

Federal Court



Cour fédérale

Date: 20120430

Docket: IMM-5743-11

Citation: 2012 FC 497

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 30, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

FELIPE MENDOZA BERBER

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review submitted in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act), of a decision dated July 21, 2011, by the Refugee Protection Division of the Immigration and Refugee Board (panel) that the applicant is not a refugee or a person in need of protection within the meaning of sections 96 and 97 of the Act.

I. Background

A. *Factual background*

[2] Felipe Mendoza Berber (the applicant) is a citizen of Mexico. He is claiming refugee protection in Canada based on his fear of reprisals from drug dealers in his country of origin.

[3] The applicant was a police officer with the public safety branch, traffic division, in Ciudad Juarez, in the state of Chihuahua, Mexico, for a period of six (6) years.

[4] On November 25, 2006, at around 2 a.m., the applicant participated in a police intervention involving a dozen police officers, seven police patrols and a recovery car. The intervention was supervised by the commanding officer, Javier Macias.

[5] During the police intervention, a speeding vehicle without licence plates was stopped. There were four armed men in the vehicle. After a minor scuffle, the men in the vehicle were immobilized and handcuffed by the police officers.

[6] During the intervention, the men in the vehicle uttered death threats against the police officers. The men also told the officers that they were members of the "LINEA" cartel, led by "JL" under the orders of Mario Zambada.

[7] When the vehicle was inspected, the police officers found several weapons, a grenade, numerous cartridges of various calibres, Federal Investigation Agency uniforms and bulletproof vests.

[8] Thirty (30) minutes later, at around 2:30 a.m., the commanding officer allegedly received a call ordering him to release the detainees. The order was given by Guillermo Prieto Quintana, who was the director of public safety at the time of the intervention.

[9] When they left, the men repeated their death threats against the police officers.

[10] The next day, the police officers who had participated in the intervention started receiving death threats through anonymous calls and text messages on their cellphones. The applicant submits that headquarters had given out the telephone numbers of the police officers involved in the group's arrest to the drug traffickers.

[11] In the months and years following the intervention, some of the officers were murdered, some quit their jobs and others disappeared.

[12] In December 2006, the applicant fled Mexico for Florida, in the United States.

[13] In March 2009, the applicant returned to Mexico – specifically to Ciudad Juarez and to Mexico City – to see his wife, his children and his gravely ill mother.

[14] The applicant left Mexico and arrived in Canada on May 28, 2009, where he claimed refugee protection.

[15] On May 6, 2011, his refugee claim was heard by the panel.

B. The impugned decision

[16] Having considered all of the evidence, the panel declared that the applicant had not discharged his burden of proof. The panel was of the opinion that the applicant's testimony was not credible because it contained omissions and implausibilities.

[17] Furthermore, the panel found there was a lack of subjective fear on the applicant's part because he never applied for refugee status in the United States in spite of the fact that he had lived there for two (2) years and because he had returned to Mexico to visit his family. The panel found the applicant's explanations to be unsatisfactory.

[18] Lastly, the panel determined that there was an internal flight alternative (IFA) for the applicant in Mexico City.

II. Issues

[19] The Court is of the opinion that this matter raises the following issues:

Were the panel's negative findings with respect to the applicant's credibility made in a capricious manner or without regard for the evidence before it?

Did the panel err in finding that there was an IFA in Mexico City?

III. Applicable legislative provisions

[20] Sections 96 and 97 of the Immigration and Refugee Protection Act read as follows:

REFUGEE PROTECTION,
CONVENTION REFUGEES AND
PERSONS IN NEED OF
PROTECTION

NOTIONS D'ASILE, DE RÉFUGIÉ
ET DE PERSONNE À PROTÉGER

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 social group or political opinion,

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) 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 ou, 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

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

habitual residence, would subject them personally

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.

Person in need of protection

Personne à protéger

(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 qualifié 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. Applicable standard of review

[21] It is established in the case law that the standard of review applicable to the assessment of the credibility of a refugee claimant is that of reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)* (FCA), (1993) 160 NR 315, 42 ACWS (3d) 886; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 (*Dunsmuir*)).

[22] The standard of review applicable to IFA issues is also that of reasonableness (*Goltsberg v Canada (Minister of Citizenship and Immigration)*, 2010 FC 886 at paragraph 16, [2010] FCJ No 1103; *Mejia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 354 at paragraph 29, [2010] FCJ No 438).

[23] Consequently, according to the standard of reasonableness, this Court will intervene only where the panel has come to a conclusion that is not transparent, justifiable and intelligible or that does not fall within a range of possible, acceptable outcomes based on the evidence before it (*Dunsmuir, supra*, at paragraph 47).

V. Applicant's position

[24] According to the applicant, the panel erred in its assessment of the credibility of his testimony. Citing *Sheikh v Canada (Minister of Employment and Immigration)* (CA), [1990] 3 FC 238, [1990] FCJ No 604; *Attakora v Canada (Minister of Employment and Immigration)* (FCA), [1989] FCJ No 444, 99 NR 168; *Rajaratnam v Canada (Minister of Employment and Immigration)*

(FCA), [1991] FCJ No 1271, 135 NR 300; and *Owusu-Ansah v Canada (Minister of Employment and Immigration)* (FCA), [1989] FCJ No 442, 98 NR 312, the applicant argues that the panel should not have demonstrated such excessive zeal trying to find instances of contradiction in the applicant's testimony and should not have been overly vigilant in undertaking a microscopic examination of the evidence.

[25] In addition, the applicant contends that, pursuant to the decision in *Maldonado v Canada (Minister of Employment and Immigration)* (FCA), [1980] 2 FC 302, 31 NR 34, when an applicant swears that certain facts are true, there is a presumption that they are true, unless there is a valid reason to doubt their truthfulness. The applicant argues that the panel misunderstood part of his testimony regarding his fear of the drug traffickers and their leader. Also, the applicant submits that the panel erred in finding that he was not credible on this point, because it had no evidence to the contrary to support that finding. The applicant states that the panel ought to have based its negative credibility finding on credible evidence.

[26] Furthermore, the applicant notes that fact that the panel acknowledged that there is an extremely precarious situation in Mexico in terms of police officers being caught between the drug cartels, the army and the government. However, the applicant claims that the panel misapprehended the documentation on drug traffickers in Mexico.

VI. Respondent's position

[27] For its part, the respondent argues that the panel is in the best position to decide credibility and evidentiary issues, and to make determinations on a claimant's explanations regarding any contradictions and implausibilities that appear in his or her claim for refugee protection.

[28] The respondent submits that the panel was correct in finding that the applicant lacked credibility in light of the contradictions, inconsistencies and implausibilities that had been noted in his testimony. In the respondent's view, although the applicant was given the opportunity to provide satisfactory explanations with respect to the contradictions between his statements in his PIF and his testimony, he failed to do so. The respondent further asserts that it was open to the panel to use the implausibilities in the applicant's narrative as a basis on which to assess his credibility. Moreover, while there is a presumption of truthfulness attached to the allegations of a refugee claimant, that presumption was rebutted on the basis of the contradictions, omissions, implausibilities and inconsistencies in the evidence.

[29] In this case, the respondent submits that the panel correctly found that the murders and disappearances of police officers in Ciudad Juarez and the applicant's flight had not been specifically linked to the police operation in question. The respondent claims that the panel provided a thorough analysis of the events that led to the disappearances and to the applicant's flight: the generalized violence in Ciudad Juarez, the war between the Mexican government and groups of drug traffickers, and the corruption of a significant number of police officers involved with the drug cartels.

[30] Lastly, the respondent submits that it was open to the panel to find that the applicant lacked subjective fear because he had not sought refugee protection in the United States, had later returned to Mexico and had been unable to provide a satisfactory explanation for these actions.

VII. Analysis

[31] With respect to the issue of the applicant's credibility, the Court points out that the panel is in the best position to determine credibility and evidentiary issues. It is also in a better position to assess a claimant's explanations (*Cortes v Canada (Minister of Citizenship and Immigration)*, 2009 FC 583, [2009] FCJ No 734).

[32] After having reviewed all of the evidence in the record and heard the parties, the Court cannot agree with the applicant's arguments and conclude that the panel erred in its assessment of his credibility. There is a presumption that the panel has considered all of the evidence (*Florea v Canada (Minister of Employment and Immigration)* (FCA), [1993] FCJ No 598, and, in this case, the arguments put forth by the applicant have not convinced this Court.

[33] In particular, the panel noted the following:

- Although at the beginning he feared the drug traffickers in general, during the hearing he was more precise and alleged that he fears a leader of the drug traffickers named Mario Zambada, because one of the people arrested during the traffic check was allegedly a member of Mr. Zambada's family. However, the panel noted that the applicant had failed to report this fact in his Personal Information Form (PIF). The panel also noted the applicant's lack of a satisfactory explanation on this point.
- The panel found it implausible that the officers had never tried to identify the detained individuals, that the car had no licence plates and that the individuals were released thirty (30) minutes after the intervention.

- The panel determined that it was implausible that these arrested traffickers would become “so angry in the 30 minutes during which they were allegedly in custody that, once released, they would begin killing all of the police officers”. The panel concluded that the killings of the police officers were not linked to the intervention. Rather, the panel determined that the officers had been killed as a result of the widespread violence in Ciudad Juarez and of corruption among a great many police officers who are involved with the drug cartels. (the Court notes that most of the exhibits on the subject – such as P-6 and P-7 (Tribunal Record, pages 123 and 125) confirm this.
- The panel was of the view that the applicant was not credible as to the death threats that he allegedly received. The panel determined that he quit the police because of the widespread violence and not because of any death threats.

[34] But more importantly, the Court notes that the applicant left Mexico a first time and lived in the United States for over two (2) years without claiming refugee protection. Throughout his stay in the United States, the applicant did not seek the protection of that country. He then returned to Mexico before coming to Canada and claiming refugee protection. It is therefore difficult, given these circumstances, to conclude – as the panel reasonably noted – that the applicant’s behaviour indicated a subjective fear on his part.

[35] The decision, as far as the reasonableness of the panel’s finding that an IFA existed in Mexico City, is also reasonable.

[36] First, the Court takes note of the comments of Justice O’Reilly in *Velasquez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1201 at paragraph 15, [2010] FCJ No 1496:

[15] The concept of an IFA is an inherent part of the Convention refugee definition because a claimant must be a refugee from a country, not from a particular region of a country ...

[37] The Court also recalls that when an IFA is raised, a two-prong test must be applied: the onus is on applicants to demonstrate, on a balance of probabilities, that there is a serious possibility they will be persecuted in the proposed IFA location, and that in all the circumstances, it would be objectively unreasonable for them to seek refuge there (*Chevarro v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1119, [2010] FCJ No 1397; *Thirunavukkarasu v Canada (Minister of Employment and Immigration, (CA)* [1993] FCJ No 1172, [1994] 1 FC 589). In addition, applicants are required to demonstrate this by providing actual and concrete evidence of conditions jeopardizing their life and safety (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 2118 at paragraph 15, [2001] 2 FC 164).

[38] Furthermore, in both *Farias v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1035, [2008] FCJ No 1292 and *Khokhar v Canada (Minister of Citizenship and Immigration)*, 2008 FC 449, [2008] FCJ No 571, the Court noted that the threshold is high for what makes an IFA unreasonable in the circumstances of a refugee claimant.

[39] In the present case, the applicant stated at the hearing before the panel that he had worked in the restaurant business for 15 years prior to becoming a police officer in 1999 (Tribunal Record, p. 174) and that he had worked in construction (renovation) during his stay in the United States (Tribunal Record, pages 16, 190-192).

[40] Thus, in considering the applicant's testimony with respect to an internal flight alternative in Mexico City, the panel wrote the following:

[32] The panel proposed to the claimant an internal flight alternative in Mexico City, which has a population of more than 10 million. In the panel's opinion, the claimant could live in Mexico City. When asked whether he could find a job in Mexico City, he stated that it would be practically impossible for him to find a job. He stated that Mexicans do not hire former police officers. However, he quit the police about five years ago, and he could work in construction, an area he knows well because he worked in construction in the United States for more than three years. He could also work in the restaurant industry, which he worked in before he became a police officer. The panel is of the opinion that the claimant has an internal flight alternative. Given all of the evidence, the panel is of the opinion that the claimant did not discharge his burden of proof.

[41] In light of the evidence in the record, the Court finds the panel's conclusion that there was an IFA in Mexico City to be reasonable based on the fact that the applicant did not demonstrate that there was a serious possibility he would be persecuted in the proposed IFA area, or that it would be objectively unreasonable for him to seek refuge there. Moreover, the Court notes that the applicant submitted no documentary evidence in support of his claims and that the IFA issue is determinative in itself.

[42] For these reasons, the application for judicial review is dismissed.

[43] There is no question to certify.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application for judicial review be dismissed.
2. There will be no question for certification.

“Richard Boivin”

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT
SOLICITORS OF RECORD

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