

**Date: 20080522**

**Docket: IMM-4307-07**

**Citation: 2008 FC 652**

**Toronto, Ontario, May 22, 2008**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**OSIRIS LETICIA PADILLA PEREZ**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Osiris Padilla Perez is a citizen of Mexico, who seeks judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board rejecting her claim for refugee protection.

[2] At the conclusion of the hearing, I advised counsel that I would be allowing the application. These are my reasons for doing so.

## I. Background

[3] Ms. Padilla is a young woman from Tabasco, Mexico. She says that in June of 2006, when she was 17 years old, an individual identifying himself as a member of the Los Zetas gang contacted her father, demanding that he pay 500,000 pesos to the gang within 48 hours, in order to ensure the family's safety. While Ms. Padilla's father initially thought that the call might have been a joke, he did tell his wife and daughters to be very careful. He did not pay the money demanded by the gang.

[4] A couple of weeks later, while she was on her way home from work, Ms. Padilla states that she was forcibly abducted by a group of men in vans. She says that she was then drugged, beaten and raped.

[5] After she was released by her captors, Ms. Padilla sought medical attention from a family friend, who was a medical doctor. She then fled to a relative's house in Colima.

[6] Her father then received a second call from a member of the Los Zetas gang, once again demanding money. This time, her father paid up, but was unable to raise the full amount sought by the gang.

[7] Ms. Padilla says that she then began getting threatening phone calls on her cell phone from gang members, and that these calls continued even after she changed her phone number. The callers asked her if she had liked what the gang had done to her, as they could not understand why her

father had not paid all the money that had been demanded of him. Ms. Padilla was also told by callers that the gang knew where she was, and that “nobody plays with the Zetas”.

[8] Ms. Padilla says that although her family was reluctant to allow her to travel alone, she began making arrangements to leave the country. A week after she turned 18 and no longer required parental consent to travel abroad, she left Mexico and came to Canada, whereupon she immediately made her refugee claim.

## II. Ms. Padilla’s Refugee Hearing

[9] At the commencement of Ms. Padilla’s refugee hearing, the presiding member advised Ms. Padilla and her counsel that the member “did not want to get into the details of what occurred with Ms. Padilla Perez”. The member then went on to say that “Although credibility will of course remain in issue, I don’t want to go into the PIF narrative in terms of getting the details of the incident. If I find it necessary to do so as the hearing progresses I will let you know”.

[10] A few minutes later, the Refugee Protection Officer sought to clarify the member’s position with respect to the credibility issue. In this regard, the presiding member confirmed that credibility was only an issue “as it relates to state protection”.

[11] With this understanding to what issues were “on the table”, the hearing proceeded. Over the course of the hearing, Ms. Padilla was not asked any questions whatsoever about the actual attack.

### III. The Board's Decision

[12] At the conclusion of the hearing, the presiding member took a brief recess, returning about 20 minutes later to deliver an oral decision. The member's reasons were subsequently reduced to writing.

[13] After briefly summarizing the basis for Ms. Padilla's claim, the member stated that the determinative issues in the claim were state protection and the availability of an internal flight alternative in Mexico City.

[14] The reasons go on to state that "The Board had concerns with respect to the claimant's credibility and the lack of documentation". The member then says that "...the Board is left with the claimant's onus to demonstrate that the events occurred and that the Los Zetas gang were the perpetrators. In this regard, the Board is not satisfied the standard of proof has been met". The reasons then assert that the member did not find credibility to be a determinative factor.

[15] The member next addressed Ms. Padilla's argument that the sexual violence that she experienced in Mexico was sufficiently severe as to bring her within the "compelling reasons" exception set out in subsection 108(4) of the *Immigration and Refugee Act*. In this regard, the member held that "the act alleged did not meet the standard of 'appalling and atrocious' although if what was alleged did [...] occur, the Board is persuaded that this was a horrific event for a young woman". The reasons then state that "The case law, on which the Board relied with respect to appalling and atrocious, guides the Board in its conclusion that in this case, the test was not met".

[16] The presiding member then turned to the issue of state protection, commencing her analysis with the observation that she “did not accept the testimony that the claimant has given and finds material aspects of the claim to be lacking”.

[17] The member then says that even if she were to accept Ms. Padilla’s story as true, which she did not, she would still have to address the issue of state protection. This is, of course, incorrect: if the member did not believe Ms. Padilla’s story, there was no need to go on to address the question of state protection.

[18] What then follows is a lengthy recitation of the relevant legal principles with respect to the question of state protection, as well as a summary of selected portions of the country condition information.

[19] The member then considered the evidence with respect to “kidnappings and drug cartels”, noting that the country condition information confirmed that such kidnappings were indeed taking place in Mexico, but that the state was making serious efforts to combat these crimes, and that these efforts were paying off.

[20] The member did not fault Ms. Padilla for not reporting her assault to the police, given that she was a minor when the attack took place.

[21] While accepting that Ms. Padilla had a genuine subjective fear of returning to Mexico, the member concluded that on a forward-looking analysis, state protection would be forthcoming, in the event that she were to return to Mexico.

[22] Insofar as the internal flight alternative finding was concerned, the member considered the jurisprudence relating to this issue, also noting that this Court has confirmed findings in other cases that those fearing criminality have been found to have an internal flight alternative in Mexico City.

[23] After examining Ms. Padilla's personal situation, the member then found that Ms. Padilla too had an internal flight alternative in Mexico City.

#### IV. Analysis

[24] There are a number of problems with the member's decision, as well as real concerns with respect to the fairness of the process that was followed at the hearing.

[25] Dealing first with the fairness issue, questions as to the fairness of the process followed in a given case are to be determined by the reviewing Court, and no deference is owed to the Board in this regard: see, for example, *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, at paragraphs 52 and 53.

[26] I do not understand this to have changed as a consequence of the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9: see Justice Binnie's

concurring decision in *Dunsmuir*, at paragraph 129, where he confirmed a reviewing court has the final say in relation to questions of procedural fairness. See also *Dunsmuir*, at paragraph 151, and *Halifax Employers' Association v. Tucker*, 2008 FC 516.

[27] It appears that, perhaps in an effort to be sensitive to the trauma that she had experienced in Mexico, the member did not wish to put Ms. Padilla through the ordeal of having to relive the details of her assault in her testimony.

[28] While the member is to be commended for her sensitivity, it was unfair to tell Ms. Padilla and her counsel at the outset of the hearing that the member “did not want to get into the details of what occurred”, leaving her with the impression that the member accepted that the kidnapping and assault had taken place as alleged, and to then express concerns with respect to the credibility of this aspect of Ms. Padilla’s story in the decision.

[29] Particularly problematic from a fairness perspective is the Board’s finding that Ms. Padilla had not established that the events in issue actually occurred, and that the Los Zetas gang were the perpetrators.

[30] An additional fairness concern with respect to this finding is the complete absence of *any* reasons being provided for finding the central aspect of Ms. Padilla’s story not to be credible.

[31] Particularly puzzling is the member's statement that while she did not accept that the events described by Ms. Padilla in her PIF had occurred, she did accept that Ms. Padilla "experienced some negative incident during the time before she left Mexico", but that she "was not persuaded about the details of the agents of persecution as alleged".

[32] The reasons provide absolutely no explanation as to why the member rejected Ms. Padilla's story, what the member thought the unidentified 'negative incident' really was, or who it was that the member thought was responsible for the incident in question.

[33] Moreover, given the statement by the member at the commencement of the hearing that she viewed the issue of credibility as being in issue "as it related to state protection", it is difficult to ascertain the extent to which the negative credibility findings then tainted the Board's state protection analysis. It is also impossible to know what effect they may have had on the internal flight alternative analysis.

[34] In addition, there is no evidentiary foundation for some of the Board's findings relating to the internal flight alternative issue, such as the finding that Ms. Padilla's English language skills "are quite comprehensive" and would assist her in finding work in Mexico City. As counsel pointed out, Ms. Padilla testified at her hearing through an interpreter, and no evidence was been cited to support the Board's finding with respect to Ms. Padilla's language skills.



[35] Finally, the Board's reasoning with respect to the "compelling reasons" issue is both flawed and confusing. First of all, it is clear from the member's analysis of this issue that she did not believe that the events described by Ms. Padilla actually took place. The problems with that finding have already been discussed.

[36] The member also finds, seemingly in the alternative, that the matters described in Ms. Padilla's PIF would have been "a horrific event for a young woman", had they occurred. At the same time, the member finds that the kidnapping, drugging and rape of a very young woman by one or more men did not meet the standard of "appalling and atrocious". No reasons have been provided by the member for this conclusion, nor has any explanation been offered as to the member's understanding of the differences between "horrific", "atrocious" and "appalling".

#### V. Conclusion

[37] For all of the reasons, the Court finds that the process followed in this case was unfair, and that the Board's decision lacks the justification, transparency and intelligibility required of the decision-making process. As a consequence, the application for judicial review is allowed.

#### VI. Certification

[38] Neither party has suggested a question for certification, and none arises here.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. This application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination; and
2. No serious question of general importance is certified.

“Anne Mactavish”

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Judge

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

**DOCKET:** IMM-4307-07

**STYLE OF CAUSE:** OSIRIS LETICIA PADILLA PEREZ v. THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

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AND JUDGMENT:** MACTAVISH J.

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