Federal Court Cour fédérale

Date: 20120220

Docket: IMM-3683-11

Citation: 2012 FC 227

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 20, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

JUAN CARLOS GORDILLO MUNOZ
GLORIA ELIANA EID ORTIZ
DANIELA GORDILLO EID

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review submitted pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of a decision of the Immigration

and Refugee Board (IRB), dated May 11, 2011, that Juan Carlos Gordillo Munoz (Mr. Munoz), his spouse Gloria Eliana Eid Ortiz (Ms. Ortiz) and their minor child Daniela Gordillo Eid (D. Eid) (applicants), are neither Convention refugees nor persons in need of protection within the meaning of sections 96 and 97 of the IRPA.

[2] For the following reasons, the application for judicial review is allowed.

II. Facts

[3] Mr. Munoz is a citizen of Colombia and his spouse, a citizen of Bolivia. Their daughter D. Eid is a citizen of the United States of America.

[4] Mr. Munoz claims to fear the Revolutionary Armed Forces of Colombia (FARC) due to problems that occurred in 1991. Between 1993 and 2005 he sought refuge in the United States before returning to Colombia with his spouse and daughter.

[5] Between April 4 and 6, 2006, Mr. Munoz was detained by members of the FARC who wanted to get him to reveal information about certain politicians and entrepreneurs because he worked for a company that organized public events.

[6] In 2006, that applicants fled to Santa Cruz, in Bolivia, where Ms. Ortiz's family live.

[7] Ms. Ortiz claims to fear the Bolivian party Movimiento al Socialismo [MAS] due to her participation in a movement for the defence of women's rights and her work at city hall in Cobija. She alleges that she was attacked by the MAS in January 2008 and again in September 2008.

[8] The applicants subsequently fled Bolivia and made their way to Brazil, then to Guatemala, through Mexico to the United States before arriving in Canada on December 1, 2008.

[9] The claimed refugee protection on December 2, 2008.

[10] The panel rejected their claim for refugee protection based on the lack of credibility of the applicants' narrative.

[11] The panel found that the applicants had failed to rebut the presumption of state protection in Colombia, and that an internal flight alternative [IFA] was available to them in Cartagena, Colombia.

III. Legislation

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

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, membership in a particular	**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

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.

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

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

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

(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,

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

(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) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(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.

IV. Issues and standard of review

A. Issues

1. ***Did the Board member's conduct at the hearing raise a reasonable apprehension of bias?***

2 ***Did the IRB err in finding that the applicants' narrative was not credible?***

3. ***Did the IRB err in its analysis of state protection?***

4. ***Did the IRB make a reviewable error by identifying an internal flight alternative [IFA] in Cartagena, Colombia?***

B. Standard of review

[13] The applicants first raise an issue of procedural fairness which "is reviewable on the standard of correctness" (see *Ghirmatsion v Canada (Minister of Citizenship and Immigration)*, 2011 FC 519 at para 51).

[14] Credibility issues generally concern questions of fact or questions of mixed fact and law. They are reviewable on a standard of reasonableness (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration*) (1998), 157 FTR 35 at para 14).

[15] Furthermore, "[d]eterminations as to the availability of an IFA warrant deference because they involve not only the evaluation of the applicant's circumstances … but also an expert

understanding of the country conditions involved" (see *Lebedeva v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1165 at para 32).

[16] In *Mejia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 354 at para 26, it is stated that the standard of review for an IFA is reasonableness.

V. Positions of the parties

A. Applicants' position

[17] The applicants raise a reasonable apprehension of bias and emphasize that even though they did not raise this at the first opportunity, "such a surrender of rights should not be inferred lightly" (see *Khakh v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 548 at para 31).

[18] The applicants allege that the IRB decision changed the answers provided by the applicant in a biased way.

[19] The applicants claim that the Board member did not pay attention during the hearing. The asset that the testimony they gave was consistent and highly credible.

[20] The applicants point out that when an applicant swears that certain facts are true, this creates a presumption that they are true unless there is a valid reason to doubt their truthfulness (see *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA)). The

panel should not dwell on details or look for evidence to undermine the applicants' credibility (*Djama v Canada* (Minister of Employment and Immigration), [1992] FCJ No 531).

[21] In this case, the applicants maintain IRB had no reason to doubt the truthfulness of their narrative. The applicants also contend that the IRB must support its adverse credibility findings with tangible evidence.

[22] In response to the IRB's criticism regarding the lack of documentary evidence, the applicants argue that one cannot simply dismiss the applicants' narrative because they failed to submit evidence corroborating their testimony (*Ovakimoglu v Canada (Minister of Employment and Immigration)*, [1983] FCJ No 937; *Attakora v Canada (Minister of Employment and Immigration*), [1989] FCJ No 444; and *Ahortor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 705).

[23] The applicants maintain that if the IRB wanted more information with regard to Mr. Munoz's departure in 1991, it should have requested it at the hearing.

[24] The IRB determined that the applicants had an IFA in Colombia. The applicants argue that the tests established in the case law have not been met in this case. The IRB erred in interpreting the applicants' answers and in ignoring some of the evidence in the record that clearly established that their persecutors would be able to find and pursue then throughout Colombia.

[25] The applicants further contend that the IRB misinterpreted their answers and misconstrued the evidence in the record with regard to the availability of state protection in Colombia.

B. Respondent's position

(1) Preliminary remarks

[26] In his memorandum, the respondent objected to certain excerpts from the affidavit of Mr. Munoz dated June13, 2011 (see pages 24 to 33 of the Applicants' Record), as it contained arguments of law contrary to subsection 81(1) of the *Federal Courts Rules,* SOR/98-106, "[a]ffidavits shall be confined to facts within the deponent's personal knowledge…".

[27] The respondent also objects to the presence of Exhibit B attached to the applicant's affidavit, entitled "Transcripts of Maria Elena Munoz C.'s Letter" (see page 42 of the Applicants' Record), on the basis that the applicants had not attached an affidavit confirming the accuracy of the translation of the letter submitted at the hearing.

(2) Position on the merits

[28] The respondent begins by noting the rule that breaches of the principle of procedural fairness must be raised at the earliest opportunity and that the failure to do so amounts to an implied waiver of the right to use it as a basis for impugning a decision (see *Re Human Rights Tribunal and Atomic Energy of Canada Limited*, [1986] 1 FC 103 (FCA) at page 113; *Wijekoon v Canada*

(Minister of Citizenship and Immigration), 2002 FCT 758, [2002] FCJ No 1022 (QL) at paras 29 to 31; and *Kostyshyn v West Region Tribal Council*, [1992] FCJ No 731, 55 FTR 28).

[29] The respondent therefore argues that it is not open to the applicants to invoke a reasonable apprehension of bias.

[30] The respondent also notes that the test for determining whether there is a reasonable apprehension of bias is well known. It consists of asking whether an informed person, viewing the matter realistically and practically, having thought the matter through would conclude that it is likely that the decision maker failed to determine the matter in a fair manner (see *Committee for Justice and Liberty et al. v National Energy Board*, [1978] 1 SCR 369). An allegation of bias must be supported by material evidence and cannot rest on mere suspicion (see *Arthur v Canada (Attorney General)*, 2001 FCA 223).

[31] According to the respondent, the allegations of the applicants must be dismissed since no excerpt from the transcript of the hearing was cited in support of their position.

[32] The respondent further argues that the Board's finding with regard to the applicants' credibility is reasonable since it is based on the lack of evidence corroborating the truthfulness of their narrative. According to the respondent, the case law of this Court is clear: the onus is on the claimant to credibly establish the essential elements of his or her narrative (see *Ramirez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 442 at para 15; and *El Jarjouhi v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 466).

[33] Pursuant to Rule 7 of the *Refugee Protection Division Rules*, SOR/2002-228, the IRB may reasonably expect the applicants to provide evidence to support their narrative.

[34] The respondent alleges that the applicants' behaviour is incompatible with that of people fearing for their lives (*Rahman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 729). A refugee claimant returning to his or her country of origin affects the merits of the claim demonstrates a lack of subjective fear of persecution.

[35] The respondent maintains that the IRB validly determined that the applicants had failed to rebut the presumption of state protection in Colombia. The fact that they left their country of origin, after having filed a single complaint, does not indicate an absence of state protection (see *Vergera v Canada (Minister of Citizenship and Immigration)*, 2011 FC 350). The respondent argues that refugee protection is a form of surrogate protection. A refugee claimant must exhaust all avenues of state protection in his or her country of origin (see *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at page 709; and *Carillo v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ No 399).

[36] In this case, the applicants did not do so before leaving Colombia, according to the respondent.

[37] Lastly, the respondent concludes that the IRB did not err when it determined that there was an IFA available to the applicants in Cartagena.

VI. Analysis

A. Preliminary remarks

[38] The respondent contends that the male applicant's affidavit does not comply with the *Federal Courts Rules,* SOR/98-106. The terms of Rule 81(1) are clear: "[a]ffidavits shall be confined to facts within the deponent's personal knowledge". The Court cannot consider the arguments on the law contained in the affidavit of Mr. Munoz (see *Liu v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 375 at paras 12 and 13).

[39] As fro the exclusion de la Exhibit B attached to the affidavit of Mr. Munoz, the Board accepted the reading of the exhibit at the hearing. Its contents are therefore now part of the Court record.

B. Position on the merits

1. Did the Board member's conduct at the hearing raise a reasonable apprehension of bias?

[40] A reasonable apprehension of bias "calls into question not only the integrity of the presiding judge, but that of the administration of justice itself. In other words, as Cory J. concluded at para.

112, "a real likelihood or probability of bias must be demonstrated … mere suspicion is not enough" (*R. v Teskey*, 2007 SCC 25, [2007] SCJ No 25 at para 32).

[41] When an applicant alleges a reasonable apprehension of bias, « … it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality" (*Wewaykum Indian Band,* [2003] 2 SCR 259 at para 76).

[42] In this case, the applicants raise the Member's conduct. The Court, after a careful reading of the transcript of the hearing, notes that the Member questioned the applicants in a somewhat erratic and haphazard manner and even went so far as to attribute a purely fictional reaction to the applicants' counsel in her decision. This is sufficient proof of the member's bias. A decision maker cannot simply invent facts to support their findings. In this case, the Member claimed the applicant's counsel was surprised. She writes, at paragraph 18 of her decision: "The letter was only in Spanish and had no translation. Counsel for the claimants had no awareness of the letter and was as surprised as the Tribunal".

[43] However, the applicants' counsel, Mr. Pluviose, recalls that he was aware of the document's existence during oral arguments: "Now with respect to the confusion that seems to have appeared around the document that was prepared by the aunt of the main claimant I would submit to you there was no confusion at all. The claimant said that he did not have a letter because today he showed me the document outside of the building and I asked the claimant did he have the original of

said document. He did not have the original so I told him in your testimony you'll be able to talk about it but they're going to ask you for an original, you have to submit an original. But there was no confusion because for him this is an email, it's not a letter. So he printed out the email and it's preposterous to think that he wanted to hide that document, he was going to speak about that document but he wanted to give it the proper name. He said because my aunt, talking about my aunt the attorney Maître Munoz, she was not able to send it in time, she sent an email, through email. So it wasn't a letter, it was an email » (see Tribunal Record, page 404, first and second paragraphs). It is simply unacceptable for a decision maker to fabricate facts to support their findings.

[44] The Member emphasized to Ms. Munoz, toward the end of the hearing, that she believed the female applicant had told her mother what to write in the mother's affidavit:

> Q : And, madam, your parents still live in Santa Cruz, have they been bothered or intimidated by people looking for you?
>
> A : My mother says that there are people that are calling but they're actually, they're not saying anything and then they hang up the phone. My mother doesn't want to have anything, any relation with my problems and she says that those people don't identify themselves so it can be anybody.
>
> BY THE PRESIDING MEMBER (to the female person concerned)
>
> Q. How come she didn't put that in her declaration at Exhibit C-8?
>
> A : Because she cannot identify them because when they call they don't identify themselves, she doesn't know who they are.
>
> Q : But she doesn't even mention that she's getting any calls? And what she does put in her documentation is all that you've already told us, that she's just confirming what you told her.
>
> BY THE INTERPRETER

- Who is confirming what, sorry?

BY THE PRESIDING MEMBER (to the female person concerned)

Q : What you told her. Okay, what about your three brothers.

BY THE COUNSEL (to the Presiding Member)

Q : No, I'm sorry, she wants to address what she just said.

A : Okay.

Q : I thing she has a right to be heard.

A : Absolutely.

Q : So let her, give her a chance to speak her mind.

A : Sure.

BY THE FEMALE PERSON CONCERNED

- The letter from my mother is not what I told her. She lived it, she was present, she saw the fact that I was hurt, she took me to the hospital. It's a declaration about the fact that she was present, she saw what I had on my body, the fact that I had some hematoma and other ---

BY THE COUNSEL (to the interpreter)

Q : Bruises?

A : Bruises.

BY THE PRESIDING MEMBER (to the female person concerned)

Q : Okay, that's in there too.

A : You are telling me that I told her what to say ---

Q : No, that's not what I said. I'm just saying that she is recanting what you told her.

BY THE COUNSEL (to the Presiding Member)

Q : No, but she just told you that she wrote what she lived through, what she knows, what she witnessed, that's what it is, a sworn statement.

BY THE PRESIDING MEMBER (to the female person concerned)

Q : It says in September Kobiha was taking my daughter and her family were assaulted, she wasn't present was she?

[45] These kinds of comments by the Member can interfere with a claimant's testimony, as Justice Martineau noted in *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 179. At paragraph 54 of that decision, he writes: "[t]he language used by the member during the hearing is a way of measuring whether justice is both done and seen to be done. The member must at all times be attentive and sensitive to aux claimants, and it is not clear that this was the case here. That each member speak impeccably and respectfully toward the persons appearing before the tribunal is the price to pay to have reviewing courts grant the latitude requested on behalf of the tribunal for assessing the credibility of each claimant".

[46] In the present matter, the Court finds that the member's conduct raises a reasonable apprehension of bias. Given these circumstances, there is no need for the Court to deal with the other grounds raised by the applicants. The decision must be referred back for redetermination before a different member.

VII. Conclusion

[47] The Court finds that the member's conduct raises a reasonable apprehension of bias in this matter. Accordingly, the application for judicial review is allowed and the decision must be referred back for redetermination before a different Member of the IRB.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed; and
2. There is no question of general importance to certify.

"André F.J. Scott"
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3683-11
STYLE OF CAUSE:	JUAN CARLOS GORDILLO MUNOZ GLORIA ELIANA EID ORTIZ DANIELA GORDILLO EID v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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