

Federal Court



Cour fédérale

Date: 20110126

Docket: IMM-2288-10

Citation: 2011 FC 67

Ottawa, Ontario, January 26, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**LUIS ALBERTO ORTIZ TORRES
LAURA ELENA DIAZ LARA
BRITNEY LUCERO ORTIZ DIAZ
LUIS ALBERTO ORTIZ DIAZ
MARIA JOSE ORTIZ DIAZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In keeping with the *Dunsmuir* decision criteria safeguards as to deference, when appropriate, a complete reading of the evidence points to a clear and unequivocal understanding that

the pivotal evidence has been misconstrued and, therefore, deference would not be appropriate (*Dunsmuir v New-Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[2] Key portions of the transcript of the principal Applicant's testimony, including a corroborative substantiation of that testimony validate the principal Applicant's statements. The Internal Flight Alternative (IFA) option does not appear available, at all, due to the paradoxical nature of the drug cartel's operations, which appear to have placed the Applicant and his family in direct danger, due to the cartel's pervasiveness, on the one hand, and, on the other, through its random-hit arbitrariness, wherein logic remains stymied.

[3] The subjective fear of the principal Applicant (which also relates to family members associated with the principal Applicant) appears, based on objective evidence, which is fully substantiated in the Board's own documentation. In respect of the Los Zetas organization, the Immigration and Refugee Board (Board), itself, stated:

[18] Documentary evidence indicates that, while the Zetas were initially comprised of members of special forces, they now include federal, state, and local law enforcement personnel as well as civilians. The Zetas act as assassins for the Gulf Cartel. They also traffic arms, kidnap, and collect payments for the cartel on its drug routes. In addition to defending the cartel's terrain in northern Mexico, Zetas are believed to control trafficking routes along the eastern half of the U.S.-Mexico border. Although initially found mainly along Mexico's northern border, the Zetas now have a presence in southern Mexico, where the Gulf cartel is disputing territory previously controlled by the Juárez and Sinaloa cartels. A recent federal investigation found that the Zetas also engage in kidnapping, drug dealing, and money laundering. (Exhibit R/A-1, item 7.7, United States (US). 25 February 2008. Colleen W. Cook. Congressional Research Service. CRS Report for Congress: Mexico's Drug Cartels).

[4] In the above paragraph of the Board's decision it appears that members at every level of police forces in Mexico (federal, state and local), have joined the Los Zetas organization, an organization, which has developed intelligence links to every part of the country.

II. Introduction

[5] The principal Applicant gave sworn testimony describing his position and gave a description of his duties. He explained that he was a police officer at a lower rank, as he had not, as yet, advanced up the ranks after graduating from the police academy. He provided identification documents which had been emailed to him from Mexico identifying him by name and position. He also provided several group photographs of himself in the company of police officers in full official uniform.

[6] The Board ignored the preponderance of the evidence pointing out that the principal Applicant was, indeed, a police officer. Instead, it relied on a translation of an identification card stating that the principal Applicant was authorized to work as a "Police Service Technician".

[7] The principal Applicant does not read English and did not understand the English translation of the said document. As he states in his affidavit, dated May 24, 2010, the correct translation of the document should read "Higher University Technician in Preventive Police".

[8] The Board also referred to a later document provided by the principal Applicant, which referred to him as a "non-commissioned officer". Again, the Board may have concluded, incorrectly, from this document, that the principal Applicant was not a police officer. The Board

rejected his explanation of the meaning of a non-commissioned police officer who serves within the police forces of Mexico and is considered to be part of, and integrated into, the police corps.

[9] The principal Applicant has provided an affidavit from Mr. Javier Cordova Amaton, who is a permanent resident of Canada and was a police commander in Mexico, who worked professionally with the Applicant on a number of operations. Mr. Cordova stated:

2. While I was employed as a police commander in Aguascalientes, I met the principal applicant in this judicial review, Luis Alberto Ortiz Torres, in his capacity as a non-commissioned police officer. This is referred to as a “sub-official” in the Spanish language. This is the first rank in the police force that a police cadet obtains immediately after graduation from the police academy. Mr. Ortiz held this rank from 2001 until I left Mexico in 2008. (Emphasis added).

(Application Record, Tab 3, Exhibit C).

III Facts

[10] The Applicants are all citizens of Mexico. The principal Applicant, Mr. Luis Alberto Ortiz Torres, and the refugee claims of his wife and minor children were joined to his claim. The Applicants sought refugee protection in Canada on the basis of their fear of harm due to Mr. Ortiz Torres’ position and duties as a police officer in Mexico. The Applicants additionally claimed to be persons in need of protection because they would be subjected personally to a risk to their lives or a risk of cruel and unusual treatment or punishment in Mexico if they were forced to return to Mexico.

[11] The refugee hearing for the Applicants was held on two separate dates, on July 30, 2009 and on November 23, 2009. Mr. Ortiz Torres testified at the hearings that he was employed as a state

police officer in a police station in the state of Aguascalientes from 2001. He further testified that, as a result of his duties, which included patrolling the streets, he observed a suspicious vehicle which he and his fellow officer tried to stop. A chase ensued and Mr. Ortiz Torres radioed for back-up. This incident occurred on December 26, 2008.

[12] When Mr. Ortiz Torres approached the individuals in the car, three men tried to bribe him and his companion with a bag of money, which they declined. At that moment, police back-up arrived and the officers confiscated a large quantity of drugs, two weapons and cash. Mr. Ortiz Torres' supervisor, Mr. Refugio Salazar was on the scene and conducted the arrest. The three individuals involved were arrested and taken to the police station. They made threats, stating, they would kill everyone who participated in the operation, especially, the first patrols who had intercepted them.

[13] On December 28, 2008, Mr. Ortiz Torres' coworkers, Mr. Miguel Angel Ramirez Montes and Mr. Obed Lopez Espinoza, were assassinated. These officers were the first to arrive on the scene when Mr. Ortiz Torres had radioed for police back-up. Their murder was very alarming to the officers, especially Mr. Ortiz Torres, because the day prior to their murder they had mentioned that they had been followed by a dark car and they had been threatened by telephone.

[14] Mr. Ortiz Torres' supervisor, Mr. Salazar was then murdered, in the same manner. After this murder, Mr. Ortiz Torres took precautions but he soon observed a dark car following him and he received threats on his cell phone. That same night, he took his wife and children and moved to a relative's home.

[15] The following day, upon entering his home, Mr. Ortiz Torres observed that the interior of his residence was destroyed and he found a threatening note stating that he was the next of eight officers to die. Mr. Ortiz Torres left his position immediately.

IV. Decision Under Review

[16] The Board based its decision on its determination that the Applicants had not provided trustworthy or credible evidence in areas pivotal to their claims. The Board stated that, on a balance of probabilities, the principal Applicant's allegations of being a policeman and the incidents as described by him were not credible, due to inconsistencies, omissions and implausibilities.

[17] The Board also found that there was adequate state protection available to the Applicants in Mexico and that there was a viable IFA.

V. Issues

- [18] (1) Did the Board base its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard to the material before it?
- (2) Did the Board err in finding that the Applicants would have adequate state protection in Mexico?

VI. Analysis

[19] The Court is in agreement with the Applicants' position due to error in respect of the findings of fact.

(1) Did the Board base its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard to the material before it?

[20] In its assessment of credibility, the Board's decision is to be guided by the legislative provisions and the jurisprudence. In *Maldonado v Canada (Minister of Citizenship Employment and Immigration)*, [1980] 2 FC 302 (CA), the Court held that when an applicant swears certain facts are true, this creates a presumption that they are true unless there is valid reason to doubt their truthfulness.

[21] The Board appears to have failed to understand the evidence provided that showed Mr. Ortiz Torres' rank within the police force. Not only did the Board appear to fail to understand the evidence, but, in fact, the Board dismissed the evidence as not credible and as proof that Mr. Ortiz Torres was **not** a police officer. This appears to be a misinterpretation of the evidence, in respect of his being a police officer, a most determinative factor in the Board's rejection of Mr. Ortiz Torres' testimony.

[22] The Board appears to have ignored relevant evidence, in addition to having misconstrued and misinterpreted the evidence before it, and, it made findings of fact that appear wholly unreasonable and, thus, do constitute a reviewable error. Mr. Ortiz Torres explained in detail at the second hearing date of his claim that he had instructed a friend in Mexico to send all his original documents, including his original identity documents to him in Canada, via DHL, a courier company. Mr. Ortiz Torres explained at his hearing that he was informed by DHL that the documents had been seized by Canada custom officials. Mr. Ortiz Torres even provided a DHL company tracking number for the package.

[23] The Board stated that Mr. Ortiz Torres did not provide credible explanations as to the reasons he was unable to obtain originals of the identification documents of which he provided photocopies. This is also an unreasonable finding, as Mr. Ortiz Torres did everything, he could possibly do, to explain what had happened to the documents. This situation was clearly beyond his control. The fact that Citizenship and Immigration Canada (CIC) and Canada Border Services Agency (CBSA) did not have the documents, does not, in any way, demonstrate that the documents had not been seized or lost subsequent to the above explanations which had not been contradicted.

[24] The Board, in fact, did not attempt to obtain the documents directly from Canada customs officials, choosing only to write to CIC and CBSA. This failure does not appear to be that of Mr. Ortiz Torres whatsoever without further evidence to the contrary.

[25] In *Mangat v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 459, 122 ACWS (3d) 541, this Court held, in part, at paragraph 10:

However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact. (Emphasis in original).

[26] Canadian jurisprudence indicates that an adverse finding of credibility must have a proper foundation in the evidence. Credibility findings must be explained and must be supported by the evidence. While the Board dismissed the plausibility of Mr. Ortiz Torres' narrative, it made no

specific reference to specific evidence to the contrary. Failure to lay out a clear and specific evidentiary basis is unreasonable and the result is that it renders each of the findings speculative (*Kanaphathipillai v Canada (Minister of Citizenship and Immigration)* (1998), 81 ACWS (3d) 859, [1998] FCJ 1110 (QL/Lexis); *Ali v Canada (Minister of Citizenship and Immigration)*, 2003 FC 982, 125 ACWS (3d) 477; *Armson v Canada (Minister of Employment and Immigration)* (1989), 9 Imm LR (2d) 150, 17 ACWS (3d) 322 (FCA)).

[27] The Board erred in failing to consider the totality of the evidence tendered in support of Mr. Ortiz Torres' claim. The Board was required to evaluate the credibility of Mr. Ortiz Torres' evidence concerning the substance of their refugee claim in light of all of the evidence before it (*Ahangaran v Canada (Minister of Citizenship and Immigration)* (1999), 168 FTR 315, 88 ACWS (3d) 856).

[28] In *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, [2009] 1 FCR 237, this Court has held that "... where there is contradictory evidence before the Board, it must provide reasons why it did not consider this evidence relevant or trustworthy..." (at para 28).

[29] The Board's decision was unreasonable in that it did not properly consider all of the evidence before it, and to say why it preferred its evidence and interpretation of the evidence over the sworn evidence of Mr. Ortiz Torres.

[30] The Board did not appear to have engaged in any in-depth analysis of the Applicants' claim and of their genuine subjective fear.

[31] In *Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 FTR 35,

Justice Luc Martineau held:

[32] ... the main flaw of the impugned decision results from a complete lack of analysis of the applicant's personal situation. It is not sufficient for the Board to indicate in its decision that it considered all the documentary evidence ...

[32] The Board's determination that there is no credible basis for Mr. Ortiz Torres' claim was reached by ignoring and misinterpreting the evidence before it and was additionally based on speculative findings.

(2) Did the Board err in finding that the Applicants would have adequate state protection in Mexico?

[33] The Board, once it decided that Mr. Ortiz Torres was not a police officer in Mexico, engaged in a very generic analysis of state protection available to the Applicants in Mexico. It renders the decision unreasonable, as the personal circumstances of Mr. Ortiz Torres, namely his identity as a police officer and the danger that he faced as such, was not fully considered.

VII. Conclusion

[34] For all of the above reasons, the Applicants' application for judicial review is allowed and the matter is remitted for redetermination by a differently constituted panel.

JUDGMENT

THIS COURT’S JUDGMENT is that the Applicants’ application for judicial review be allowed and the matter be remitted for redetermination by a differently constituted panel. No question to be certified.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2288-10

STYLE OF CAUSE: LUIS ALBERTO ORTIZ TORRES
LAURA ELENA DIAZ LARA
BRITNEY LUCERO ORTIZ DIAZ
LUIS ALBERTO ORTIZ DIAZ
MARIA JOSE ORTIZ DIAZ v
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 17, 2011

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

DATED: January 26, 2011

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