

Date: 20080219

Docket: IMM-3159-07

Citation: 2008 FC 211

Ottawa (Ontario), February 19, 2008

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

**VLADIMIR OLGUIN SANDOVAL,
LILIANA VILLEGAS VIDALS,
HELENA CIPACTI OLGUIN VILLEGAS (minor), and
ANDRE VLADIMIR OLGUIN VILLEGAS (minor)**

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In the present case, the applicants, who are citizens of Mexico, claim refugee protection from government authorities in Mexico on the basis of their political opinion and family affiliation for the three accompanying family members. They are: Vladimir Olguin Sandoval (the "principal applicant"), his wife, Liana Villegas Vidals (the "female applicant"), their children, Helena Cipactli Olguin Villegas (the "female minor applicant"), and Andre Vladimir Olguin Villegas (the "male minor applicant"). The applicants are self-represented by the principal applicant who was a lawyer in their home country.

[2] In dismissing their application on June 21, 2007, Mr. Roger Houde (the Presiding Member) of the Refugee Protection Division (RPD) provided the following undisputed factual context.

I. Factual Context

[3] The principal applicant became a leftist student activist at university as an under graduate during the 1990s. He was a full time activist of the left wing movement “Liga 23 de septiembre,” and led public demonstrations against, among others the army, the Mexican and U.S. governments.

[4] During his studies at law school at the Independent University of Mexico, the principal applicant maintained his links with the leftist movement. He learned of the planned 1994 armed revolt in Chiapas and while he refused to go to Cuba to train, he became a partisan of the guerrilla movement in Chiapas and provided passage and shelter to the guerrillas when they visited Mexico City. He was also a sympathizer of the group Zapatista National Liberation Army (EZLN) in 1996.

[5] On December 22, 1999, as he left one such guerrilla meeting, his car was intercepted and two armed men forced him to get out of his car and into another. He was threatened and warned that he was under surveillance since his university days and if he knew what was good for him, he would stop these clandestine leftist activities or else he would be killed.

[6] Following this incident, the applicant stopped all such activities and instead focussed his energies in intellectual protests as a member of the Democratic Lawyers Association of Mexico. To that end, he started a research project on the Military and Civilian leaders in Mexico who allegedly participated in the massacres of 1968 and 1971, with the view to bringing them to justice before the International Criminal Court of Justice in the Haye.

[7] On August 2, 2004, he made an access to information (ATIP) request to the Federal Institute for Access to Information (FIAI), in order to get the names of military and civilian commanders who participated in the massacres in 1968 and 1971.

[8] On August 10, 2004, the principal applicant and his wife had their car blocked and two armed individuals forced them into another vehicle. They received death threats not only against themselves but also against their two young children, the minor applicants. They were warned that no one can undermine or bring down the army and they intended to kill their entire family, providing heart curdling graphic details.

[9] The same day, the principal applicant alleges that he went to lodge a complaint against the two individuals and the army with the office of the Minister of Justice of the Federal District. However, when he realized that the office was impotent to help him and his family, the principal applicant decided to leave Mexico with his wife and arrange to have his children follow them to Canada. That is exactly what they did on August 20, 2004, when both spouses arrived in Canada and claimed asylum here. Their children followed with their maternal grandmother on October 10, 2004.

[10] At his hearing of March 26, 2007, the principal applicant testified that while he was in hiding in the State of Guerrero, on 14th or 15th August 2004, he received an anonymous telephone call threatening him. However, this incident was not recorded either in his Personal Information Form (PIF) or his narrative.

II. Impugned Decision

[11] The SPD concludes that the information requested by the principal applicant regarding the massacres in 1968 and 1971 was clearly documented and present in the public domain as noted by media coverage, including Exhibit P-15, a CBS News article dated October 1, 2003, which highlighted the names of participants in the bloody attack on student protesters in 1971. As such, the principal applicant's access to information request would not introduce anything new to the public debate such that it would rile the ire of the police, the army or the government. Moreover, the events took place in 1968 and 1971 or more than 30 years ago, and it was not plausible that the applicants would be persecuted as a result of a simple ATIP request.

[12] The omission of key information by the principal applicant also gave pause to the SPD as to the credibility of the principal applicant and his allegations of persecution. Indeed, at the hearing and for the first time, the principal applicant informed the SPD that he fled to the State of Guerrero after the incident on August 10, 2004 to hide from his persecutors and that while there, he received anonymous telephone calls on August 14 or 15, 2004 with death threats against him and his family. These two critical pieces of information were absent from the applicants' narrative and his PIF. When asked why such key facts were missing from his file, the principal applicant stated that he did include it in his narrative but that the interpreter took out that information. The SPD did not therefore accept as satisfactory the applicant's explanation because he had ample time to amend his PIF, especially since he had retained new counsel more than eighteen months prior to the hearing.

[13] Finally, the SPD rejected the application for refugee status because the principal applicant lodged only one complaint with the Mexican authorities i.e., on August 10, 2004 and he did not give them an opportunity to take action on his behalf. In fact, the applicant had decided that same day to leave Mexico and left within ten days without therefore affording the Mexican authorities the opportunity to come to his aid and provide protection.

[14] In light of their testimony and documentary evidence, the SPD concluded that their story was not credible and none of them qualified to be declared either a refugee according to the Convention or a person in need of protection. It is this straightforward decision that brings the Sandoval family before the Federal Court.

III. Issues

[15] Did the SPD err in fact or in law in reaching its decision?

[16] For the reasons that follow, the Court finds that the behaviour of the presiding member created a reasonable apprehension of bias against the principal applicant; as a result of which, the applications for judicial review shall be allowed.

IV. Analysis

[17] The SPD found that the applicant was not credible and that he had failed to avail himself of state protection in that he left the country before the Mexican authorities had an opportunity to pursue his complaint of August 10, 2004. Having reviewed the documents and the material before the SPD, these conclusions will have to be reassess for the reasons given in the following paragraphs.

[18] The principal applicant raises questions of behaviour of the presiding member who dealt with him in a dismissive and prejudicial manner because of his profession as a lawyer. The principal applicant states in particular that the presiding member made different comments including several interventions in French, even though the principal applicant did not understand French and the hearing was held in English with an English-Spanish interpreter (See pages 424, 430, 476 and 525 of the Certified Transcription of the Hearings, held on October 31, 2005, July 10, 2006, and March 26, 2007). To cite but a few examples:

October 31, 2005

BY THE PRESIDING MEMBER

-Alors bonjour à tous, nous sommes aujourd'hui le 31 octobre 2005 à Montréal, à la Place Guy-Favreau, pour entendre les demandes d'asile de monsieur Vladimir Olguin Sandoval et son fils Andre Olguin Villegas et sa fille Olguin Villegas Helena et de sa belle-mère Luce Alicia Vidals et de sa conjointe Liliana Villegas Vidals..

BY COUNSEL? (to presiding member)

- *C'est marquee en anglais.* It's in English

A. You're right it's in English, sir, but they were all written in French. I don't...
Okay, well, we'll proceed in English.

July 10, 2006

BY THE PRESIDING MEMBER

-Alors bonjour à tous, nous sommes aujourd'hui le 10 juillet 2006 à Montréal, à la Place Guy-Favreau. Nous devons entendre les demandes d'asile de Vladimir Olguin Sandoval et de Andre Olguin Villegas et Helena Olguin Villegas et Liliana Villegas Vidals [. .]

Les demandeurs sont représentés par monsieur Abraham Gara. Notre agent de protection des réfugiés est maître Michel Colin et notre interprète est monsieur François Paul Cimachowicz, qui traduira du français ...

BY PRESIDING MEMBER (to counsel)

Q. Oh, it's in English, eh?

A. Yeah, it's in English.

March 26, 2007

BY PRESIDING MEMBER

-We're back on recording.

BY PRESIDING MEMBER (to Minister's counsel)

- TCC/CCIMadame Poulin.

A. FCA/CAFOui. *En ce qui concerne le Ministre, nous allons, nos questions sont terminées et comme dans une question comme ça, c'est beaucoup une question de crédibilité, nous allons quand même rester ici pour écouter, le reste des questions et réponses de Monsieur et nous allons finalement soumettre nos commentaires à la fin. En ce qui ... Il y a eu tantôt, et ça c'est enregistré, confusion dans les dates et tout ça. Donc, c'est la raison pour laquelle on reste ici. Si ç'avait été extrêmement clair tantôt les dates là, on aurait pas poursuivi. Donc, j'aimerais aviser tout le monde que à ce moment-ci Monsieur est très crédible, nous allons retire notre intervention pour le reste.*

- Okay.

A. *Merci.*

BY PRESIDING MEMBER (to refugee protection officer)

- *Madame, please.*

A. Okay. But I will continue in English.

- Excuse me.

[19] These passages from the three different hearings reflect insensitivity to the applicants who do not speak French. Moreover, the interpreter, Madame Cristina Swidzinski, translated from English to Spanish and vice versa. There is no indication in the transcripts that the presiding member repeated in English the instances when French was spoken. This oversight is particularly egregious when one considers the fact that when the Minister's representative spoke in French, at the March 26, 2007, it was not a simple exchange of introductory remarks as in the two previous instances. Rather, the Minister's representative spoke to the substance of the Minister's presence, indicating that they would be remaining to observe the proceedings because the essence of the Minister's concerns depended on the credibility of the principal applicant. Isn't that information the applicants and indeed the principal applicant ought to have been privy to? The presiding member neither reiterated in English what was said during this exchange nor had the presence of mind to do so when the refugee protection officer intervened and objected. This is unacceptable. The principal applicant has a right to hear what is being levied against him in order to be fully armed to respond accordingly.

[20] In addition, both the Refugee Protection Officer (RPO) and Counsel for the applicants numerous interventions for clarification or objection were made to the presiding member by (see pages 449 (several times), 454, 466, 483, 499, 500, 501, 538-539. Finally, the applicants allege that the presiding member made several inappropriate comments and demonstrated an attitude unbecoming of the office (see pages 498-500, 521, 537-538).

[21] In particular, the transcripts of the hearing on March 26, 2007 reveal the following exchange between the presiding member and the principal applicant:

BY PRESIDING MEMBER (to person concerned)

- Sir, I want to come back on the fact that you didn't include in your story the anonymous call you received on the 10th of August 2004.
- A. It wasn't on the 10th of August.
- Q. No? When was it? After the 10th.
- A. It was approximately on the 14th or 15th of August. I can't tell you precisely.
- Okay.
- Q. So you say that, and the board finds that this is a very important event. It shows that your persecution is pursuing itself in Mexico. So you said that it is not include (*sic*) in your narrative because the translator said to take it off. That's it?
- A. Yes, that's right.
- I find it strange, sir, that a lawyer cannot say, well, I think this is important and insist to be include (*sic*). Wait. This was signed, I don't know when, in 2004 probably. Since that time you didn't have any time to make an amendment to your narrative, which you could have.
- A. The lawyer had nothing to do with it. It was the translator that decided that I will ... you are going to say this and this during your hearing.
- Yeah, okay.

[22] The Court finds the presiding member's comments that he found it strange that as a lawyer the principal applicant did not take the first opportunity to reveal the incident involving telephone calls in mid August, to be inappropriate.

[23] Over and beyond these incidents that disturbed both Counsel and the applicants, Counsel for the applicants provided several pages illustrating errors committed by the presiding member either in regards to comprehension or misinterpretation, wasting time, or lack of preparedness for the hearing, these include pages: 472, 299, 513, and 516.

[24] It is trite law that the rules of natural justice require presiding members at SPD hearings to respect the principles of procedural fairness in spite of the heavy case load and complexity of matters before them.

[25] My colleague Mr. Justice Luc Martineau in *Guermache v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1058 reminds us that each application for refugee protection deserves the same high degree of care. He wrote in particular at paragraphs 4 and 5 as follows:

4 Members have a difficult but essential role to play. Because of their workload, the stress is enormous. Nevertheless, even if they may have heard the same "story" hundreds of times, the individuals are different, so that each application for protection deserves the same degree of care. We must bear in mind that Canada offers protection to those who have well-founded fear of persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group, as well as those in danger of torture or risk of cruel and unusual treatment or punishment. At the same time, in refugee matters, the objectives of the Act are, inter alia, to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution, and to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings (paragraphs 3(2) (c) and (e) of the Act). The members are therefore the first and, at this time, the last decision-making link (the provisions of the Act on the Refugee Appeal Division are not yet in force) to whom claimants can

address their application for protection and be heard in Canada in the formal framework of an oral hearing before a quasi-judicial tribunal.

5 With that in mind, the scale of the members' tasks must not cause them to lose sight of the fact that the rules of natural justice must be observed and that their conduct during hearings and applications for protection must, at all times, be irreproachable and objective. It goes without saying that the most basic courtesy and politeness are de rigueur. There is no place for intimidation, contempt, and offensive innuendo, nor for harshness or inappropriate language. As the Right Honourable Mr. Justice Fauteux wrote in the *Livre du magistrat* ["a book for judges"], "[TRANSLATION] The judge will ensure the climate necessary for the operation of justice by his moderation, his discipline and his courtesy in his relations with counsel, the parties and the witnesses." (The Right Honourable Gérard Fauteux, *Le livre du magistrat*, Minister of Supply and Services Canada, 1980, at page 49).

[26] Having read the transcripts and heard the pleadings of the parties, I note that the respondent has declined to make further representations with respect to the allegations of apprehension of bias. Taking also into consideration the fact that both Counsel for the applicants and the RPO did intervene on numerous occasions either to seek clarification or to raise objections to the presiding member's attitude, I agree that there was a reasonable question regarding the behaviour of the presiding member. It is not because the principal applicant happens to be a lawyer in Mexico that he should be treated with a different measuring stick and not afforded the full ear and care of the presiding member.

[27] Based on the comments made above, the Court is compelled to intervene and allow this application.

[28] The parties were invited to make submissions of questions for certification. However, none was proffered; therefore no question is certified.

JUDGMENT

THIS COURT ORDERS THAT:

- The application for judicial review is allowed.
- The SPD decision rendered June 21, 2007 is quashed and the matter is referred back for re-determination before a different member.
- No question is certified.

“Simon Noël”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-3159-07

STYLE OF CAUSE: VLADIMIR OLGUIN SANDOVAL,
LILIANA VILLEGAS VIDALS,
HELENA CIPACTI OLGUIN VILLEGAS, and
ANDRE VLADIMIR OLGUIN VILLEGAS and
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: February 12, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** The Honourable Mr. Justice S. NOËL

DATED: February 19, 2008

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