

Federal Court



Cour fédérale

**Date: 20111201**

**Docket: IMM-748-11**

**Citation: 2011 FC 1393**

**[UNREVISED CERTIFIED ENGLISH TRANSLATION]**

**Montréal, Quebec, December 1, 2011**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**JORGE MARCELO VILTE  
BLANCA GUADALUPE TORRES HERNANDEZ  
ETHAN JARED VILTE**

**Applicants**

**and**

**MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Preliminary**

[1] In *Administrative Law* (6th ed. 1988), at p. 535, Professor Wade discusses the notion that fair procedure should come first and that the demerits of bad cases should not ordinarily lead courts to ignore breaches of natural justice or fairness. But then he also states:

A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice

where the demerits of the claim are such that it would in any case be hopeless.

In this appeal, the distinction suggested by Professor Wade is apt.

. . . Nonetheless, the discretionary remedies at the disposal of the court were withheld, at least partly because “[g]ood public administration is concerned with substance rather than form” and because the Commission “would have reached and would now reach the same conclusion as did their experienced chairman” (p. 774). Given the circumstances of this case as I have described them, this statement is accurate here, although I would reiterate its exceptional character and would not wish to apply it broadly. [Emphasis added.]

(*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, Justice Frank Iacobucci writing for the Court).

[2] Each case turns on its own facts and must be analyzed on its own merits.

## II. Introduction

[3] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] dated January 11, 2011, which determined that the applicants are neither Convention refugees as defined in section 96 of the IRPA nor persons in need of protection under section 97 of the IRPA.

## III. Facts

[4] Jorge Marcelo Vilte, born July 28, 1966, is a citizen of Argentina, his spouse Blanca Guadalupe Torres Hernandez, born March 25, 1969, is a citizen of Mexico, and their son Ethan Jared Vilte, born November 5, 2007, is a citizen of the United States.

[5] Marcelo Vilte and his son Ethan Jared did not demonstrate any fear towards their respective countries of citizenship. Consequently, their claims were denied without analysis.

[6] Ms. Torres Hernandez claims that she fears her former common-law spouse, Jorge E. Oliva, in Mexico, specifically in the city of Leon. She has been subjected to domestic violence by her ex-spouse and his wife since the early 1990's.

[7] She also alleges that she did not ask for protection from the authorities because her ex-spouse's cousin, known as El Lobo, is the chief of the judicial police.

[8] Ms. Torres Hernandez first fled to the United States on January 21, 1994. She returned to Mexico in October 1994. Because her ex-spouse tracked her down, she went back to the United States on February 17, 1995, where she met her current spouse. She remained in the United States illegally until November 12, 2008, the date of her last return to Mexico.

[9] On November 16, 2008, Ms. Torres Hernandez had an altercation with her ex-spouse in front of the Hotel Condesa in the city of Leon, an altercation during which Mr. Oliva threatened to kill her and her son. He also stole her purse containing US\$1500. This altercation occurred in front of Ms. Torres Hernandez' aunt and cousin. They filed a complaint with the authorities two days later.

[10] Ms. Torres Hernandez left Mexico to request Canada's protection. Her spouse joined her there.

[11] The hearing before the RPD took place on December 14, 2010.

#### IV. Impugned decision

[12] Although the RPD admitted in its decision that “Ms. Torres told her story in a clear fashion and was clearly moved by her travails” (Decision at paragraph 9), it concluded that a number of aspects of the story were not credible.

[13] The RPD framed the issue as follows:

[10] The major determinative issue in this case is whether the claimant has met her burden of showing that she in fact faces a threat from Mr. Oliva and further that Mr. Oliva even exists.

[14] The RPD found it unlikely that Mr. Oliva exists given the lack of evidence corroborating Ms. Torres Hernandez’ story such as factors establishing cohabitation. Stating that she had known her ex-spouse for nearly twenty years, neither the letters from Ms. Torres Hernandez’ aunt nor the evidence of the complaint to the police were sufficient, in the RPD’s view, to support Ms. Torres Hernandez’ story.

[15] According to the RPD, the following factors also prevented it from finding Ms. Torres Hernandez’ story plausible:

- a. Ms. Torres Hernandez does not know El Lobo’s real name and did not adduce any evidence to identify this person’s position in the Mexican police force;
- b. The November 16, 2008, incident in Mexico does not demonstrate that Mr. Oliva had been tracking Ms. Torres Hernandez for twenty years, but rather that it was a chance meeting;

- c. During her testimony, Ms. Torres Hernandez answered a question with a fact that was not mentioned in her Personal Information Form [PIF] or her aunt's letters;
- d. After an investigation on its own initiative, the RPD found that the Hotel Condesa, where the November 16, 2008 incident occurred, is in fact a four-star hotel and that it was implausible that she could not have secured some aid in such a busy place;
- e. Ms. Torres Hernandez did not make a complaint against Mr. Oliva until two days after the incident;
- f. The police report is a false document because of the details it contains about events dating back to 1993. It reads like Ms. Torres Hernandez' PIF. Furthermore, Ms. Torres Hernandez did not mention at the Port of Entry interview in Canada or in her PIF that she had made a complaint against her ex-spouse. In fact, the police report was faxed subsequently, shortly before the date of the RPD hearing. The RPD also relied on the Mexico National Documentation Package, MEX100643.EF, dated September 29, 2010, which states that fraudulent documents can be easily obtained in Mexico;
- g. The same day the applicant filed the complaint with the Mexican police she applied for a passport to leave Mexico. Thus, the purpose of the complaint was to remedy what could have been considered, in the refugee application process, as the failure to seek state protection before seeking international protection.

## V. Issues

- [16] (1) Did the RPD make an error of natural justice by failing to disclose the result of its investigation and by accepting documents in French without being able to understand them?
- (2) If not, is the RPD decision unreasonable?

## VI. Relevant statutory provisions

- [17] The following sections apply to this case:

### **Convention Refugee**

**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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(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.

### **Person in need of protection**

**97.** (1) A person in need of protection is a person in Canada whose removal to their country

### **Définition de « réfugié »**

**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) 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) 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.

### **Personne à protéger**

**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait

or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins

or medical care.

médicaux ou de santé  
adéquats.

**Person in need of protection**

**Personne à protéger**

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. Position of the parties

[18] Ms. Torres Hernandez submits that the RPD made errors of natural justice. First, the RPD based its finding about the location of the November 16, 2008, incident on the result of its own investigation, which was not disclosed to the applicant. As a result, she was deprived of her right to respond to the RPD's allegations that the location of the incident was very busy and that she could have obtained aid.

[19] Concerning the complaint that was filed, the RPD did not consider Ms. Torres Hernandez' explanations that she was only able to file a complaint two days later, and thus it did not take into account the amendment to the PIF stating that the complaint had been filed.

[20] Next, Ms. Torres Hernandez contends that the member used an English translation of her story in her PIF to question her credibility without providing the translation to the parties. This infringed her right to verify the quality of the translation. Similarly, she maintains that, since the member was not bilingual, he was unable to understand the police report entered in evidence at the hearing, which had been translated into French.



[21] Last, Ms. Torres Hernandez submits that the RPD erred by finding that the police report was a false document. In her view, the documentary evidence does not support the RPD's finding, and it is plausible that the complaint was so detailed because Ms. Torres Hernandez explained all the reasons why she took her ex-spouse's threats seriously.

[22] Ms. Torres Hernandez also submits that the RPD erred in assessing her burden of proof by requiring evidence of a threat against her.

[23] The respondent contends that the issue has more to do with Ms. Torres Hernandez' credibility and the inadequate evidence that was adduced. The respondent maintains that the RPD considered Ms. Torres Hernandez' amendment to her PIF.

[24] Regarding the issue of non-disclosure by the RPD, the respondent submits that it was not necessary that the RPD disclose the result of its investigation since the number of stars the hotel has was not relevant in determining whether the incident was plausible.

[25] As for the issues related to the member's language capabilities, the respondent contends that the allegations about the member's language capabilities, the content of the access to information request and the content of the RPD's file should be disregarded because they were not verified by an affidavit of Ms. Torres Hernandez as required under paragraph 10(2)(d) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22.

[26] In addition, the respondent maintains that Ms. Torres Hernandez should have raised this issue at the hearing, the first opportunity to raise an error of procedural fairness. With respect to the authenticity of the police report, the respondent takes the position that the RPD may disregard a document if the applicant is not credible. The documentary evidence also supports the RPD's finding on this point.

#### VIII. Analysis

[27] Because of the natural justice issues, the entire file is remitted to the RPD to a differently constituted panel for reconsideration.

[28] This does not necessarily imply that the conclusion will not be the same given that the core of the claim submitted by the applicant, Ms. Torres Hernandez, appears to be rife with ambiguities, implausibilities and lack of credibility.

[29] This Court's decision is based on the *Mobil Oil* decision, above, written at the time by Iacobucci J.:

53 In *Administrative Law* (6th ed. 1988), at p. 535, Professor Wade discusses the notion that fair procedure should come first, and that the demerits of bad cases should not ordinarily lead courts to ignore breaches of natural justice or fairness. But then he also states:

A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim are such that it would in any case be hopeless.

In this appeal, the distinction suggested by Professor Wade is apt.

54 Likewise, it is apt to cite *R. v. Monopolies and Mergers Commission*, [1986] 1 W.L.R. 763 (C.A.). In that case, a Chairman interpreted a statute administered by his Commission in order to determine whether a take over proposal had been abandoned. When he decided that abandonment had, in fact, occurred, he stopped a monopolies and mergers reference at the threshold stage. Upon judicial review, the Court of Appeal held that the Chairman had properly interpreted the statute, but the court also held that he had no statutory authority to act alone. Nonetheless, the discretionary remedies at the disposal of the court were withheld, at least partly because “[g]ood public administration is concerned with substance rather than form” and because the Commission “would have reached and would now reach the same conclusion as did their experienced chairman” (p. 774). Given the circumstances of this case as I have described them, this statement is accurate here, although I would reiterate its exceptional character and would not wish to apply it broadly.

52 The bottom line in this case is thus exceptional, since ordinarily the apparent futility of a remedy will not bar its recognition: *Cardinal, supra*. On occasion, however, this Court has discussed circumstances in which no relief will be offered in the face of breached administrative law principles: e.g., *Harekin v. University of Regina*, [1979] 2 S.C.R. 561. As I described in the context of the issue in the cross-appeal, the circumstances of this case involve a particular kind of legal question, viz., one which has an inevitable answer.

The distinction suggested by Professor Wade is relevant in this appeal.

[30] The Court has reached the conclusion that it is essential to decide whether the RPD decision under review could have arrived at a different conclusion other than the one that is before the Court.

[31] For this, only a decision-maker at first instance can determine whether the conclusion could have been different by ensuring that language comprehension would no longer be called into question. Therefore, a new hearing is essential to disentangle the facts and to make sure they were understood.

[32] This is to ensure that the Supreme Court of Canada's statements are thoroughly understood and that the Board's reconsideration is conducted in accordance with the findings of this decision.

**JUDGMENT**

**THE COURT ORDERS that**

1. the applicants' application for judicial review is allowed for Blanca Guadalupe Torres Hernandez only;
2. the application for judicial review is dismissed for Jorge Marcelo Vilte, who is a citizen of Argentina;
3. the application for judicial review is dismissed for the child Ethan Jared Vilte, who is a citizen of the United States.

There is no question of general importance to certify.

\_\_\_\_\_  
"Michel M.J. Shore"

Judge

Certified true translation  
Mary Jo Egan, LLB

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

**DOCKET:** IMM-748-11

**STYLE OF CAUSE:** JORGE MARCELO VILTE  
BLANCA GUADALUPE TORRES HERNANDEZ  
ETHAN JARED VILTE  
v MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** November 29, 2011

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

**DATED:** December 1, 2011

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