

Federal Court



Cour fédérale

Date: 20121023

Docket: IMM-9762-11

Citation: 2012 FC 1231

Ottawa, Ontario, October 23, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

OMAR ROMAN JIMENEZ

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant, a citizen of Mexico, claimed refugee protection due to threats from a gang and because he had been shot at. The central issue in this matter was whether the Applicant was excluded from the Convention Relating to the Status of Refugees, 1951, CTS 1969/6; 189 UNTS 150 because he had "... committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee" as provided in Article 1F(b).

[2] A preliminary issue in this judicial review is whether the leave and judicial review application was out of time. The Applicant claimed that he did not receive the Immigration and Refugee Board [IRB] decision until he picked it up directly from the Board's office 18 months after the decision was issued. However, the Applicant knew the results of the decision since it was first rendered orally in his presence at the conclusion of his hearing.

[3] This Court grants the extension of time (to the extent it was needed), influenced by the fact that leave was granted by Justice Simpson in the face of the "late" filing as raised by the Respondent. It seems highly unlikely that an experienced judge would have missed this issue.

[4] The Court was also influenced by the words of the Applicant's counsel, as an officer of the Court, as to events which surround obtaining the decision in the absence of any affidavit evidence. The Court could only have rejected the counsel's evidence if it believed it to be untrue. Counsel was advised that the Court accepted her word as an officer of the Court on the clear understanding that should it be knowingly inaccurate, the Court could refer such conduct to the professional disciplinary body as well as initiating contempt proceedings.

[5] Lastly, the Court was influenced by the only real issue in this judicial review, that of whether "duress" had been adequately considered by the Board. If there was merit in the "duress" argument, not to hear the matter would result in an injustice.

II. BACKGROUND

[6] The Applicant claimed that his wife was kidnapped by the Los Zetas gang who demanded a large ransom which he could not afford. In lieu of paying the ransom, the Applicant carried drugs, two kilograms of cocaine, to Holland where he was caught smuggling.

[7] At the Applicant's trial in Amsterdam, the Applicant pled guilty to the drug trafficking charge. He was sentenced to 20 months, served eight months and was then deported to Mexico.

[8] It appears that the Applicant's wife was released by her kidnappers sometime after his arrest in Holland.

[9] During his time in prison, the Applicant's wife left the family home, took their daughter with her and cut all ties to the Applicant.

[10] The Applicant left Mexico after being shot in the leg. He arrived in Canada in July 2008 and claimed refugee protection in November of that year.

[11] At the IRB hearing, the Member first dealt with the exclusion issue under Article 1F(b). The Applicant pleaded "duress" before the Member. The Applicant claimed that he did not raise the defence of duress in the Amsterdam Court, although he did tell his lawyer about his wife's kidnapping.

[12] In this judicial review, the Applicant asserts that the Member failed to consider the element of “duress” that led to his conviction and that the Member simply adopted the Amsterdam Court’s conclusion of guilt.

[13] The Applicant also raised fairness issues (such as bias, inadequacy of reasons, legitimate expectations and failure to adjourn) as well as unreasonable credibility findings. Having heard argument on these points, the Court asked the Respondent to only respond to the “duress” issue. There is no basis for the other grounds raised.

III. ANALYSIS

[14] The issue of whether the IRB considered the issue of “duress” on its own or whether it blindly followed the Amsterdam Court’s acceptance of a guilty plea is a matter of law. It is to be decided under a “correctness” standard of review (*Feimi v Canada (Minister of Citizenship & Immigration*, 2012 FC 262, 2012 CarswellNat 1157 at para 9).

[15] A fair reading of the IRB decision is that the Member found that the Applicant had not made out the “duress” defence. The effort to make out the defence was flawed due to the lack of corroborating evidence regarding the kidnapping.

[16] The Applicant had full and complete notice that “duress” was an issue, that he had the onus to make out that claim and that he had to produce documentary evidence. Specifically, the Applicant had been advised by the IRB that he had to file documents dealing with the events in Holland, the problem of Los Zetas, and the kidnapping of his wife.

[17] There is no issue that the Applicant committed the offence of drug smuggling or that it was a serious offence. The only mitigating factor raised, as discussed in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164, was duress.

[18] The burden was on the Applicant to establish that his crime was motivated by duress. In this case the only duress is that flowing from his wife's kidnapping. Absent the kidnapping, there is no duress.

[19] There was no affidavit from anyone confirming the kidnapping, least of all an affidavit from his wife. There was not even an affidavit from his Dutch lawyer confirming that duress had been discussed but the decision was made not to raise it in the Dutch proceedings. Duress is not even raised in the Applicant's request for a pardon from the Dutch authorities.

[20] The Member found that there was no collaborative evidence that such kidnapping occurred. The Member's conclusion is correct and he did not ignore the issue but merely found that the issue had not been made out.

[21] Therefore, the Court concludes that the issue of duress was addressed by the IRB and that its conclusion that the defence was not made out was reasonable.

IV. CONCLUSION

[22] This judicial review will be dismissed. There is no question for certification.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is dismissed.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9762-11

STYLE OF CAUSE: OMAR ROMAN JIMENEZ

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: October 18, 2012

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

DATED: October 23, 2012

APPEARANCES:

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