

Federal Court



Cour fédérale

Date: 20100511

Docket: IMM-4817-09

Citation: 2010 FC 515

Toronto, Ontario, May 11, 2010

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**OSCAR HUGO TREJO ABELAR,
CARLA RUIZ RUBIO,
CARLOS EMMANUEL TREJO RUIZ
and OSCAR ALBERTO TREJO RUIZ**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns members of a family, citizens of Mexico, who claim protection under s.96 and s. 97 of the *IRPA* on grounds of fear of persecution due to political opinion and fear of risk due to death should they be required to return to Mexico.

[2] In rejecting the Applicants' claim, the Refugee Protection Division (RPD) did not make a negative credibility finding and, thus, the Applicants' evidence in support of their claim must be accepted as true. Nevertheless, the RPD rejected the claim on the basis of a viable IFA in Mexico.

[3] The RPD's findings of fact are as follows:

Oscar Hugo Trejo Abelar ("the claimant"), Carla Ruiz Rubio ("the female claimant"), Oscar Alberto Trejo Ruiz and Carlos Emmanuel Trejo Ruiz ("the minor claimants"), citizens of Mexico as established by certified true copies of their passports, claim refugee protection pursuant to sections 96 and 97 (1) of the *Immigration and Refugee Protection Act (IRPA)*.

ALLEGATIONS

The claimants alleged the following.

The adult claimants are a common-law couple who are the parents of the minor claimants. The family resided in Coacalco, State of Mexico. In July 2002, the claimant started to do volunteer work for an organization called "Vive sin Drogas" (Lives without Drugs), a private youth rehabilitation centre that helps street kids stay away from drugs. The claimant's work there included speaking with youth in the streets, organizing social activities and sports teams, and fundraising. He came in contact with Victor Aviles Cruz ("Aviles Cruz"), a former member of the Federal Police who was a drug dealer. On September 17, 2005, Aviles Cruz held a gun to the claimant's head and threatened to kill him for taking away customers. On September 20, 2005, the claimant made a denunciation against Aviles Cruz, who was charged and was to spend 10 to 13 years in prison for dealing drugs. The claimant testified against Aviles Cruz in Court on February 23, 2006. At that time he assumed Aviles Cruz was jailed.

In December 2005, the claimant had filed an application to come to work in Canada to make money to expand his taxi business. He traveled to Canada on April 9, 2006 and returned to Mexico on November 28, 2006. In December 2006, he resumed his volunteer activities with Vive sin Drogas. He did not see Aviles Cruz at that time. On March 9, 2007, the claimant

returned to Canada to work again. He had to return to Mexico briefly one month later because his father was very ill. He then travelled back to Canada, where he remained until September 11, 2007.

In mid-May 2007, the female claimant reported to the claimant that she was receiving suspicious phone calls. By the end of May, she left her job and she and the minor claimants abandoned the family home and went to live with her sister in Prados Sur, about one hour from Coacalco. They never returned to the family's house. The minor claimants stopped going to school in Mexico at that time as well. When the claimant returned from Canada, he joined his family in Prados Sur. They soon went to visit the claimant's terminally ill father in Puebla. While he was in Puebla, the claimant learned that Aviles Cruz had been released from prison and was looking for him in Coacalco. The family remained in Puebla until on or about October 4, 2007 when they traveled to Mexico City. The claimant journeyed to Canada on October 6, 2007. He made his claim for refugee protection on March 24, 2008.

Two or three days after the claimant left Mexico, the female and minor claimants went to hide in Veracruz with another of her sisters. The female claimant traveled to Canada on April 13, 2008 and made her claim for refugee protection on April 18, 2008. The minor claimants remained in Veracruz until they traveled to Canada on November 2, 2008. They made their claims for refugee protection on November 3, 2008.

[4] Counsel for the Applicants argues that the following IFA finding is made in error of law:

I find the claimants clearly had an obligation to relocate, in this case to Guadalajara, and if the chance they were to have problems with Aviles Cruz there, to approach the state before seeking Canada's protection. I note that Aviles Cruz was arrested and jailed for a period of time, and based on this, find that the police did offer protection to this claimant. There is no persuasive evidence before me that the police would not offer protection to the claimant in future, were he to seek it.

[...]

I am strongly of the view that leaving one's own country and seeking international refugee protection abroad is a reluctant last resort, and should only be undertaken after other measures, such as the seeking

of an IFA within one's own country, have been tried unsuccessfully or are patently pointless. That is not the case in these claims. It is almost trite to say that claimants have an obligation to at least try to find some place else to live, work and study in their own country before deciding to leave it altogether.

I note that the claimant did not make any attempt to seek an IFA elsewhere in the Republic of Mexico. The female and minor claimants did move, first within the state of Mexico and then to Veracruz. While in both locations, I note that they suffered absolutely no harm or threats over a period almost one year in the female claimant's case and a year and a half in the minor claimants' case. Based on the evidence in these claims, I find that the claimants had the onus to move to an IFA, in this case specifically in Guadalajara, before leaving the country. The claimants have not discharged their responsibility of showing that the risk of harm they fear would be faced in every part of Mexico pursuant to section 97 (1)(b) of the *IRPA*.

[Emphasis added]
(Decision, paras. 17; 22 and 23)

[5] There is no question that Counsel for the Applicants is correct. In *Alvapillai v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1160 at paragraph 3, Justice Rothstein states the law as follows:

The viability of an IFA is to be objectively determined and it is not open to an applicant, simply for his own reasons, to reject the possibility of resettlement in his own country, if he can do so without fear of persecution; see *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (F.C.A.) at 597-599. However, the way in which the panel has characterized the IFA test here is not correct. The panel seems to be saying that it is up to an individual, before he seeks the surrogate protection of Canada, to test the viability of an IFA in his own country. The logical conclusion of his proposition is that an applicant is obliged to test the IFA and suffer persecution before making a refugee claim in Canada. This cannot be correct. There is no onus on an applicant to personally test the viability of an IFA before seeking surrogate protection in Canada.

In *Victor Manuel Martinez et. al. v. The Minister of Citizenship and Immigration* (IMM-3598-08, February 11, 2009), Justice Barnes applies Justice Rothstein's decision.

[6] As a result, I find the decision under review is made in reviewable error of law. Of particular importance in the present case is the fact that the evidence tendered by the Applicants was accepted as true. In my opinion on a re-determination this element of the Applicants' claim should not be re-determined as it would be most unfair to have them prove themselves once again. Whether an IFA exists for the Applicants in Mexico is the only issue for re-determination, and, accordingly, in the order which follows, I give directions to achieve this result.

ORDER

THIS COURT ORDERS that:

The decision under review is set aside, and the matter is referred back to a differently constituted panel for re-determination on the following directions:

1. The re-determination be conducted on the basis that the Applicants' evidence in support of their claim for protection already produced before the RPD be accepted as true;
2. The re-determination be focused solely on the question of whether an IFA is available to the Applicants in Mexico; and
3. With respect to the IFA issue only, the Applicants and the Respondent are at liberty to provide further evidence, but, in any event, the Applicants must be made available for further questioning on the evidence already provided to the RPD, and any new evidence provided.

There is no question to certify.

"Douglas R. Campbell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE: OSCAR HUGO TREJO ABELAR ET AL v. MCI

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**REASONS FOR ORDER
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