

Federal Court



Cour fédérale

Date: 20121126

Docket: IMM-9481-11

Citation: 2012 FC 1358

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 26, 2012

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

**SERGIO CERVANTES GARCIA
ROSA MARIA DIAZ SOTO
SERGIO URIEL CERVANTES DIAZ
LESLIE ESTEFANI CERVANTES DIAZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] In a decision rendered on October 6, 2011, the Refugee Protection Division (the panel) denied the refugee claim of the Garcia family, composed of the father Sergio Cervantes Garcia, his spouse Rosa Maria Diaz Soto and their two minor children, all citizens of Mexico.

[2] The panel finds that the determinative issue was the lack of credibility of the applicants' story.

II. The applicants' story

[3] According to the applicants, their agents of persecution are Juan Manuel Andrade and his allies. He works for the same company as Mr. Garcia, the Herradura de Plata bus transport company. Mr. Andrade is apparently an important member of the company's union of bus drivers and a militant of the Party of the Democratic Revolution (PRD), with several people working for him, including a member of the Judicial Police of the State of Guanajuato, a province bordering the United States.

[4] They alleged that they are targeted by Mr. Andrade because of a report that Mr. Garcia wrote against Mr. Andrade and gave to his senior supervisor (Mr. Tapia). This report apparently incriminated Mr. Andrade in the illicit transport of people from Central America to the United States.

[5] According to Mr. Garcia, on November 4, 2007, he was verifying passengers travelling to the United States in a bus driven by Mr. Andrade. Mr. Garcia noticed that five passengers did not have their tickets but had paid the driver (Mr. Andrade) for their passage.

[6] Noticing that Mr. Garcia was writing a report, Mr. Andrade offered him money, but was refused. It was at this point that Mr. Andrade threatened Mr. Garcia if he filed a report against him.

[7] Mr. Garcia testified that he gave his report to Mr. Tapia, a fact that he revealed during a telephone call with individuals who were threatening him if he did not give them this report.

[8] Mr. Garcia left Mexico for Canada on May 5, 2008, after he recognized the voices of the two individuals who had threatened him by telephone and who now watched his house that his family had left out of fear of persecution, and after he sought help from the Public Ministry to no avail because he did not know the identity of his aggressors and had no proof of or witnesses to the facts.

[9] Furthermore, his wife Maria wrote, in her Personal Information Form (PIF), that she was kidnapped and raped on July 5, 2008, by individuals searching for her husband.

III. Decision of the panel

[10] The panel is of the view that “[t]he credibility of the claimants’ allegations is the determinative issue in this claim”. It determined that the applicants were not credible, for the following reasons:

- a. The principal applicant did not take any steps to obtain from his supervisor, Mr. Tapia, a document that could have corroborated the fact that he had indeed written a report about Mr. Andrade. The explanation given by Mr. Garcia to justify his omission was that he did not know whether his supervisor was part of the same group as Mr. Andrade. The panel found this answer unreasonable “given that Mr. Tapia cannot be part of the same group as Mr. Andrade and that he could have corroborated, if only in a simple letter, that the principal claimant did indeed write a report incriminating Mr. Andrade in November 2007”.
- b. Mr. Garcia did not approach the Herradura company to obtain such a document. The explanation given by him was that he believed that most people working in this company or business are involved in the same business as Mr. Andrade. The panel is of the view that this explanation is not reasonable, “given that he could have contacted people who, according to his own analysis, may not be involved in the same criminal enterprise as Mr. Tapia and tried to obtain from them, if only in a simple letter, a document corroborating that he did indeed write a report incriminating Mr. Andrade in November 2007”.
- c. The applicant stated that he took steps to obtain documents that could have corroborated that Mr. Andrade was involved with the PRD party in Mexico and that he was a member of a union of drivers, which allowed him to travel throughout Mexico, but claimed to have found nothing. The RPD determined that the principal

applicant's explanation was not satisfactory "given that, if Mr. Andrade were indeed a member of a well-known and influential political party in Mexico and of a driver's union, allowing him to travel throughout Mexico, it would presumably be possible to obtain a document from the groups concerned that can corroborate that Mr. Andrade is one of their members or sympathizers".

- d. The principal applicant displayed a lack of diligence by not providing documents that could have corroborated his allegations that he wrote a report incriminating Juan Manuel Andrade, a union member and sympathizer of the PRD political party. In support of this conclusion, the panel relied on section 7 of the *Refugee Protection Division Rules* (SOR/2002-228) and certain Federal Court decisions (see *Mercado v Canada (Minister of Citizenship and Immigration)*, 2010 FC 289, at para 32), according to which the failure to provide supporting documentation that is reasonably expected may have an impact on an applicant's credibility. The panel believes that this is such a case. The credibility of Mr. Garcia is affected.
- e. The principal applicant was not able to explain why Mr. Andrade would hold it against him, if the report incriminating him was never revealed to the Mexican authorities. In the context where the report never left the company, the RPD found it implausible that Mr. Andrade would have gone after the principal applicant, given that there were no consequences from the fact that he wrote this report. The panel based its finding on an answer that Mr. Garcia had given that his disclosures to the police had not been accepted.
- f. The RPD also found it implausible that Mr. Andrade and police officers working for him went after the female applicant given that there were no consequences from the

fact that a report incriminating Mr. Andrade had been written by her husband and submitted, according to his testimony, to Mr. Tapia.

- g. The female applicant specified that she was tested in a laboratory to check whether she had been infected with HIV after being kidnapped and raped, but that she did not keep the results of the negative test that could have corroborated that she had been raped. The panel, in light of the wife's testimony as a whole, found that she was not credible in this respect.

[11] The panel wrote its finding on the applicants' credibility as follows:

[54] In short, having heard all of the testimony from the claimants, I find that their overall credibility is undermined; in other words, they have no credibility and, in fact, their story is fabricated. Whether they presented that story at the hearing without contradicting themselves in no way limits the problems of credibility and implausibility noted in the preceding paragraphs. [Emphasis added]

[55] With regard to the documents filed in evidence, on one hand, by a lawyer who confirms having taken the statement of the principal claimant's wife with regard to the abduction and assaults that she experienced and, on the other hand, by their family members who indicate that the attackers are still looking for them today and have even gone after some of them, I am of the opinion that these are not reliable documents and I give them no credibility.

[12] Two other conclusions were expressed by the panel:

In the alternative, although the claimants' lawyer argued in his submissions at the end of the hearing that there is no state protection in Mexico, [the RPD notes] that his analysis is not supported by the case law on this matter, since the Federal Court has ruled on several occasions that, despite the corruption of some members of the Mexican public authorities, including police officers, state protection is nevertheless available in Mexico ... again in the alternative, [the RPD added] that, according to the claimants' testimony, they evidently did not exhaust all possible avenues of protection". [Emphasis added]

IV. Parties' submissions

(a) That of the applicants

[13] Counsel for the applicants submitted the following:

- a. The panel erred on pages 13 to 15 of its decision when it did not take into account all the medical reports that show that Ms. Diaz was a victim of psychological and sexual violence and the more general documents relating to the situation of abused women in Mexico. If there is solid and conclusive evidence of the lack of protection for women in Mexico, it is extremely important that the decision-maker notes this evidence. It is unreasonable not to consider medical reports and the psychological report in the analysis of credibility.
- b. All the very strong evidence gathered by the female applicant to show that her story is true was rejected without much explanation in the decision. When a certificate from an NGO showing that this person is receiving medical and psychological treatment since her arrival in the country is rejected, one fails to understand the insensitivity of the member in question.
- c. Ms. Diaz was referred to RIVO, the intervention network for victims of organized violence, for counselling for more than one year. A summary report on her psychological state was submitted and filed before the administrative decision-maker who chose to not consider it. The opinions of the Canadian health professionals were set aside only because the psychologists were not direct witnesses of the events in Mexico.

- d. The panel erred in law by not applying the guidelines for women fleeing gender-related persecution in its decision.
- e. The panel erred by not taking into account the documentary evidence on the lack of protection in Mexico for persons in the applicant's situation. Counsel raised the issue of an internal flight alternative in Mexico. The panel did not really assess this possibility.
- f. The panel drew capricious and unreasonable conclusions with respect to the female applicant's credibility.

(b) Those of the respondent

[14] He advanced the following arguments:

- a. Several of the applicant's allegations are not related to the decision rendered by the panel.
- b. After considering the evidence as a whole, the panel found that the applicants' general credibility was affected by several elements including (1) failing to request a copy of the report incriminating Mr. Andrade; and (2) no explanation of why their agents of persecution would pay attention to them if this report had never been revealed to the Mexican authorities; there were no consequences from the fact that a report had been written by Mr. Garcia. The improbability resulting from this, according to the panel, also extends to Ms. Diaz. Why come after her given that there were no consequences as a result of the fact that such a report had been written by her husband?

- c. The panel also found it implausible that Ms. Diaz had a laboratory test done to verify whether she had been infected after being raped during the kidnapping, but did not keep the results of this test that could have corroborated that she had been raped.
- d. The panel was correct to set aside the applicants' analysis of the lack of state protection in Mexico since this analysis was not supported by case law. What is more, even if the applicants' testimony had been supported, they clearly did not exhaust all available avenues.
- e. The applicants did not show that the panel had committed one or more errors in its analysis of the evidence.
- f. The panel took into consideration the Gender Guidelines. The panel made specific reference to it at paragraph 49 of its reasons.
- g. The panel drew no conclusions on the internal flight alternative.
- h. The applicants' arguments on the administrative and institutional bias of the panel are without basis. These arguments were raised, unsuccessfully, by the applicants' counsel in file IMM-1884-11; the application for leave was dismissed on June 10, 2011.

V. Analysis and conclusions

(a) Standard of review

[15] The panel's decision is based on its analysis of the questions of fact in this case and the inferences or deductions resulting from it. According to the Supreme Court of Canada in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, the standard of review of such decision is that of reasonableness. At paragraph 47 of this decision, the High Court explained what a reasonable decision is:

47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, 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. [Emphasis added]

[16] A question of law or of natural justice is reviewed on the basis of the correctness standard. That is the case for the applicants' argument on partiality.

(b) Conclusions

[17] This application for judicial review must be dismissed. The panel felt that the applicants' story was fabricated. It found that the refugee claims were not credible. This conclusion was based on the lack of corroboration, on inferences drawn from the evidence, on the conduct of the female

applicant and the implausibility of their testimony. The following principles are very well established in this Court's case law:

- a. Assessing the credibility of a refugee claimant is at the heart of the tribunal's expertise and the Court must handle this type of decision with great deference (*Zheng v Canada (Minister of Citizenship and Immigration)*, 2007 FC 673, at paragraph 1).
- b. "There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As 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. In *Giron*, the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, *Giron* in no way reduces the burden that rests on an appellant, of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn. In this case, the appellant has not discharged this burden" (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732, written by Justice Décary).
- c. "Contrary to what has sometimes been said, the Board (the panel) is entitled, in assessing credibility, to rely on criteria such as rationality and common sense" (*Shahamati v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 415, written by Justice Pratte).

[18] I have considered all the arguments made by the applicants' counsel. These arguments relate to Ms. Diaz's case. He does not dispute the panel's findings on Mr. Garcia's credibility.

[19] I feel that, in Ms. Diaz's case, the panel did not ignore the evidence before it and did not err with respect to the case law on state protection in Mexico.

[20] In summary, the applicants have not shown me that the panel had committed an error justifying the Court's intervention.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. The applicants proposed two serious questions to be certified. The respondent objects to this action on the ground that the questions proposed do not meet the criteria set out in case law. In my view, the respondent is correct. No question will be certified.

“François Lemieux”

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9481-11

STYLE OF CAUSE: **SERGIO CERVANTES GARCIA, ROSA MARIA DIAZ SOTO, SERGIO URIEL CERVANTES DIAZ, LESLIE ESTEFANI CERVANTES DIAZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

PLACE OF HEARING: Montréal, Quebec

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