

Federal Court



Cour fédérale

Date: 20100902

Docket: IMM-8-10

Citation: 2010 FC 866

Ottawa, Ontario, September 2, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

**ORLANDO DE LOERA MARTINEZ
ELIZABETH JUAREZ LOPEZ
IVAN DE LOERA JUAREZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of the Refugee Protection Division (the Board), dated November 10, 2009, wherein Orlando de Loera Martinez (the principal applicant), Elizabeth Juarez Lopez (the principal applicant's wife) and Ivan de Loera Juarez (the principal applicant's son) were found not to be Convention refugees or persons in need of protection.

[2] The relevant legislation is attached as Appendix A to these reasons.

[3] The applicants are citizens of Mexico from the State of Aguascalientes.

[4] The principal applicant, his wife, and his nine year old son, fled separately to Canada claiming fear of persecution after having allegedly been assaulted by military officers present in their area as a part of the Mexican government's efforts to deal with the growing problem of drugs in their country.

[5] On April 27, 2007, it is alleged that military officers attempted to rape Mrs. Juarez Lopez and assaulted the principal applicant when he tried to intervene. Mrs. Juarez Lopez, who had just recently learned that she was pregnant, was left feeling shaken psychologically and physically. Subsequent to this incident, the applicants filed a complaint with the local police.

[6] On May 8, 2007, en route to a doctor's appointment for Mrs. Juarez Lopez's pregnancy, the couple was intercepted by some men with pistols who then beat the principal applicant. The principal applicant was threatened that if his complaint was not withdrawn, death would follow for him and his family. The applicants promised that the complaint would be withdrawn and went to their appointment where they were informed that there was danger of losing the baby. The applicant did not file a second complaint concerning the second incident.

[7] The Board identifies credibility and state protection as determinative issues in this case.

[8] They are questions of facts and mixed facts and law which attract a standard of reasonableness. The Court has held that the Board's decisions on both credibility and state protection should be reviewed on a standard of reasonableness (*Aguirre v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 571, [2008] F.C.J. No. 732 (QL), at para. 14; *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 490, [2008] F.C.J. No. 624 (QL), at para. 10). Accordingly, the Court will only intervene if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47).

[9] The applicants submit that the Board's determination that the applicant lacked credibility was based solely upon the absence of evidence of the complaint made for the initial incident and the explanation for having decided not to tender the document which, it is alleged by the applicants, did not match the facts of the incident.

[10] In *Osman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 921, [2008] F.C.J. No. 1134 (QL), at para. 39, Justice Simpson held that a lack of reasonable explanation for a material omission can be the basis of an adverse inference and impugn an applicant's credibility.

[11] In the case at bar, while the applicants had a copy of the written complaint, they chose not to produce it. They submit that the Board should not have drawn a negative inference regarding the applicants' credibility solely based on this fact. However, an applicant needs to provide a reasonable explanation as to why such evidence is not available. In this case, the complaint is very material

given that all the elements of the applicants' story build on this event. The applicants' explanation that the document dealt with a situation that did not relate to the circumstances that they had related to the police, does not sufficiently explain why the copy was not submitted. For example, the applicants offered no explanation as to why the police would give them a document that was meant to serve as a copy of their complaint, and yet, they did not provide any information about the content of the written complaint they received. I believe that the incomplete explanation given here, is one to which Justice Simpson alluded to in *Osman*. Therefore, it is the absence of the document, coupled with incomplete explanations that lead to the negative inference drawn by the Board.

[12] The least the applicants could have done to help their case was to provide a more complete explanation as to why the written complaint was not translated and submitted, and which information was not related to the principal applicant's complaint. It would have been helpful for the applicants to have the document translated, and allow the Board to decide for itself whether or not the document was relevant evidence and accept the applicants' explanations.

[13] The applicants also submit that they filed a medical certificate issued prior to the departure of the principal applicant's spouse from Mexico which corroborates her physical injuries sustained and her danger of suffering a miscarriage. As stated in *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (QL) (C.A.), the Board is assumed to have weighed and considered all evidence before it, unless the contrary is shown. Thus, it can be assumed that the Board did examine the medical certificate. In this case, it is difficult to conclude that the medical record would have changed the Board's findings on credibility given that the medical report makes

no mention of any of the events that would have caused the physical injuries. I therefore cannot find that the Board overlooked this piece of evidence.

[14] As to the Board's analysis of the documentary evidence on state protection, the Court notes that it is brief. However, the conclusions in the decision based on the applicants' behaviour that they did not show that Mexico was unable or unwilling to provide them protection are reasonable. Therefore, the Court's intervention is not warranted.

[15] No question of general importance was submitted and none arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

“Michel Beaudry”

Judge

APPENDIX A

Immigration and Refugee Protection Act, S.C. 2001, c. 27.

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.

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

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.

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

accepted international standards, and

mépossibilité d'un refuge internes 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.

Immigration and Refugee Protection Regulations, SOR/2002-227

7. The claimant must provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them.

7. Le demandeur d'asile transmet à la Section des documents acceptables pour établir son identité et les autres éléments de sa demande. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour s'en procurer.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-8-10

STYLE OF CAUSE: **ORLANDO DE LOERA MARTINEZ
ELIZABETH JUAREZ LOPEZ
IVAN DE LOERA JUAREZ
and
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: August 31, 2010

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

DATED: September 2, 2010

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