverse credibility findings, with respect to that portion of the evidence, it is argued that the analysis conducted by the Board is flawed because it ignored a substantial part of the claim.

[36] In essence, the Applicants allege that the Board member ignored the children's claim that they feared persecution each from their two abusive fathers.

B. Respondent's submissions

Credibility findings

[37] The Respondent submits that the circumstances surrounding Mr. Antele's release were speculative and more importantly there were inconsistencies between Ms. Cruz' Personal Information Form [PIF] and her testimony with respect to Mr. Antele's release.

[38] The Respondent also underlines the lack of evidence linking Mr. Antele's release with the fact that his brother is a police officer. This allegation was mere speculation. The Board reasonably concluded there was insufficient evidence adduced to prove the Applicants' allegations according to the Respondent.

State Protection

[39] The Respondent claims that the panel reasonably noted that Ms. Cruz had only sought state protection on one occasion. In that instance, Mr. Antele was in fact arrested. Where state protection is reasonably forthcoming, an applicant's failure to seek state protection is fatal. The Respondent relies on *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] FCJ No 399 [*Carillo*] for that proposition.

[40] The Respondent submits that the Applicants were unable to adduce sufficient reliable and convincing evidence that state protection in Mexico is inadequate. Ms. Cruz only filed one report with the police despite extensive abuse at the hands of Mr. Antele over several years.

[41] Moreover, the Respondent underlines that the test for state protection is not the effectiveness but the adequacy of state protection. The Court recognized, in *Smirnov v Canada (Secretary of State)*, [1995] 1 FC 780, that "even the most effective, well-resourced and highly motivated police forces will have difficulty providing effective protection. This Court should not impose on other states a standard of "effective" protection that police forces in our country, regrettably, sometimes only aspire to". The fact that the state of Mexico does not provide perfect protection is not in itself a basis for determining that the state is unwilling or unable to offer reasonable protection to victims of domestic violence.

[42] The Respondent also underlines that Ms. Cruz never filed a request to have the children's claim determined separately. Ms. Cruz was the designated representative for her minor children.

The minor children relied on Ms. Cruz' narrative. The Board was not required to assess the Applicants' claims separately. The Board did consider the evidence concerning the children. However, it found that Ms. Cruz failed to exhaust all avenues of state protection available to her prior to leaving Mexico. It also found that state protection would reasonably be forthcoming to the Applicants in Mexico as it looked the documentary evidence which indicated that measures existed to exempt parents from communicating their change of address in instances of domestic violence, and Ms. Cruz could inform the Court if either father threatened his respective child.

VI. Analysis

1. Did the Board err in determining that Ms. Cruz was not credible?

[43] Determining the credibility of an Applicant is factual in nature. "The jurisprudence is clear in stating that the Board's credibility and plausibility analysis is central to its role as trier of facts and that, accordingly, its findings in this regard should be given significant deference" (see *Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052, [2008] FCJ No 1329 at para 13).

[44] The Board found inconsistencies between the Applicants' PIF and Ms. Cruz' testimony more precisely with respect to the circumstances underlying Mr. Antele's release. This finding is reasonable as Ms. Cruz' allegations concerning Mr. Antele's release were speculative in nature. No evidence was adduced to establish that Mr. Antele had paid a bribe for his release.

[45] In addition, no evidence was adduced by the Applicants to demonstrate that Mr. Antele's brother had any involvement with the early release.

2. *Did the Board err in finding that state protection was available to the Applicants in Mexico?*

[46] The Board erred when it determined that state protection was available to the minor Applicants in Mexico.

[47] In *Mendoza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 119, Justice Lemieux held, in paragraph 33, that "each case is sui generis so while state protection may have been found to be available in Mexico, maybe even in a particular state, this does not preclude a court from finding the same state to offer inadequate protection on the basis of different facts" (see also *Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359 [*Avila*]). Applicants were expected to take all reasonable steps in the circumstances to seek state protection from their persecutors (see *Ward* and *Avila*). It is important to note that an applicant who fails to do so bears the onus of convincing the Board of the inadequacy of state protection (see *Carillo*).

[48] Furthermore, it is important to underline that when a Board finds that an applicant failed to take the necessary measures to seek state protection, this finding is fatal to the claim if the Board concludes the protection would have been forthcoming. The Board must assess the influence of the alleged persecutor on the capability and willingness of the state to protect (see *Ward* and *Avila*).

[49] In *Ward*, cited above, the Supreme Court of Canada held that the testimony of similarly situated persons, individual experiences with state protection and documentary evidence can all be adduced to demonstrate that state protection would not have been forthcoming.

[50] The quality of the evidence necessary to rebut the presumption of state protection will rise in proportion to the degree of democracy of the state involved (see *Avila and Ward*).

[51] The evidence must also be relevant, reliable and convincing to satisfy the trier of fact on a balance of probabilities that state protection is inadequate (see *Carillo*).

[52] In its decision, the Board wrote that “claimant must do more than merely show she went to see members of the police force and that those efforts were unsuccessful. A claimant must show that they have taken all reasonable steps in the circumstances to seek state protection, taking into account the context of the country of origin, the steps taken and the claimant’s interactions with the authorities” (see Board’s decision at para 56).

[53] Domestic violence is frequent in the state of Mexico. The Board should have conducted a separate analysis of the children’s situation.

[54] As the Court reviews the evidence adduced with respect to the children, it is obvious that each child’s fear is distinct and relies on a different factual basis and circumstances that should have been assessed.

[55] The Board failed to take into consideration these claims in their own right. It is not sufficient to merely rely on a review of existing measures with respect to changes of address or the existence of organizations to help families caught with problems of domestic violence.

[56] The evidence adduced with respect to the situation of each individual child should have triggered separate analyses of risk and the ability of the Mexican state to protect these children and whether they could reasonably access such protection taking into consideration each child's individual circumstance.

[57] The country conditions should have been contextualized in respect of each child's respective situation (see *Zhu v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 884 and *M.L.R.T. v Canada*, 2005 FC 1690).

[58] In view of this important deficiency, this decision cannot stand. The application is allowed.

VII. Conclusion

[59] The Board failed to properly analyse the children's situation with respect to the availability of state protection in Mexico. For this reason, this application for judicial review is allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is allowed; and
2. There is no question of general interest to certify.

"André F.J. Scott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6527-11

STYLE OF CAUSE: FLORA LEYDI SANCHEZ CRUZ, and
CARLOS DE JESUS AMOROSO SANCHEZ,
MIA REGINA SANCHEZ CRUZ
(BY THEIR LITIGATION GUARDIAN
FLORA LEYDI SANCHEZ CRUZ)
v
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 16, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** SCOTT J.

DATED: May 30, 2012

APPEARANCES:

Eugenia Cappellaro Zavaleta FOR THE APPLICANTS

Margherita Braccio FOR THE RESPONDENT

SOLICITORS OF RECORD:

Eugenia Cappellaro Zavaleta FOR THE APPLICANTS
Toronto, Ontario

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario