Federal Court  Cour fédérale

Date: 20121116

Docket: IMM-3303-12

Citation: 2012 FC 1331

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 16, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

GERMAN HERNANDEZ RODRIGUEZ
IRMA GABRIELA ORTIZ BLANCA
GERMAN HERNANDEZ ORTIZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are challenging the legality of the decision dated February 17, 2012, by the Refugee Protection Division of the Immigration and Refugee Board [the panel], rejecting their claim for refugee protection essentially because of a lack of credibility and subjective fear.

[2] It is the second application for judicial review of a decision of the panel involving the applicants. On May 25, 2011, their application for refugee protection was rejected for the first time

by Member Bissonnette. On May 25, 2011, the Federal Court quashed the first decision of the panel and referred the matter back for redetermination: *Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 587 [*Rodriguez* 1]. On February 17, 2012, Mr. Aronoff [Member] heard the matter *de novo* and rendered the decision being challenged today by the applicants.

[3] At the outset, the applicant submits that the panel erred in law or otherwise showed a lack of respect towards the Court by failing to consider in its analysis the findings of Member Bissonnette and the judgment of the Court in *Rodriguez* 1. It should be noted that my colleague Justice Pinard reversed the first decision of the panel because the panel erred in determining the existence of state protection and, to a lesser degree, in its assessment of the evidence (*Rodriguez* at paragraphs 10-12). With respect, the Court cannot accept the applicants' argument.

[4] First, because it is a *de novo* hearing, the panel was not obliged to address only the question of state protection (*Munoz v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1273 at paragraphs 41-42). However, given that the first decision was quashed, there is no *stare decisis* or *res judicata*, whether it involves questions of credibility or other aspects such as state protection (*Lee v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 743 at paragraph 11). Furthermore, it turns out that the panel did not repeat the errors identified by this Court in *Rodriguez* 1, especially since the impugned decision is based on evidence and reasoning in whole or in part different.

[5] I now turn to the main reason for quashing the impugned decision, namely, that the panel allegedly ignored relevant evidence or rendered an otherwise unreasonable decision. There is no

reason to intervene in this case. On the one hand, the findings of credibility made by the panel are clear, well articulated and based on the evidence on file. On the other hand, the allegations of reasonable apprehension of bias against the Member are not justified, nor are the other grounds raised by the applicants.

Applicants' Allegations

[6] I will begin by summarizing the applicants' main allegations. As will be discussed further on, the panel did not find the allegations to be credible or supported by the evidence on the record.

[7] The applicants are citizens of Mexico and base their fear of persecution or risk to life on the account of Irma Gabriela Ortiz Blanca [female applicant], wife of German Hernandez Rodriguez and the mother of German Hernandez Ortiz, their son. The female applicant fears a man called Rafael Pellegrin Breton with whom she did business in Puebla, Mexico.

[8] Mr. Pellegrin Breton is a representative of a Mexican company which had a business relationship with the company of the female applicant for the acquisition of calling cards. However, on May 2, 2007, three federal police officers allegedly attempted to arrest the female applicant at her home, on the ground that Mr. Pellegrin Breton had instituted a criminal action against her allegedly for fraud or breach of trust. According to the female applicant, Mr. Pellegrin Breton—who was in collusion with the federal police—sought to implicate her in a fraud for which he was solely responsible.

[9] On May 4, 2007, the female applicant retained the services of a lawyer who immediately brought an action to stay the arrest warrant. Once the stay was granted, according to the applicants, they left Mexico for Phoenix, Arizona, where they resided for 25 days. Owing to financial reasons, they did not go back to Puebla, but rather moved to Tuxtla, in the state of Chiapas, for four months, that is, until their lawyer informed them that the Federal Mexico Court rendered a favourable decision.

[10] Upon their return to Puebla, the female applicant stated that she received threatening telephone calls. She allegedly tried to file a complaint with the police, but they allegedly refused to take her complaint given the lack of evidence. In the meantime, on February 19, 2008, the applicants allegedly met with Mr. Pellegrin Breton in a shopping centre and he allegedly threatened them. Following that incident, on February 24, 2008, the female applicant filed a complaint with the public prosecutor, but on February 28, 2008, Mr. Hernandez Rodriguez was allegedly beat up by three men. Fearing for their lives, the applicants decided to leave Mexico and arrived in Montréal on June 9, 2008, to claim refugee status.

[11] Since the applicants have been in Canada, a judgment has been rendered against the female applicant by default in Mexico on or about March 29, 2011. The female applicant alleges that the second action of Mr. Pellegrin Breton is fraudulent as it involves the same charges laid against her in 2007 and of which she has already been acquitted.

Reasonableness of the Impugned Decision

[12] In my view, the panel rendered a reasoned decision in which the reasons for rejecting the refugee claim are set out in a clear and intelligible manner. In this case, the decision to reject the claim falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. I will simply discuss some salient or determinative aspects of the panel's reasoning, and not necessarily in the order in which they were dealt with by the panel in the impugned decision or by counsel for the parties at the hearing before this Court.

[13] As regards the lack of subjective fear, the panel considers that it is unlikely that the applicants hid for a period of four months in Tuxtla, in the state of Chiapas. This conclusion does not strike me as being unreasonable. With the exception of two medical prescriptions issued in Tuxtla on October 4 and 10, 2007, there is no credible evidence on the panel's file corroborating the applicants' assertions. Also, in its decision the panel wonders why exactly the applicants felt it was necessary to move to Chiapas. After all, their purported departure follows the stay of the arrest warrant and the evidence does not make it possible to conclude that the female applicant had received threats at the time.

[14] Furthermore, the panel notes that a letter from counsel for the female applicant informing her that her life was in danger and that she had to consider leaving the country, was falsified by the addition of the date of October 19, 2007, written in different characters. The panel concludes that, in all likelihood, the letter was rather written during the first two weeks of September 2007 (versus October 19, 2007). That conclusion also appears reasonable to me as it is based on contradictory evidence on file, particularly the testimony of the female applicant that she was informed by her

lawyer that she could return to Puebla following the favourable decision of the Mexican Court dated October 4, 2007.

[15] The panel also notes that the female applicant does not at all mention the alleged death threats she said she had received since October 2007 in the complaint she filed on February 24, 2008, with the public prosecutor. The panel also notes that the applicants did not file a complaint against Mr. Pellegrin Breton after the assault on Hernandez Rodriguez on February 28, 2008, and that they continued to live and work at the same place every day. Again, these are determinative aspects of the applicants' claim.

[16] This is a determinative aspect and it significantly affects the claim for refugee protection. The applicants submit today that it was unreasonable for the panel to conclude that the female applicant had not mentioned in her statement to the public prosecutor the death threats uttered by Mr. Pellegrin Breton. They submit that the complaint made mentioned serious threats. However, a simple reading of the complaint shows that there is no mention of the death threats by telephone.

[17] According to the evidence, the female applicants husband continued to work after February 28, 2008, that is, after being threatened, which is not challenged in this case. The applicants nevertheless argue that the female applicant's husband explained to the panel that he needed to work to earn a living. In any event, in my opinion, the panel could have reasonably concluded that this fact, coupled with the fact that the applicants did not file a complaint against Mr. Pellegrin Breton after the assault and with the fact that they continued to live at the same place after the attack, supports the finding of lack of subjective fear or risk to life.

[18] The applicants also reproach the panel for having disregarded or ignored in its analysis the medical evidence that the female applicant suffers from major depression and from post-traumatic stress, in addition to the medical evidence in relation to the assault of Hernan Rodriguez. The reproach also appears to be unfounded to me, considering the fact that the general account of the the female applicant was not found to be credible by the panel. It should be noted that the panel is presumed to have considered all of the evidence submitted to it. This presumption will only be rebutted where the evidence not discussed is significant and relevant to a crucial element. In the case at bar, the medical evidence of the female applicant's mental health does not corroborate the facts in support of her refugee protection claim. Although the medical evidence of the assault of Mr. Gernan Rodriguez demonstrates that he was injured, it has little probative value. In fact, there is no evidence that the injuries were caused by Mr. Pellegrin Breton's men.

[19] The applicants take issue with the fact that in its analysis the panel attaches little importance to the corruption that many denounce in Mexico. The panel notes in passing that the applicants' claim that the legal system itself is corrupt appears to be unfounded in this case, as the female applicant was in fact actually able to obtain a withdrawal of the warrant for arrest that had been issued against her. However, the panel concluded that the applicants were not forthright about the content of the Mexican judgment on the dismissal of the criminal charges. According to the panel, contrary to the female applicant's submissions, the Mexican judge did not indicate that the female applicant or her company owed money to the company of Mr. Pellegrin Breton; the judge rather indicated that the failure to pay for merchandise upon receiving it did not constitute a breach of trust on the part of the female applicant.

[20] While the execution of the arrest warrant was suspended, the fact remains, in the applicants' view, that corruption is ubiquitous in Mexico, which renders the panel's findings unreasonable. The applicants submit that the existence of the second judgment, in which the charges are identical to the first, shows that Mr. Pellegrin Breton managed to bribe or intimidate a judge to obtain judgment in his favour because the same case was tried twice. In any event, the female applicant was unable to obtain protection from the Mexican police and on that basis the applicants conclude that their claim for refugee protection should have been granted by the panel. The findings drawn by the panel from the Mexican judgments are being vehemently challenged today by the applicants who reproach the panel for having mischaracterized the nature and scope of the legal proceedings, thus wrongly treating the entire matter as though it resulted from a commercial dispute—Mr. Pellegrin Breton having brought an action against the female applicant because she owed his money, which she strongly denies.

[21] For its part, the respondent submits that the panel did not err in determining that, because the two decisions address different issues, the existence of the second decision does not prove that the state of Puebla is corrupted. Relying on *R v Kienapple*, [1975] 1 SCR 729 at page 748, the respondent submits that there is no *res judicata* between the two decisions. The first examines whether there was a breach of trust in the criminal context, whereas the other considers whether the female applicant owed money to Mr. Pellegrin Breton after the contracted sale on credit was complete, for commercial purposes. Also, the respondent submits that the applicants cannot invoke that the same case was tried twice if they did not raise the issue before the Mexican court at the time

of the second proceeding (*United Laboratories, Inc v Abraham et al*, [2002] OJ No 3985 at paragraphs 33 and 34, confirmed by *United Laboratories, Inc v Abraham*, [2004] OJ No 3063).

[22] I need not determine today whether the reading of panel's and the respondent's reading of the Mexican judgments is correct. Suffice it to say here that it is not unreasonable to find that the two decisions address different issues. Essentially, the applicants are asking me to review all of the evidence and substitute my judgment for that of the panel. That is not the role of the judge in a judicial review. I am of the opinion here that all of the panel's findings are supported by the evidence on file and the panel's reasoning does not appear to be capricious or arbitrary to me.

No Reasonable Apprehension of Bias

[23] Although it is an alternative argument, the applicants submit strongly argue before this Court that the Member's conduct during the refugee claim hearing raises a reasonable apprehension of bias. This is a serious allegation that the Court cannot take lightly. To that end, the Court must determine whether an informed person, viewing the matter realistically and practically—and having thought the matter through—would think that there is a reasonable apprehension of bias (*Committee for Justice and Liberty c Canada (National Energy Board)*, [1978] 1 SCR 369 at pp 394 and 395). I have carefully read the transcripts of the hearing and find no grounds for reproach against the Member in the circumstances.

[24] Although the applicants submit that the Member was [TRANSLATION] "biased" and that he was [TRANSLATION] "cantankerous and negative throughout the hearing of the evidence," counsel for the applicants cannot point out any particular passage of the transcripts where the Member acted

inappropriately, especially since counsel for the applicants continued to insist that the Member limit the scope of his investigation. The Member simply resisted the repeated and manifestly unfounded requests of counsel for the applicants to address only the question of state protection. The applicants also rely upon an affidavit of an observer at the hearing who stated that the Member [TRANSLATION] "played with his papers and stared at the wall" when counsel for the applicants interviewed the female applicant, but the observer was not present throughout the hearing and it is necessary to consider the Member's conduct as a whole before rushing to the conclusion that he was biased.

[25] Nor was there any breach of procedural fairness during the hearing as the learned counsel for the applicants now seems to suggest. There was indeed much confusion at the hearing before the panel on the interpretation or the effect of the Mexican judgments relied upon by the applicants. It is unfortunate, but the applicants must, in my opinion, assume full responsibility. All evidence of payment of invoices relied upon by the female applicant should have been submitted in a timely fashion, whereas the applicants had three years to obtain and have all relevant documents translated, including the most important judgment on which they rely now.

[26] It should also be noted that foreign law is a question of fact, which must be proved to the satisfaction of the Court (*Lakhani v Canada (Citizenship and Immigration)*, 2007 FC 674 at paragraphs 22 and 23). The panel cannot in this case be faulted for having asked the Spanish interpreter at the hearing to provide an unofficial translation of the judgment in Spanish, especially since the panel is not even legally obligated to consider the document at the hearing because it was not translated into French or English by the applicants.

[27] The applicants also complain about the numerous interventions by the Member at the hearing. However, the fact remains that the female applicant did not always answer the Member's specific and legitimate questions. In my view, it is necessary to treat the multiple interventions for what they are, that is, a simple call to order. Finally, as noted by the respondent, this is a case where the energetic interventions alone by the Member do not in themselves give rise to a reasonable apprehension of bias; I agree with the respondent. See *Veres v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 124 at paragraph 36; *Ithibu v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 288 at paragraph 68; *Llana v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1450 at paragraphs 20 and 22. Moreover, none of the interventions by the Member prevented the applicants, who were represented by the same counsel as today, from eventually providing explanations and arguing their point of view.

The rights under the Charter and the international instruments are not directly threatened

[28] Finally, the applicants claim that their removal to Mexico would place their lives and their physical integrity at risk, thus violating sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, constituting Schedule B to the *Canada Act 1982* (UK), 1982, c 11, and Canada's international obligations under Article 3 of the United Nations' 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Nevertheless, I agree with the respondent that this argument is premature, while the applicants are not in imminent danger of removal to their country.

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

[30] The applicants propose that the Court certify the following questions:

a. What is the role of the Federal Court's first judgment in a *de novo* hearing?

b. Does the Member in the case have the right to depart from the Federal Court's findings of law or fact without providing a clear explanation?

The respondent opposes the certification of the above two questions.

[31] A certified question must transcend the interests of the immediate parties to the litigation and contemplate issues of broad significance or general application and be determinative of the appeal (see *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ 1637 at paragraph 4; *Boni v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68 at paragraphs 10 and 11).

[32] In my view, it is clear that the proposed questions do not meet the criteria established by the case law. On the one hand, the proposed questions have already been sufficiently addressed by the case law. Such is the case of the nature of a *de novo* hearing and *stare decisis* issues. On the other hand, the proposed questions do not transcend the impugned decision, are not of general interest and would not bring the dispute to an end. Accordingly, no question will be certified by the Court.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. No question will be certified.

"Luc Martineau"

Judge

Certified true translation

Daniela Guglietta, Translator

SOLICITORS OF RECORD

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APPEARANCES:

Stewart Istvanffy	FOR THE APPLICANTS
Geneviève Bourbonnais Sonia Bédard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Law Office of Stewart Istvanffy Montréal, Quebec	FOR THE APPLICANTS
Myles J. Kirvan, Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT