

Federal Court



Cour fédérale

Date: 20111208

Docket: IMM-3023-11

Citation: 2011 FC 1438

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, December 8, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

**CARLOS ALBERTO VAQUERA GARZA
ROCHEL ESMERALDA ORTEGA DAVILA
ANGEL ALAN VAQUERA ORTEGA
FERNANDO VAQUERA ORTEGA
JUAN CARLOS VAQUERA ORTEGA**

Applicants

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision dated April 11, 2001, in which the Refugee Protection Division of the Immigration and Refugee Board (the panel) found that the

applicants were neither refugees nor persons in need of protection under sections 96 and 97 of the Act.

I. Background

A. *Facts*

[2] Carlos Alberto Vaquera Garza (the principal applicant), his spouse Rochel Esmeralda Ortega Davila, and their three minor sons Angel Alan Vaquera Ortega, Fernando Vaquera Ortega and Juan Carlos Vaquera Ortega, are Mexican citizens who are seeking refugee protection under sections 96 and 97 of the Act.

[3] The principal applicant alleges that in March 2008 a municipal police commander in Escobedo (Nuevo León) attempted to recruit him for an “intimidation operation”. The principal applicant refused this request and, as a result, was attacked, beaten and threatened by police officers.

[4] The principal applicant says that he moved his family to his mother-in-law’s home to hide from the police officers in question.

[5] The applicants subsequently left Mexico and came to Canada on October 1, 2008. The family members claimed refugee protection upon arrival at the Montréal airport.

[6] The family members base their refugee claim on the principal applicant's narrative. The Court will therefore refer to the applicant in its reasons.

[7] The hearing before the panel took place on April 7, 2011.

B. Impugned decision

[8] In its decision dated April 11, 2011, the panel did not consider the applicant's testimony credible. The panel determined that the applicants were neither "Convention refugees" under section 96 of the Act nor "persons in need of protection" under section 97 of the Act.

[9] With respect to the issue of state protection, the panel observed that the applicant had not filed a complaint at the state level in Nuevo León or at the federal level. The panel therefore found that the applicant had failed in his duty to seek protection in his country of nationality before seeking protection elsewhere. The panel also stated that the applicant did not provide clear and convincing evidence to rebut the presumption of the state's ability to protect (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689, [1993] SCJ No 74).

[10] Finally, in the absence of real, concrete and probative evidence to the contrary, the panel found that an internal flight alternative (IFA) was available to the family in this case, either in Mérida (Yucatan) or in La Paz (Baja California Sur).

II. Issue

[11] The issue to be determined is as follows:

Did the panel err in assessing the principal applicant's credibility and the validity of his fear of persecution?

III. Applicable statutory provisions

[12] Sections 96 and 97 of the Act read as follows:

REFUGEE PROTECTION,
CONVENTION REFUGEES AND
PERSONS IN NEED OF
PROTECTION

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.

NOTIONS D'ASILE, DE RÉFUGIÉ
ET DE PERSONNE À PROTÉGER

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.

Person in need of protection

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

Person in need of protection

Personne à protéger

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

(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.

adéquats.
Personne à protéger

(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.

IV. Appropriate standard of review

[13] The panel's findings on credibility, state protection and the availability of an internal flight alternative are reviewable on a reasonableness standard (see *Barajas v Canada (Minister of Citizenship and Immigration)*, 2010 FC 21, [2010] FCJ No 8, and *Khokhar v Canada (Minister of Citizenship and Immigration)*, 2008 FC 449, [2008] FCJ No 571). Pursuant to *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, the Court will intervene only where it appears that the panel made findings in a capricious or unreasonable manner or in a way that is not supported by the evidence in the record.

V. Analysis

[14] The applicant maintains that the reasons for the panel's decision are unfounded, arbitrary and based on an erroneous assessment of the evidence in the record. The applicant claims that the inconsistencies noted by the panel stem from the applicant's nervousness during the hearing before the panel.

[15] In addition, the applicant says that the inconsistencies in his testimony pointed out by the panel are merely superficial, secondary details and do not call into question the validity of his statements. Essentially, the applicant argues that the panel failed to deal with the primary element of his claim: the fear of persecution alleged by the applicant. Consequently, the applicant submits that the panel's decision is unreasonable under the principles set out in *Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168 (FCA) [*Attakora*], *Djama v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 531 (FCA) [*Djama*], and *Gracielome v Canada (Minister of Employment and Immigration)* (1989), 9 Imm LR (2d) 237 (FCA) [*Gracielome*].

[16] For his part, the respondent submits that the panel's decision in this case is well-founded. The respondent points out, *inter alia*, the inconsistencies and omissions in the applicant's testimony and maintains that the applicant did not discharge his onus of establishing that he and his family could not move to other areas in Mexico (*Thabet v Canada (Minister of Citizenship and Immigration)*, [1998] 4 FC 21, [1998] FCJ No 629, *Pena v Canada (Minister of Citizenship and Immigration)*, 2009 FC 616, [2009] FCJ No 739, and *Lopez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 990, [2010] FCJ No 1352).

[17] The applicant's primary argument in this judicial review is that the panel did not develop its findings on the issue of credibility. The Court notes that the applicant focused his arguments on the issue of the applicant's credibility and his fear of persecution in Mexico. However, the panel's findings on state protection and the IFA in Mexico were not challenged before this Court.

[18] After examining the evidence in the record and hearing the parties, the Court is of the view that the panel did not err in assessing the applicant's credibility and the validity of his fear of persecution.

[19] Although the decision on the credibility issue is detailed and would probably have benefited from being developed, it was addressed by the panel, and its findings are supported by the evidence in the record.

[20] In this case, the Court points out that the inconsistencies and omissions noted by the panel are well-founded in this case. The applicant testified that he had been beaten twice whereas his PIF mentions only one incident (Tribunal Record, pp. 23 and 175); the applicant was stopped and threatened by the police, but his narrative does not refer to this episode (Tribunal Record, pages 23 and 183-190); the applicant moved in with his mother-in-law in May 2008, but his PIF indicates August 2007 (Tribunal Record, pages 19 and 195-196). The Court also finds that these inconsistencies exist in the applicant's testimony despite the fact that the panel gave the applicant the opportunity to reread the documents and submissions and to make corrections prior to the hearing (Tribunal Record, pages 165, 166).

[21] More importantly, the decision also deals with the issues of the state's ability to protect and the IFA in Mexico. The Court notes that the applicant did not provide clear and convincing evidence to rebut state protection or the IFA in this case, and, as the respondent correctly points out, a finding on an IFA is determinative in itself and is sufficient to have a refugee claim rejected (*Pena* and *Lopez*).

[22] Under the appropriate standard of review in this case—reasonableness—the Court is of the view that the reasoning of the Board’s decision falls within a range of reasonable outcomes, and accordingly the Court’s intervention is not warranted. For all these reasons, the application for judicial review is dismissed.

[23] The parties did not submit any question for certification.

JUDGMENT

THE COURT RULES as follows:

1. This application for judicial review is dismissed.
2. No question will be certified.

“Richard Boivin”

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-3023-11

STYLE OF CAUSE: CARLOS ALBERTO VAQUERA GARZA ET AL.
and MCI

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: December 5, 2011

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

DATED: December 8, 2011

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