Federal Court Cour fédérale

Date: 20120201

Docket: IMM-2725-11

Citation: 2012 FC 129

2012 FC 129 (CanLII)

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 1, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

ROY FLORES VARGAS
MARIA ELENA RIVERA TAPIA
MAYRA FLORES RIVERA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review, submitted in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of the decision by the

Immigration and Refugee Board (panel), dated March 25, 2011, that Roy Flores Vargas, Maria Elena Rivera Tapia and their minor daughter, Mayra Flores Rivera, (the applicants) are not Convention refugees or persons in need of protection under section 96 and paragraph 97(1)(*b*) of the IRPA.

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

II. Facts

[3] The applicants are Mexican citizens.

[4] On August 5, 2007, Ms. Tapia found torn ballots in a plastic bag following the municipal elections of Calvillo, Aguascalientes. She decided to take the bag home to show it to her husband, Mr. Vargas, and to his brother. Thus, the two men suggested that she bring the ballots to the mayor, Humberto Gallegos.

[5] She took their suggestion and went to the office of Mr. Gallegos. Upon seeing the torn ballots, Mr. Gallegos became very aggressive. He told Ms. Tapia not to say anything or he would kill her and her family.

[6] Six weeks later, the applicants decided to go and see the municipal candidate of the Party of the Democratic Revolution [PRD], Mr. Martinez, to report the election fraud. However, Mr. Martinez told them there was nothing he could do for them.

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[7] On October 18, 2007, officers of the Federal Investigative Agency [FIA] went to the applicants' house and questioned Ms. Tapia, while pointing out that they were sent by Mr. Gallegos.

[8] On December 15, 2007, and January 5, 2008, the applicants participated in demonstrations against election fraud in Mexico.

[9] On January 10, 2008, the officers of the FIA forced Mr. Vargas and his brother into a van. Once inside, the officers physically assaulted them.

[10] However, the applicants participated in a third demonstration, on January 25, 2008. The officers of the FIA went to the applicants' house a second time and physically assaulted Mr. Vargas.

[11] That same day, the applicants decided to leave their residence and fled to the house of Mr. Vargas's sister, Rocio Flores, in Colonia Estrella, Aguascalientes. On March 3, 2008, the applicants noticed an FIA van with the same persecutors inside.

[12] Mr. Vargas's sister asked them to leave her house as she did not want to endanger her own family. Therefore, the applicants went back to their home.

[13] On March 23, 2008, the FIA officers arrived unexpectedly at the applicants' home and tried to break open their entrance door. The female applicant fled through the back door and cried for

help. She noticed people in a nearby park and asked them for help. The neighbours' intervention caused the FIA officers to flee.

[14] The applicants left Mexico on June 6, 2008, for Canada. They arrived in Montréal and filed a claim for refugee protection on June 7, 2008.

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III. Legislation

[15] Section 96 and subsection 97(1) of the IRPA read as follows:

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 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	*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;
(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.	*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	**Personne à protéger**

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	**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*) 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 themself 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	(iv) la menace ou le

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by the inability of that country to provide adequate health or medical care.	risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

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IV. Issues and standard of review

A. Issues

[16] This application for judicial review raises two issues:

1. ***Did the panel err by finding that the applicants' factual story was not credible?***

2. ***Did the panel err by finding that an internal flight alternative (IFA) existed for the applicants?***

B. Standard of review

[17] The Court notes, in *Mejia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 354, [2009] FCJ No 438, at para 26, the standard of review applicable, when assessing a claimant's credibility, is reasonableness (see also *Zarza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 139, [2011] FCJ No 196, at para 16).

[18] As for the existence of an IFA, in *Diaz v Canada (Minister of Citizenship and Immigration)*, [2008] ACE No 1543, at paragraph 24, the Court states as follows:

> *Ortiz* v. *Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1716, summarizes the features of IFA determinations in judicial review, "[Justice Richard] held at paragraph 26 that Board determinations with respect to an IFA deserve deference because the question falls squarely within the special expertise of the Board. The determination involves both an evaluation of the circumstances of the applicants, as related by them in their testimony, and an expert understanding of the country conditions" from *Sivasamboo* v. *Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 2018. In light of these issues, this Court has found the standard of review to be patent unreasonableness pre-*Dunsmuir* [*v New Brunswick*, 2008 SCC 9] . . . .

Thus, the standard of review applicable to the issues of an IFA is reasonableness.

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V. Position of the parties

A. Position of the applicants

[19] The applicants submit that the panel’s findings on their lack of credibility and the IFA are unreasonable, arbitrary and capricious as they are a breach of procedural fairness. The panel drew a negative credibility inference based on an apparent contradiction between the notes taken by the immigration officer and the applicants’ Personal Information Form [PIF]. The panel did not question the applicants about the contradiction at the hearing. They therefore claim that they were not given an opportunity to be heard on this important issue.

[20] The panel states, at paragraph 26 of its decision: “[a]lthough [Ms. Tapia] was not confronted about it, the panel draws a negative inference from the fact that the immigration officer’s notes from the interview with the female claimant, [TRANSLATION] ‘on March 3, 2008, the officers came again

and broke down the door. I went to find help in a baseball park;' however, in her PIF, she alleged that this incident happened on March 23 and that, on March 3, she was at her sister-in-law's home in Mexico City." The applicants maintain that the findings are contrary to the principles of natural justice and procedural fairness. Accordingly, the panel's finding, as to their credibility, is unreasonable as a whole.

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[21] The applicants note that the panel dwells on peripheral and minor details to conclude that they are not credible. At paragraphs 13 to 27 of its decision, the panel conducted a microscopic analysis of their refugee claim. The applicants submit that it is not implausible they waited 6 weeks before denouncing the mayor to his mayoral opponent, Mr. Martinez. They also state that it is not absurd that members of certain Mexican political parties be engaged in underhanded schemes.

[22] The applicants submit that when a panel assesses the credibility of a claimant, it must presume that the allegations made under oath are true, unless there are serious grounds to doubt their truthfulness (see *Moldano v Canada (Minister of Citizenship and Immigration)*, [1979] FCJ No 248; *Miral v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 254). It is therefore only with great caution that a panel like the Refugee Protection Division of the Immigration and Refugee Board may find a narrative to be implausible.

[23] Such caution is to be exercised especially when a claimant is of Mexican origin and the culture and customs are different from ours (see *Gunes v* Canada *(Minister of Citizenship and Immigration)*, 2008 FC 664).

[24] Finally, according to the applicants, the panel found, without valid grounds, that they could avail themselves of an IFA. In its decision, the panel does not take into account FIA persecutors who have the means and the motivation to find the applicants anywhere in Mexico. According to the applicants, the documentary evidence presented as regards Mexico indicates that the FIA can access the government system of the Federal Electoral Institute. That system allows the FIA to find the applicants based on their electoral card.

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[25] Moreover, the applicants maintain that their potential employer may unintentionally reveal their haven as all employers must register in the computer system Clave Unica de Registro de Poblacion [CURP].

[26] The applicants allege that an IFA cannot be speculative or theoretical but rather it must be a realistic and attainable option (*Huerta v Canada (Minister of Citizenship and Immigration)*, 2008 FC 586 [*Huerta*]). They also mention that they cannot undergo undue hardship in travelling to another location in Mexico or hide out in an isolated region of the country (see *Thirunavukkarasu v Canada (Minister of Citizenship and Immigration)* (CA), [1994] 1 FC 589 [*Thirunavukkarasu*]). There is no doubt, according to the applicants, that the IFA is not a realistic and attainable option.

B. Position of the respondent

[27] For his part, the respondent submits that the assessment of the credibility of a refugee claimant is for the panel who specializes in such matters (see *Bunema v Canada (Minister of Citizenship and Immigration)*, 2007 FC 774, at para 1 [*Bunema*]; *Singh v Canada (Minister of*

Citizenship and Immigration), 2007 FC 62; *Encinas v Canada (Minister of Citizenship and Immigration)*, 2006 FC 61; and *Kengkarasa v Canada (Minister of Citizenship and Immigration)*, 2007 FC 714). The Court's intervention must be limited to cases where serious errors are made in weighing facts or testimonies (see *Bunema*, *supra*, at para 17; and *Navarro v Canada (Minister of Citizenship and Immigration)*, 2008 FC 358, at paras 12-14).

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[28] In the case at bar, the panel did not believe central points of the applicants' narrative as it is vague, unclear and has many implausibilities and contradictions which undermine their credibility.

[29] First, the respondent notes that the applicants' testimony, as to the reporting of election fraud, is implausible. The panel found it curious that Ms. Tapia took the ballots home instead of giving them to the responsible authorities. She also did not know how many ballots were in the bag.

[30] Second, the panel considered it implausible that Mr. Martinez would be in collusion with his defeated opponent and informed him of the fraud committed against him.

[31] Third, the panel wondered why Ms. Tapia reported the ballots to the incumbent candidate.

[32] Fourth, the respondent notes that the panel found implausible that the fraudsters would be so careless as to leave a bag containing ballots abandoned on the ground.

[33] Finally, the applicants did not explain why they waited six weeks before reporting Mr. Gallegos.

[34] The respondent maintains that the panel correctly identified contradictions in the applicants' testimony. Moreover, the applicants submit that the FIA officers went to their home to search the house for the ballots. However, the applicant had already given the ballots to Mr. Gallegos.

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[35] Moreover, when the panel questioned the applicants as to the motivations of Mr. Gallegos and the possibility of an IFA, they stated that the FIA persecutors were watching them. When asked by the panel to explain why two years went by between the FIA's numerous visits and their visit to her mother's house, Ms. Tapia adjusted her testimony by stating that she often saw the officers in front of the house and she was under constant surveillance.

[36] The respondent submits that the elements raised by the panel, when it assessed the truthfulness of the applicants' testimony, are vital elements of their claim and greatly undermine their credibility.

[37] As to the existence of an error of procedural fairness, the respondent submits that the lack of credibility suffices to deny the applicants' claim for refugee protection.

[38] The panel concludes that the applicants could seek refuge in Mexico by settling in Mexico City, Federal District, or in Guadalajara. Indeed, the applicants recognize that one of the male applicant's brothers went back to live in Puebla without undergoing any undue hardship (see panel's decision, paras 30-33). The respondent submits that it is, therefore, a reasonable finding.

[39] Finally, the applicants argue, in their memorandum, that their personal information available through CURP would allow the FIA officers to locate them. They also fear that the officers would use their electoral cards to find them. However, the respondent states that no documentary evidence was provided to support those submissions.

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VI. Analysis

1. Did the panel err by finding that the applicants' factual story was not credible?

[40] The Court would like to note that the "credibility is central to most, if not all, of the findings that the [IRB] makes when assessing asylum claims" (see *Umubyeyi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 69, [2011] FCJ No 76, at para 11). The IRB may draw a negative finding on the claimant's credibility where inconsistencies are found between the claimant's testimony and the evidence provided (see *Aguebor v Canada (Minister of Employment and Immigration*), [1993] FCJ No 732 [*Aguebor*]).

[41] However, "[t]he Court should not interfere with the findings of fact and the conclusions drawn by the [IRB] unless the Court is satisfied that the [IRB] based its conclusion on irrelevant considerations or that it ignored evidence" (see *Kengkarasa v Canada (Minister of Citizenship and Immigration)*, 2007 CF 714, [2007] FCJ No 970, at para 7; see also *Miranda v Canada (Minister of Citizenship and Immigration)*, [1993] FCJ No 437). The case law is consistent that assessing evidence and testimony, as well as attaching probative value to them, is up to the IRB (see *Aguebor*,

supra, and *Romhaine v Canada (Minister of Citizenship and Immigration)*, 2011 FC 534, [2011] FCJ No 693 at para 21).

[42] The panel found many implausibilities in the applicants' narrative. It mentioned that it found curious that Ms. Tapia brought the torn ballots home and that she no longer remembered how many ballots were in the bag. The panel also notes that it is implausible that there could be collusion between opposing political parties. However, the panel found it unlikely that the fraudsters would be so careless in their attempt to alter the result of the vote. Finally, the panel does not understand why the applicants waited six weeks to denounce Mr. Gallegos.

[43] The panel's findings are based on irrelevant considerations. It dwells on minor details that cannot undermine the applicants' credibility to the point where their refugee claim would be denied. The panel's findings cannot withstand a more probing examination with the result that if its decision was only based on these points, the Court would not have any difficulty in allowing this application for judicial review.

[44] However, the Court must also consider the panel's finding that there is an IFA in Mexico City or in Guadalajara.

2. Did the panel err by finding that an internal flight alternative (IFA) existed for the applicants?

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[45] The panel did not reasonably find that an IFA exists in Mexico City or in Guadalajara for the applicants.

[46] In *Rasaratnam v Canada (Minister of Employment and Immigration)* (CA), [1992] 1 FC 706, the Federal Court of Appeal sets out the criteria which applies to determine whether an IFA exists. The criteria is also applied in *Thirunavukkarasu*, *supra*, at paragraph 12:

> In my opinion, in finding the IFA, the Board was required to be satisfied, on a balance of probabilities, that there was no serious possibility of the appellant being persecuted in [place of IFA] and that, in all the circumstances including circumstances particular to him, conditions in [place of IFA] were such that it would not be unreasonable for the appellant to seek refuge there.

[47] It is also important to note that "…[*Thirunavukkaras*] clearly states that it is not sufficient for a refugee applicant to allege that he/she has no friends or family in the more secure part of the country or that he/she risks not finding suitable employment (*Thirunavukkarasu*, *supr*a, at paragraphs 13 and 14)" (see *Ramirez v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1191, [2007] FCJ No 1536, at para 8).

[48] The applicants are attempting to reverse the panel's finding that they could move to Mexico City, Federal District, or Guadalajara. The applicants presented their testimony as their sole evidence to establish that the FIA officers would try to find them elsewhere in Mexico. While they state, furthermore, that the FIA has the resources and means necessary to find them and that they would not feel safe as they would have to go out and work, no documentary evidence was adduced before the panel in support of their allegation.

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[49] Nevertheless, the evidence established that Mr. Vargas's brother is in a similar situation. The applicants admit that he found refuge in Puebla and that he has been living there "quietly." The case law is clear: a person who seeks refuge elsewhere in the country must be able to live there safely and free from the threat he or she initially faced. Thus, the existence of an IFA appears unreasonable and unrealistic in this case.

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[50] The panel's decision, respecting the IFA, falls outside the range of possible acceptable outcomes which are defensible in respect of the facts and law in the particular circumstances of this case.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

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

"André F.J. Scott"
Judge

Certified true translation

Daniela Possamai, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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