

Federal Court



Cour fédérale

Date: 20130207

Docket: IMM-5455-12

Citation: 2013 FC 132

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 7, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

LEONEL MENDOZA VELEZ

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board dated April 25, 2012, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 (IRPA). The RPD found that the applicant is not a Convention refugee under section 96 of the IRPA or a person in need of protection under section 97 of the IRPA.

I. Facts

[2] The applicant is a Mexican citizen. On June 12, 2005, he witnessed the murder of Cirilo Morales Feliciano, a friend who was 16 years old. During the incident, the applicant was with another friend, Gorgonio Ventura Vasquez, as well as Jesus Victorio Barrio, known as “El Navarro”. That evening, Jesus Victorio Barrio and Cirilo Morales Feliciano fought and Cirilo accused Jesus Victorio Barrio of being a horse and cattle thief. Jesus Victorio Barrio assaulted Cirilo Morales Feliciano with rocks to the head, which killed him. Jesus Victorio Barrio left the area and threatened to kill the applicant and Gorgonio Ventura Vasquez if they spoke about the murder. When people approached to find out who had killed Cirilo Morales Feliciano, the applicant went home because he was afraid that Jesus Victorio Barrio would return and kill him.

[3] After those incidents, the Office of the Public Prosecutor arrested Gorgonio Ventura Vasquez and two other men who showed up at the scene of the crime. Fearing for his life, Gorgonio Ventura Vasquez stated that Cirilo Morales Feliciano was attacked by a group of men from the village of San Augustin, Cuilutla. Thus, the police arrested three men from that village.

[4] When the applicant learned that three innocent men had been arrested, he went to the Office of the Public Prosecutor on August 22, 2005, to make a detailed statement accusing Jesus Victorio Barrio of having been solely responsible for the death of Cirilo Morales Feliciano. According to the applicant, he had bribed certain people to ensure that he was not arrested for the crime he committed.

[5] On July 9, 2007, the applicant received a summons from the Office of the Public Prosecutor to appear at the trial of the three men accused of murdering Cirilio Morales Feliciano. He felt obliged to question Gorgonio Ventura Vasquez on the false statement he made to the Office of the Public Prosecutor. Gorgonio Ventura Vasquez then explained that Jesus Victorio Barrio had threatened to kill him if he ever told the truth.

[6] A few months later, the applicant learned that the three men accused of murdering Cirilio Morales Feliciano would be released. However, in December 2007, he learned that Jesus Victorio Barrio had returned to the area and had uttered threats against him and his family. Therefore, the applicant left the region with his wife and two children to go live in Chicoloapan, in the State of Mexico. He became a clothing salesperson in a small store. He rented a house and registered his children in school there.

[7] In May 2008, the applicant learned that his friend Gorgonio Ventura Vasquez, who had moved to Guadalajara, in the State of Jalisco, had been shot dead. Following his statement, Gorgonio Ventura Vasquez had been tracked throughout the country by Jesus Victorio Barrio or people he had hired. Thus, the applicant left Mexico for Canada on July 3, 2008, and claimed refugee protection the day he arrived.

II. Decision under review

[8] The RPD found that the applicant is not a refugee because the reason at the basis of his refugee claim is not a valid Convention ground. Regarding the claim filed under section 97 of the

IRPA, the RPD found that the applicant did not establish, on a balance of probabilities, that he would be the subject of cruel and unusual treatment if he returned to Mexico.

[9] In support of his claim, the applicant provided a declaration dated August 22, 2005, to the Office of the Public Prosecutor of the State of Guerrero, in which he set forth a detailed description of what occurred on June 12, 2005, resulting in the death of Cirilio Morales Feliciano. He also provided a copy of the summons dated July 9, 2007, which states that a criminal trial was instituted with respect to the murder of Cirilio Morales Feliciano. The RPD thus found that the applicant's account was credible and that Jesus Victorio Barrio had murdered Cirilio Morales Feliciano.

[10] The RPD found that it was curious that Jesus Victorio Barrio had been convicted of murder but was not in prison and now lives in a city close to San Augustina, Cuilutla, where the applicant's family lives. It also found that the applicant does not know whether Jesus Victorio Barrio is free because the latter has filed an appeal from the criminal conviction.

[11] The RPD found that the applicant stated that Gorgonio Ventura Vasquez's death could only be attributed to Jesus Victorio Barrio since he had no enemies. However, it also found that the applicant lived in Chicoloapan for four and a half years in the same house. Furthermore, the applicant confirmed that he has stayed in contact with his family in Mexico and that they have not been threatened.

[12] The RPD also found that Jesus Victorio Barrio and his family breed livestock and that he probably has neither the interest nor the financial ability to search for the applicant, especially since

he was never imprisoned for the crime he committed. The RPD therefore found that the applicant could return to Chicoloapan without being at risk of cruel and unusual treatment. Furthermore, the RPD found that, given that the applicant made a living in Chicoloapan for six months before leaving Mexico for Canada, it would not be “objectively unreasonable” or “unduly harsh” to expect the refugee claimant to move to that location.

III. Position of the applicant

[13] The applicant submits that the RPD’s decision did not take into account the evidence that it is possible to corrupt public servants in Mexico to obtain data bases containing confidential information on third parties. That evidence should have been examined as part of the internal flight alternative analysis given that it shows that, regardless of where the applicant would live, he could be located by Jesus Victorio Barrio. Thus, the RPD erred because that was a very important piece of evidence.

[14] Furthermore, the applicant states that the RPD did not consider that the context for people in the applicant’s position is very different in Mexico and instead examined the applicant’s situation from a Canadian point of view. Mexico is an emerging democracy.

[15] Third, the applicant alleges that the RPD erred when assessing his testimony. In fact, the RPD, in its decision, indicated that it did not know why Jesus Victorio Barrio did not serve prison time for murder following the guilty verdict. However, the applicant explained that there was only, to his knowledge, an arrest warrant issued against him and that he was not convicted by a Mexican court for the murder of Cirilio Morales Feliciano. Thus, the RPD’s decision, particularly regarding

the internal flight alternative, is erroneous because the RPD drew a negative inference based on an erroneous finding of fact. In fact, it is clear from the hearing transcripts that when the applicant was questioned about Jesus Victorio Barrio, he was referring to the proceedings involving the three accused men and that, when he claimed that Jesus Victorio Barrio was found guilty, he was actually referring to the three men released after he made his statement about Jesus Victorio Barrio. Thus, it is clear that, for the applicant, there is no difference between the acquittal of the three men and the case against Jesus Victorio Barrio.

[16] Fourth, the applicant submits that the RPD committed an error similar to that found by this Court in *Lugo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 170 at paragraphs 35-39, 364 FTR 188 (*Lugo*), because it rejected his claim on the basis of the fact that he did not avail himself of an internal flight alternative before he claimed refugee protection in Canada. The RPD thus added a criterion to the test developed in the case law regarding internal flight alternative assessments.

[17] Again regarding the internal flight alternative, the applicant states that it was not available to him given that Jesus Victorio Barrio was able to kill Gorgonio Ventura Vasquez in the State of Jalisco and he suspects that he hired a killer to do so. Thus, Jesus Victorio Barrio would have the financial means to harm the applicant. Furthermore, the applicant explained that Jesus Victorio Barrio belongs to a higher class of breeders than his. Therefore, the RPD made an arbitrary finding without regard for the evidence before it.

[18] Finally, the fact that the RPD found the applicant to be credible should have had an impact on the internal flight alternative analysis.

IV. Position of the respondent

[19] The applicant submits that the RPD did not err by finding that the applicant has an internal flight alternative in Chicoloapan, where he found refuge in December 2007 with his family. The two-part test established in *Rasaratnam v Canada (Minister of Employment and Immigration)* (1991), 140 NR 138 was applied fairly.

[20] Regarding the first part of the test, the applicant did not demonstrate on a balance of probabilities that he faces persecution or a risk to his life or a risk of cruel and unusual treatment or punishment in Chicoloapan. In fact, the applicant had lived there peacefully since 2007 and the respondent alleges that the RPD validly found that the applicant did not prove that Jesus Victorio Barrio would try or would be willing to try to find him.

[21] Regarding the second part of the test, the RPD's finding that it is not unreasonable for the applicant to avail himself of the internal flight alternative in Chicoloapan, where he already lived with his family before leaving Mexico, was just.

[22] Regarding the applicant's argument that the RPD misunderstood his testimony with respect to Jesus Victorio Barrio's arrest, the respondent states that that has no bearing on the RPD's analysis of the applicant's internal flight alternative.

V. Issue

[23] Did the RPD err by finding that the applicant has an internal flight alternative?

VI. Standard of review

[24] The reasonableness standard applies to the RPD's decision with respect to the internal flight alternative because it is a question of fact (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190).

VII. Analysis

[25] The RPD rendered an unreasonable decision for the following reasons.

[26] The applicant's argument that the RPD added a condition to the test applicable to the internal flight alternative issue is fair. In fact, the RPD, in this case, committed an error in the application of the test that is similar to the one found by this Court in *Lugo*, above. It applied the two parts of the test and, in addition, required the applicant to have already availed himself of his internal flight alternatives before he claimed refugee protection. A reading of the relevant passage of the decision shows that the RPD found that the applicant's refugee claim should fail on the ground that he did not avail himself of the internal flight alternatives before he claimed refugee protection in Canada. That constitutes an error.

[27] Regarding the applicant's allegation that the RPD ignored the documentary evidence that it is possible, in Mexico, to obtain personal information, for example, someone's address, by paying members of the government, the RPD did not commit an error. In fact, the applicant cannot allege

that the RPD did not consider documentary evidence on an element when there is nothing in his factual situation that corresponds to it. The RPD rendered a reasonable decision and did not commit an error by failing to address this specific problem because there is no evidence that suggests that that could be the applicant's situation (*Zavala v Canada (Minister of Citizenship and Immigration)*, 2009 FC 370 at paragraphs 14-15, 2009 CarswellNat 6562; *Alba v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1116 at paragraphs 31-32, 2007 CarswellNat 3608). In fact, the evidence shows that Jesus Victorio Barrio is a livestock breeder and is not linked to a criminal organization, which demonstrates that it is unlikely that he used that means to try to locate the applicant.

[28] Like the applicant stated, it seems that the RPD was confused in its interpretation of his testimony. The RPD understood that Jesus Victorio Barrio had been tried for murder and was therefore surprised to find that he did not serve a prison sentence. Furthermore, according to the RPD, given that he did not serve a sentence, Jesus Victorio Barrio would have no reason to harm the applicant. However, the applicant provided answers that demonstrate that he made no distinction between Jesus Victorio Barrio's trial and the acquittal of the three men.

[29] The RPD's finding is erroneous and it had an impact on the result. In fact, the evidence shows that the applicant made a statement that led to the release of three innocent men and the issuance of a warrant to arrest Jesus Victorio Barrio. Thus, the RPD found that the applicant, by his actions, was able to aggravate Jesus Victorio Barrio. The current situation is that the applicant could be a key witness in the trial against Jesus Victorio Barrio, who is still free. The RPD's finding that he would not harm the applicant given that he is not serving a prison sentence after his conviction is

based on a misinterpretation of the applicant's testimony, which impacted the issue of the applicant's internal flight alternative.

[30] Thus, the two errors committed by the RPD, that is, the addition of a criterion to the test applicable to the internal flight alternative and the misinterpretation of the applicant's testimony that led to an erroneous finding make the decision unreasonable in the circumstances.

[31] The parties were invited to submit a question for certification, but none was submitted.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed and no question will be certified.

“Simon Noël”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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