

Federal Court



Cour fédérale

Date: 20120514

Docket: IMM-7045-11

Citation: 2012 FC 573

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 14, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

**JORGE VALENTIN GOMEZ ORTEGA
JHODAD GOMEZ DE LA FUENTE**

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 the decision by the Immigration and Refugee Board (IRB), dated September 21, 2011, that Jorge Valentin Gomez Ortega

(Mr. Ortega) and his son, Jhodad Gomez De La Fuente (J. Fuente)(applicants), are not Convention refugees or persons in need of protection under sections 96 and 97 of the IRPA.

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

II. Facts

[3] The applicants are citizens of Mexico.

[4] In November 2000, Mr. Ortega lost his job as the service manager of a company. In 2002, he managed to find work as an extra at Mexico's Televisa. He worked both as an extra and as a sales clerk in a boutique.

[5] In 2008, Mr. Ortega was elected by the majority of the workers as the union representative on a committee. The committee's objective was to improve working conditions for extras. Mr. Ortega therefore prepared a report and made a list of demands. He presented it to the committee members, who categorically rejected it.

[6] According to Mr. Ortega, the committee members were dedicated to representing the interests of senior management. In the following months, Mr. Ortega was harassed and even excluded by the other members. Edgar Camacho, one of the committee members, even suggested that he leave his position. Mr. Ortega refused to do so.

[7] A few days later, Mr. Ortega received an anonymous phone call from someone demanding that he withdraw from the committee or suffer consequences. Mr. Ortega changed his telephone number, but the threats nevertheless continued. The harassers managed to contact Mr. Ortega's son, J. Fuente, on his cell phone and threatened him as well.

[8] Both of the applicants were victims of abuse and death threats by Mr. Camacho. After receiving newspaper articles about kidnappings, Mr. Ortega decided to file a complaint with the police against Mr. Camacho. The following day, the public prosecutor told him that they did not have sufficient evidence to prosecute Mr. Camacho.

[9] Four days later, he bought a plane ticket and left Mexico for Canada. He arrived in Canada on July 5, 2009, and claimed refugee protection that same day.

[10] The IRB noted that the applicants did not credibly establish the essential elements of their claim. As a result, the IRB found that the applicants are not Convention refugees or persons in need of protection under sections 96 and 97 of the IRPA.

III. Legislation

[11] Sections 96 and 97 of the IRPA specify the following:

Convention refugee

96. A Convention refugee is a person who, by reason of a

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le

well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

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) 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

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(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.

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 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

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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

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 themselves 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. Issue

[12] This application for judicial review raises two issues.

1. *Did the IRB err by finding that the applicants are not credible?*
2. *Did the IRB err by failing to rule on the subjective fear of the applicants?*

B. Standard of review

[13] In *Mejia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 354, [2009] FCJ No 438, at paragraph 26, the Court established that the reasonableness standard of review applies to issues with regard to a refugee claimant's credibility (see also *Zarza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 139, [2011] FCJ No 196 at paragraph 16).

[14] In *Lezama v Canada (Minister of Citizenship and Immigration)*, 2011 FC 986, [2011] FCJ No 1213 at paragraph 22, the Court found that an issue concerning "the alleged failure of the [IRB] to make findings regarding the Applicants' subjective fear [is an issue that] touches upon the adequacy of the Decision and as such is reviewable under a standard of correctness" (see also *Martinez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 13 at paragraph 21).

[15] Thus, as stated by the Supreme Court of Canada in paragraph 47 of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9, reasonableness “is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”.

V. Position of the parties

A. Position of the applicants

[16] The applicants raise two arguments. First, they state that the evidence in the record did not enable the IRB to find that they lack credibility. Furthermore, they rely on *Gracielome v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 463) to support that findings by the IRB with respect to their credibility must not be arbitrary, unreasonable or capricious.

[17] The applicants also allege that after [TRANSLATION] “spending a lot of time finding credibility problems, the panel completely forgot to address the main element of their claim” that is, fear for their safety and lives because of persecution and attacks by the union mafia. In other words, they state that the IRB failed to exercise its jurisdiction by not ruling on the issue of their subjective fear.

[18] The applicants cite *Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168 and *Djama v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 531,

in support of their position. In those two decisions, the Federal Court of Appeal noted that the IRB must rule on not only credibility issues but also the well-foundedness of the fear alleged by the refugee claimant.

[19] The applicants maintain that the IRB's decision is unreasonable in light of those errors in the application of the law.

B. Position of the respondent

[20] The respondent submits that the IRB is entitled to find that the credibility of the applicants is compromised because of certain deficiencies concerning the central elements of their refugee claim. According to the IRB, Mr. Ortega completed his Personal Information Form (PIF) in a vague and imprecise manner. It also pointed out that Mr. Ortega's testimony was incoherent.

[21] The respondent also alleges that the applicants did not submit the necessary evidence to establish their claim.

[22] The respondent claims that a finding of a lack of credibility with respect to the central elements of a refugee claim may extend to the other elements of the claim. He relies on *Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238, [1990] FCJ No 604 at paragraphs 7-9 (*Sheikh*).

[23] Furthermore, the respondent argues that the applicants failed to establish a subjective fear of persecution as well as the basis for their objective fear. The respondent alleges that the absence of a subjective fear is fatal to a refugee claim (see *Farfan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 123, [2011] FCJ No 153 at paragraph 16). Moreover, the respondent points out that the applicants are not directly challenging the IRB's finding that they failed to establish a subjective fear of persecution in Mexico. Because that finding remains unchallenged, it is sufficient ground for rejecting the applicants' refugee claim (see *Cienfuegos v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1262 at paragraph 26).

[24] The respondent is of the opinion that this Court's intervention is unwarranted in this case because the IRB's decision is reasonable.

VI. Analysis

1. Did the IRB err by finding that the applicants are not credible?

[25] The IRB did not err by finding that the applicants are not credible.

[26] The Court must note that "credibility is central to most, if not all, of the findings that the [IRB] makes when assessing asylum claims" (see *Umubyeyi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 69, [2011] FCJ No 76 at paragraph 11).

[27] “The Court should not interfere with the findings of fact and the conclusions drawn by the [IRB] unless the Court is satisfied that the [IRB] based its conclusion on irrelevant considerations or that it ignored evidence” (see *Kengkarasa c Canada (Minister of Citizenship and Immigration)*, 2007 FC 714, [2007] FCJ No 970 at paragraph 7; see also *Miranda v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 437). Our case law also specifies that it is up to the IRB to assess the evidence and the testimony and to attach probative value to them (see *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (*Aguebor*); and *Romhaine v Canada (Minister of Citizenship and Immigration)*, 2011 FC 534, [2011] FCJ No 693 at paragraph 21).

[28] The Court would like to note that the IRB may draw “a negative inference with respect to the applicant’s credibility based on the fact that he did not give a reasonable explanation for his failure to submit evidence corroborating his allegations” (see *Soto v Canada (Minister of Citizenship and Immigration)*, 2011 FC 360 at paragraph 25).

[29] In this case, the IRB found that Mr. Ortega is not a credible witness. It wrote the following in paragraph 8 of its decision: “The panel confronted the claimant about the fact that his narrative does not contain any dates and it therefore does not pinpoint when the events took place. When confronted by the panel, [Mr. Ortega] answered that he was nervous when he wrote his narrative and that he did not want to make any mistakes”. The IRB also noted that, at the hearing, Mr. Ortega did not respond clearly to questions. The Board is in the best position to assess the probative value of the evidence and the testimony. The Court considers the IRB’s finding reasonable because Mr. Ortega did not state the facts in his account accurately.

[30] Also, Mr. Ortega did not submit evidence in support of his allegation that he was part of the extras' union committee. "The Court would note that the burden of proof rests on the applicants, who must present all the evidence that is available and that they consider to be necessary to establish their claim at the hearing" (see *Pinon v Canada (Minister of Citizenship and Immigration)*, 2010 FC 413, [2010] FCJ No 500 at paragraph 12).

[31] The applicants allege that they experienced death threats and mistreatment at the hands of Mr. Camacho. Mr. Ortega nevertheless showed up to work and continued to file demands with the committee. Furthermore, the IRB pointed out that Mr. Ortega "justified his unwillingness to file a complaint with the police following the death threats that he allegedly received and the attacks of April 2009 and May 2009 by the fact that he does not trust the police in Mexico" (see the IRB decision at paragraph 21).

[32] In *Aguebor*, the Federal Court of Appeal specified that "[a]s long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review" (see *Aguebor* at paragraph 4). In this case, the IRB drew a negative inference regarding the applicants' credibility, which seems reasonable to us.

2. Did the IRB err by failing to rule on the subjective fear of the applicants?

[33] The IRB did not fail to rule on the subjective fear of the applicants.

[34] The applicants contend that the IRB did not address the well-foundedness of their fear in Mexico. The IRB wrote that “[e]ven if the claimant had credibly established the facts alleged in his narrative, which is not the case, he still would not have established his well-founded fear of persecution” because the applicants did not take the necessary steps to protect themselves. (see the IRB decision at paragraph 17).

[35] In *Sheikh*, above, the Federal Court of Appeal specified that a lack of credibility with respect to the central elements of a claim may extend to the other elements of the claim (see *Sheikh* at paragraphs 7-9). The findings by the IRB with respect to the lack of credibility of the applicants undermine their allegation that they fear Mr. Camacho in Mexico. The Court therefore deems that, in this case, there are no reasons that warrant our intervention.

VII. Conclusion

[36] The Court finds that the applicants’ application for judicial review must be dismissed. The IRB reasonably found that the applicants are not credible. That lack of credibility undermines their main allegation that they fear Mr. Camacho in Mexico. Consequently, the applicants are not Convention refugees or persons in need of protection.

JUDGMENT

THE COURT DISMISSES the application for judicial review and **FINDS** that there is no question of general interest for certification.

“André F.J. Scott”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7045-11

STYLE OF CAUSE: JORGE VALENTIN GOMEZ ORTEGA
JHODAD GOMEZ DE LA FUENTE
v
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: March 28, 2012

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

DATED: May 14, 2012

APPEARANCES:

Claude Brodeur FOR THE APPLICANTS

Yael Levy FOR THE RESPONDENT

SOLICITORS OF RECORD:

Claude Brodeur FOR THE APPLICANTS
Montréal, Quebec

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Montréal, Quebec