

Federal Court



Cour fédérale

Date: 20120209

Docket: IMM-4712-11

Citation: 2012 FC 187

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, February 9, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**JUAN JOSE CUBRIA JUAREZ
IRIS EDITH MORTEO PENA
ALAN DANIEL CUBRIA MORTEO
JUAN JOSE CUBRIA MORTEO
EDGAR EDUARDO CUBRIA MORTEO**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I Introduction

[1] This case involves an internal flight alternative (IFA) for the applicants in their country of origin. After assessing the facts of the matter, it appears that the issue of state protection is independent of the IFA. The administrative tribunal took the context of the matter into account when it found that the applicants benefitted from an IFA.

[2] It has been well established in the jurisprudence that it is up to an applicant to demonstrate that the administrative tribunal's analysis of the IFA is unreasonable. Justice Yvon Pinard explained the following in *Perez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 8:

[15] The threshold for disproving an IFA is high, and the applicants must demonstrate conditions that would jeopardize their life and safety, according to *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 164 (C.A.). International protection is provided only if the applicants' country of origin cannot provide them with adequate protection throughout its territory, as per *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.), at page 711. Here, the Board explicitly acknowledged that criminality and impunity problems exist in Durango, and yet still found it to be a viable IFA. It appears from the Board's reasons that the Board relied on common sense and rationality regarding the passage of time since the incident as well as the perpetrators' apparent lack of real interest in the male applicant while he was still in Mexico. The Board did not ignore any evidence, but rather took into account the applicants' fears, while finding them insufficient to displace the Board's findings. [Emphasis added.]

II Judicial procedure

[3] This is an application for judicial review pursuant to 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 10, 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, Juan Jose Cubria Juarez, his spouse, Iris Edith Morteo Pena, and their three sons, Alan Daniel Cubria Morteo, Juan Jose, Cubria Morteo and Edgar Eduardo Cubria Morteo, are citizens of Mexico.

[5] The female applicant, Iris Edith Morteo Pena, alleges that she was sexually abused since she was eight years old by her paternal uncle, Miguel Mortero, a captain in the Mexican military.

[6] Iris Edith Morteo Pena married Juan Jose Cubria Juarez in 1988 without telling him about the abuse she was a victim of because her uncle had threatened to kill her and her family if she reported him.

[7] After the marriage, Iris Edith Morteo Pena continued to suffer abuse at the hands of her uncle during his visits.

[8] Despite the family's move in 1999 from the state of Veracruz to Aguascalientes, the mistreatment continued as the uncle was transferred to the same state as the family.

[9] In 2007, Juan Jose Cubria Juarez left the family home because he found a job in Mexico City.

[10] During her spouse's absence, Iris Edith Morteo Pena was abused by her uncle more regularly. He even apparently insisted that she accompany him on outings during which she was purportedly forced to engage in sexual activities with other men.

[11] In August 2008, Iris Edith Morteo Pena told her husband about the abuse after receiving death threats as a result of telling her uncle that she did not want anything to do with him.

[12] Juan Jose Cubria Juarez returned to the family home at the end of September 2008. On October 2, 2008, the applicants filed a complaint against Miguel Mortero with the Public Prosecutor. They allege that the Public Prosecutor refused to receive their complaint because it had no jurisdiction over the military and it apparently questioned the female applicant's credibility.

[13] Friends of Juan Jose Cubria Juarez who work in the legal system purportedly told him that there are no effective legal means to use against a member of the military who apparently has a lot of contacts and influence.

[14] Iris Edith Morteo Pena allegedly revealed the abuse to Miguel Mortero's wife, who apparently did not believe her.

[15] On October 10, 2008, Miguel Mortero purportedly sent two soldiers to beat up Juan Jose Cubria Juarez in retribution for wanting to report him, but he succeeded in running away. The next day, he apparently went with his spouse to a military recruitment post to file a complaint against the captain, Miguel Mortero, but the guard soldier denied them entry.

[16] On October 13, 2008, Miguel Mortero purportedly again uttered death threats against the family.

[17] The applicants left Aguascalientes for Calvillo, but Miguel Mortero, accompanied by soldiers, allegedly found them on November 9, 2008.

[18] On November 27, 2008, the applicants arrived in Montréal, where they claimed refugee protection.

IV Decision under review

[19] The RPD was of the opinion that the applicants rebutted state presumption even if there was a lack of credibility and plausibility in their account. It found that, even if the applicants did not make every reasonable effort to seek state protection, it, according to the documentary evidence, was not imminent despite efforts made by the Mexican government.

[20] Nevertheless, the RPD was of the view that the applicants had an IFA in Mexico City. That finding relies on the fact that the female applicant's uncle would now be close to retirement and would have no reason to pursue them nearly two years later. The documentary evidence also shows, according to the RPD, that finding them throughout Mexico would not be possible, even if the agent of persecution is a member of the military.

V Issue

[21] Under the circumstances, is the RPD's decision reasonable?

VI Relevant statutory provisions

[22] The following provisions of the IRPA 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 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

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 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

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.

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
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

[23] The Applicants' Memorandum consists essentially of excerpts from case law on state protection. The applicants maintain that no contextual analysis of their situation to determine whether state protection was available. The RPD did not consider that the agent of persecution was a member of the police force. They also state that an IFA is not an appropriate remedy.

[24] The respondent first argues that the applicants' affidavit is not consistent with paragraphs 80(2.1)(a) and 80(2.1)(b) of the *Federal Courts Rules*, SOR/98-106 (*Rules*). Indeed, the affidavit should have been translated orally for the deponent in the language of the deponent by an independent interpreter who must take an oath. The application for judicial review must be dismissed for this reason. Alternatively, the Court should not attach probative value to the affidavit.

[25] The respondent claims that the applicant does not challenge the IFA and that it must therefore be considered valid. He argues that the RPD complied with the applicable law pertaining to IFAs and that the applicants did not demonstrate that their agent of persecution could find them throughout Mexico and that it would be unreasonable for them to seek refuge in Mexico City.

VIII Analysis

[26] Regarding the respondent's preliminary remark, the Court notes that the facts are not in dispute. This Court's reasoning in *Velinova v Canada (Minister of Citizenship and Immigration)*, 2008 FC 268 applies:

[14] In this case, the issues raised by the applicant can be assessed without reference to the applicant's affidavit, since the necessary

material can be found in the Certified Tribunal Record. Furthermore, there is essentially no dispute with regard to the facts, the question being whether the Board appropriately addressed the issue of state protection. Therefore, I will not dismiss this case on the basis of subsection 80(2.1), but, since there is no indication that the applicant understood what she was signing, without an affirmed statement that the content of the affidavit had been translated for her, I give no weight to the applicant's affidavit. [Emphasis added.]

[27] From the outset, the Court notes that the RPD failed to analyze the subjective fear of the applicants. Its comments on the lack of credibility and plausibility of the applicants' account concerned the search for state protection. In fact, it identified contradictions between the testimony and the Personal Information Form (PIF) regarding the complaint attempts.

[28] The applicants cite case law concerning the determination of state protection. However, the RPD admitted that the applicants rebutted the presumption of state protection because it was not imminent at the time of their departure. Thus, the determinative issue in this case is the validity of the IFA.

[29] That issue must be analyzed in light of the reasonableness standard, which is concerned with the transparency and intelligibility of the decision-making process (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[30] 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 (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA)).

Thirunavukkarasu v Canada (Minister of Employment and Immigration), [1994] 1 FC 589, [1993] FCJ No 1172 (QL/Lexis)).

[31] The burden on an applicant to establish that an IFA is unreasonable has a high threshold according to the Federal Court of Appeal in *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164:

[14] We read the decision of Linden J.A. for this Court as setting up a very high threshold for the unreasonableness test. It requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations. [Emphasis added.]

[32] In this case, the transcript analysis shows that the applicants had every opportunity to make their arguments to the RPD when it questioned them on the IFA in Mexico City (Tribunal Record at pages 283-286).

[33] Those comments were reiterated by the RPD. Regarding the first test component, the RPD stated that the uncle would likely soon retire as the female applicant testified that he was taking steps to do so when they departed for Canada. With respect to the second test component, the principal applicant reported on his difficulty in obtaining work in Mexico City given his age. The two applicants confirmed that it would not be unreasonable for them to seek refuge in Mexico City apart from their fear of her military uncle.

[34] The RPD also addressed the applicants' fear of being found through their electoral card or other confidential data such as their cellular telephone, credit card or bank account. Its finding is supported by the documentary evidence according to which no government representative or police officer has used that information to find a person in Mexico (RPD decision at paragraphs 14 and 15). It is clearly apparent that the RPD fully considered that the agent of persecution, that is, the female applicant's uncle, was a member of the military.

IX Conclusion

[35] For these reasons, the RPD's decision is reasonable. Consequently, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS THAT the application for judicial review be dismissed. No question of general importance is certified.

“Michel M.J. Shore”

Judge

Certified true translation
Janine Anderson, Translator

Federal Court



Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4712-11

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and MCI

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

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