Federal Court  Cour fédérale

**Date: 20120208**

**Docket: IMM-4414-11**

**Citation: 2012 FC 182**

**[UNREVISED CERTIFIED ENGLISH TRANSLATION]**

**Montréal, Quebec, February 8, 2012**

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

**BETWEEN:**

**J. JESUS MEZA ORTEGA**
**FRANCISCO ELPID MEZA ORTEGA**

**Applicants**

**and**

**MINISTER OF CITIZENSHIP**
**AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

### I Introduction

[1] The Court must show deference to an organization's findings of fact particularly with respect to plausibility assessments. The RPD should not, on the pretext of implausibility, disregard evidence that contradicts its findings without a transparent and intelligible analysis.

[2] In this case, the administrative tribunal conducted two separate analyses, one assessing the plausibility of the applicants' account and the other, an alternative to the first, regarding the availability of an internal flight alternative [IFA]. The Court certainly cannot substitute its reasoning for that of the tribunal of fact and reconsider the evidence. That being said, this Court must intervene where a review of the decision suggests that the findings of fact were made without regard to the evidence.

## II Judicial proceeding

[3] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] dated June 22, 2011, that the applicants are not Convention refugees as defined in section 96 of the IRPA or persons in need of protection under section 97 of the IRPA.

## III Facts

[4] The principal applicant, J. Jesus Meza Ortega, who is 30 years old, and his brother, Francisco Elpidio Meza Ortega, 22 years old, are Mexican citizens.

[5] Upon his return from the United States where he had lived for five years, the principal applicant and his brother jointly purchased 90 hectares of land near Amayuca.

[6] In May 2008, they leased one-third of their land to Javier Monroy Cisneros, who cultivated marijuana on it.

[7] When the applicants became aware of this and confronted him about it, they were kidnapped.

[8] Monroy Cisneros offered them money in exchange for their silence, but the principal applicant decided to file a complaint.

[9] The applicants were subsequently threatened.

[10] The principal applicant arrived in Canada on November 16, 2008, and claimed refugee status. His brother joined him on May 3, 2009.

IV Decision that is the subject of this application for judicial review

[11] The RPD stated that, although the applicants' testimony was consistent, their account was not plausible. Moreover, even if the allegations were true, the applicants had an IFA. The RPD determined that the land the applicants purchased was not a farm that provided sufficient income for them to earn a living.

[12] The RPD saw an IFA in Monterrey. The RPD believed that Monroy Cisneros would not be very interested in searching for the applicants even though he had discovered their hiding places twice. Moreover, since the applicants had no idea which drug cartel Monroy Cisneros belonged to, the RPD determined, based on the documentary evidence, that he was associated with the Beltran Leyva organization. Since, according to the documentary evidence, Monterrey was associated with the Zetas cartel, the applicants would not be at risk. In fact, the RPD believed that

the cartel wars and the military resources put in place by the Mexican government are the primary concerns of a cartel and that it would be unlikely that the cartel would search for the applicants in enemy territory. The RPD admitted that cartels could find the applicants through illegal means but concluded that that was unlikely considering Monroy Cisneros' resources: he was just a marijuana farmer.

[13] Furthermore, it would not be unreasonable for the applicants to move to Monterrey given their experience in the construction field. They would therefore not be subject to exploitation because of being forced to abandon the work of a farmer.

## V Issues

[14] The issues are as follows:

a. Were the principles of natural justice breached?

b. Is the RPD's decision on the plausibility of the applicant's account reasonable?

c. Is the RPD's decision regarding the IFA for the applicants reasonable?

## VI Relevant statutory provisions

[15] The following provisions of the IRPA apply to this case:

| Convention refugee | Définition de « réfugié » |
|---|---|
| **96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, | **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, |

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 themself 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 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

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

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

to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself 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.

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 adéquats.

Person in need of protection

(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.

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.

VII Position of the parties

[16] The applicants submit, first, that they legitimately believed that the RPD had admitted that the applicants were operating a farm in Mexico because of the photographs they introduced into evidence.

[17] In fact, at the hearing, the RPD had admitted that the photographs showed corn stalks, thus indicating to the applicants that the RPD had accepted the applicants' evidence that the land was suitable for cultivation. If this were not the case, the RPD was required to inform them of its doubts.

[18] The applicants also maintain that the RPD's implausibility findings about the account were based on North American standards, which do not take into consideration the country conditions in Mexico that apply to the applicants' work. They never claimed to own a farm in the North American sense of the word. The term "farm" referred to land suitable for cultivation in a Mexican context. On that basis, the applicants state that the evidence clearly indicated the condition of farmers in Mexico, thus supporting the applicants' account.

[19] The RPD erred in assessing the plausibility of the account, making negative assumptions about the applicants with no supporting evidence. Thus, the RPD erroneously found that, since the principal applicant had lived in the United States, his lifestyle was more urban than agricultural. It also determined that it was unlikely that the applicants did not know, when they leased a part of their land, that Monroy Cisneros was a drug trafficker since he had been introduced to the applicants through their childhood friend who must have had that information.

[20] Furthermore, the applicants contend that the RPD's finding on the IFA was unreasonable. Indeed, the RPD did not discuss the two attempts by the applicants' persecutor, Monroy Cisneros, to find them when they were hiding outside of their normal place of residence. In addition, since the RPD admitted that the applicants could be found anywhere in Mexico through illegal means, it should not have found that an IFA was available. The fact that the applicants' persecutor did not have the means or the interest to look for them throughout Mexico was mere speculation on the part of the RPD.

[21] The respondent submits that the RPD's finding regarding the IFA was reasonable and supported by the documentary evidence. It was also open to the RPD to reject the applicants' explanation that Monroy Cisneros had influence at the national level because he was a member of a drug cartel, just as it was open to the RPD to conclude that he did not have the interest or resources to pursue the applicants throughout Mexico.

[22] The respondent contends that the existence of a valid IFA defeats the application for refugee status. He submits that the RPD, as the tribunal of fact, properly pointed out the implausibilities in the applicants' account. Moreover, he maintains that the RPD never admitted that the applicants were operating a farm by relying on the photographs entered into evidence.

VIII Analysis

(1) Were the principles of natural justice breached?

[23] First, the RPD did not breach the principles of natural justice. The RPD's findings on the issue of the characterization of the applicants' land fall within the plausibility of the account. The RPD did not implicitly relieve the applicants of their burden of proof. It repeated what it had said at the hearing at paragraph 9 of its decision:

> . . . The claimants provide pictures of the land which does not show farm land but rolling hills. In one picture there were a few stalks of corn but no 'farm'. [Emphasis added]

[24] Moreover, it is apparent from the transcript of the hearing that the RPD asked if there were any more photographs. In no case is it possible from reading the transcript to conclude that the RPD's statements generated a legitimate expectation in the applicants (Tribunal Record [TR] at pp 306 and 307).

[25] Second, the standard of review for findings of fact made by an administrative tribunal is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[26] To set aside the decision at first instance, the applicants must demonstrate that the findings on the plausibility of the account and on the IFA are unreasonable. As the Federal Court of Appeal stated in *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94:

> [14] It is unfortunate that the judge did not address the primary finding of the Board regarding the lack of credibility of the respondent. Had he done that, it might not have been necessary for him to address the alternative and secondary ground on which the

> Board rested its decision. The litigation would have ended there and scarce judicial resources would have been spared.

(2) Is the RPD's decision on the plausibility of the applicants' account reasonable?

[27] The RPD noted various implausibilities in the applicants' account.

[28] It is settled law that the tribunal of fact is at liberty to use common sense in assessing whether an account is reasonable; however, in doing so, it must be careful not to ignore the evidence in the record. In *Valtchev v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No. 1131 (QL), this Court explained the criteria applicable in this regard as follows:

> **7** A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, *Immigration Law and Practice* (Markham, ON, Butterworths, 1992) at page 8.22]
>
> **8** In *Leung v. M.E.I.* (1994), 81 F.T.R. 303 (T.D.), Associate Chief Justice Jerome stated at page 307:
>
> > [14] . . . Nevertheless, the Board is under a very clear duty to justify its credibility findings with specific and clear reference to the evidence.
> >
> > [15] This duty becomes particularly important in cases such as this one where the Board has based its non-credibility finding on perceived "implausibilities" in the claimants' stories rather than on internal inconsistencies and contradictions in their accounts or their demeanour while testifying.

> Findings of implausibility are inherently subjective assessments which are largely dependant on the individual Board member's perceptions of what constitutes rational behaviour. The appropriateness of a particular finding can therefore only be assessed if the Board's decision clearly identifies all of the facts which form the basis for their conclusions. The Board will therefore err when it fails to refer to relevant evidence which could potentially refute their conclusions of implausibility . . . [Emphasis added]

[29] In this case, the RPD's implausibility findings about the applicants' farm operation are problematic because they are not based on the evidence in the record. The RPD stated its position in these terms:

> [10] . . . At the same time he has no buildings on the land. In the pictures there are a few animals present. The panel concludes that this farm can at best be a subsistence farm if it constitutes a 'farm' at all. Certainly this land is unlikely to provide a lucrative source of income. The claimants were asked if they had any other job aside from this 'farm' and the claimants said no. . . . There is no house on this land so they would have additional living and traveling expenses to consider. It is hard to imagine how this land would provide anything approaching a 'satisfactory' income for the claimants especially considering that Mr. Jesus Meza is accustomed to an urban lifestyle having lived in the US for several years prior to returning to Mexico in late 2006.
>
> [11] The panel concludes on a balance of probabilities the claimants are misrepresenting this land as a 'farm' as commonly understood. The land might exist and the claimants might own it but the panel does not believe that this land constitutes a 'farm' which would provide a livelihood for the claimants. [Emphasis added]

[30] It is significant that the applicants submitted into evidence a copy of the contract transferring the property rights in farmland to the applicants and a contract leasing their land to Monroy Cisneros (TR at pp 174-182), which the RPD did not even mention when criticizing the plausibility of the applicants' account on the farmland issue.

[31] Additionally, a review of the transcript shows, *inter alia*, that the principal applicant worked in the United States growing oranges, which contradicts the RPD's finding about his urban lifestyle (TR at p 308). At the same time, his brother was farming with his father (TR at p 299).

[32] Although the Court must show deference to the administrative tribunal's findings of fact, it is clear that the RPD did not consider the specific context of this case in assessing the plausibility of the account, which undermined its assessment of the applicants' subjective fear. Not satisfied with the photographs, it should have clearly stated, in the absence of inconsistencies and omissions in the testimonial evidence, the reasons that led it to conclude that the account was implausible. It should also have discussed the evidence that was contrary to its findings, which it did not do.

(3) Is the RPD's decision regarding the IFA for the applicants reasonable?

[33] In the last part of the decision, the RPD found that Monterrey was an IFA if all the allegations were true. Determining the IFA was therefore the subject of a separate and alternate analysis. In this part of the objective analysis, the Court, like the RPD, must assume that the applicants' account is true.

[34] The case law has established that an IFA finding must satisfy two criteria: the proposed IFA must be safe, and it must be objectively reasonable for an applicant to seek refuge there (*Thirunavukkarasu v Canada (Minister of Employment and Immigration*), [1994] 1 FC 589, [1993] FCJ No. 1172 (QL)).

[35] The RPD's finding is validly based on the documentary evidence that Monroy Cisneros, the persecutor, is, in all likelihood, a member of the Beltran Leyva cartel and that Monterrey is in the clutches of the Zetas, who are enemies of the Beltran Leyva cartel.

[36] However, the following excerpt from the RPD's decision is problematic:

> [15] The panel does not dispute that it might be possible for drug gangs to locate the claimants in Monterrey through possible illegal means. The panel concludes, however, that such an effort would, on a balance of probability, be beyond the interest and resources of Mr Monroy who is a marijuana farmer in state of Morelos and this is especially the case given that the claimants have clearly expressed their unwillingness to further challenge Mr. Monroy by fleeing the country in 2008 (Jesus) and 2009 (Francisco).

[37] It is clear that this finding negates the inherent logic of the RPD's reasoning in the preceding paragraphs. In fact, there is an inconsistency because the RPD admits that it would be possible to locate the applicants. Accordingly, the RPD should have mentioned and discussed the evidence that the applicants had already been located, twice, by their agent of persecution and that the principal applicant had filed a complaint with the Mexican authorities against his agent of persecution. Then it would have been possible to understand the RPD's reasoning that the applicants would not be traced to Monterrey. This is particularly important since the applicants' account is presumed to be true at this stage of the RPD's analysis.

[38] The decision in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration*) (1998), 157 FTR 35, [1998] FCJ No. 1425 (QL) teaches that an administrative tribunal has an interest in referring to the probative evidence even where that evidence does not support its arguments, which the RPD failed to do. Its decision is therefore unreasonable.

## IX Conclusion

[39] The Court must mention that this case turns on its own facts. The RPD's reasoning did not take the evidence into consideration in this case. It is understood that a different conclusion could be reached in another context even on slightly different facts.

[40] For the reasons stated above, the application for judicial review is allowed, and the case is remitted for reconsideration by a differently constituted panel.

**JUDGMENT**

**THE COURT RULES that** the application for judicial review is allowed and that the matter is remitted for reconsideration by a differently constituted panel.

No question of general importance is certified.

"Michel M.J. Shore"
Judge

Certified true translation
Mary Jo Egan, LLB

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4414-11 |
| **STYLE OF CAUSE:** | J. JESUS MEZA ORTEGA ET AL.<br>and MCI |
| **PLACE OF HEARING:** | Montréal, Quebec |
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| **REASONS FOR JUDGMENT AND JUDGMENT:** | SHORE J. |
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**APPEARANCES:**

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| Pavol Janura | FOR THE RESPONDENT |

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