Federal Court  Cour fédérale

Date: 20111007

Docket: IMM-394-11

Citation: 2011 FC 1145

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 7, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ARMANDO PEREZ ROMANO
LETICIA MARTINEZ LOPEZ
ARMANDO PEREZ MARTINEZ
KAREN DAYANA PEREZ MARTINEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] Even before finding that an internal flight alternative exists, the decision-maker must be sure to equate the documentary evidence with the oral evidence at the hearing. The decision-maker must assess the evidence as a whole. Only in this manner is it possible to try to understand as many of the

elements of an account as possible. It is only after hearing the complete patchwork from both sides (subjective and objective) of an account that the pieces of evidence are stitched together into a quilt ready for analysis.

II. Judicial procedure

[2] This is an application for judicial review in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of a decision by the Refugee Protection Division (RPD) of the Board dated December 15, 2010, that the applicants are not Convention refugees under section 96 of the IRPA or persons in need of protection under section 97 of the IRPA.

III. Facts

[3] The principal applicant, Armando Perez Romano, born November 22, 1967, his spouse, Leticia Marisol Martinez Lopez, born April 19, 1968, their son, Armando Perez Martinez, born October 21, 1989, and their daughter, Karen Dayana Perez Martinez, born September 18, 1996, are Mexican citizens.

[4] Mr. Perez Romano and his family lived in the city of Puebla, where Mr. Perez Romano alleges that he owned his business. In 1988, the family home was purportedly made available to the family by Ms. Martinez Lopez's father, the owner of the house.

[5] Mr. Perez Romano alleges that, on September 21, 2008, two individuals, who were identified by their tattoos as being members of the criminal gang Mara Salvatrucha (MS), stormed

into the family home to take possession of it. They purportedly threatened to kill the applicants and confined and mistreated them for four days.

[6] During the night from September 25 to 26, 2008, Mr. Perez Romano and his family allegedly escaped and temporarily took refuge with an uncle residing in Tlaxcal who, according to entirely uncontradicted evidence, was also threatened.

[7] The applicants did not file a complaint with the Mexican authorities. They feared retaliation, especially since a neighbouring family who had filed a complaint against the MS had been killed.

[8] Mr. Perez Romano left Mexico on October 6, 2008, to seek refugee protection in Canada. His spouse and two children joined him here on December 15, 2008.

[9] The applicants' refugee claim hearing took place on December 15, 2010.

IV. Decision under review

[10] The RPD found that Mr. Perez Romano and his family were not refugees under section 96 of the IRPA because their fear was not related to one of the five Convention grounds. Paragraph 97(1)(*a*) of the IRPA was not analyzed because neither the Mexican state nor one of its agents was involved. Consequently, the applicants' situation was analyzed under paragraph 97(1)(*b*) of the IRPA.

[11] The credibility of the principal applicant was in no way called into question for any of the elements of the account.

[12] The RPD found that the principal applicant and his family had been the victims of generalized crime. Accordingly, MS members allegedly targeted the home, not the residents personally.

[13] Furthermore, relying on the documentary evidence, the RPD found that there was an internal flight alternative (IFA) in the states of Yucatán and Zacatecas. The RPD also found it unlikely that the criminal gang, which wanted primarily to take possession of the house, was pursuing or would pursue the applicants throughout Mexico.

[14] The RPD's decision is based on the following elements:

a. The principal applicant was renting the house coveted by the MS;
b. The applicants were not pursued or threatened in Tlaxcala, where they initially took refuge after the incident on September 21, 2008;
c. In Mexico, the principal applicant and his family were never threatened and did not experience any MS-related incident after September 21, 2008;
d. Neither the principal applicant nor the owner of the home filed a complaint with the Mexican authorities.

V. Issue

[15] Is the RPD's decision reasonable given the specific circumstances of the case and context?

VI. Relevant statutory provisions

[16] Sections 96 and 97 of the IRPA apply to this case:

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 themself 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 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 themself 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 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.

VII. Positions of the parties

[17] The applicants are making a two-part argument that the RPD erred in fact and in law by not considering the evidence. First, with respect to the generalized risk, they argue that the risk is personalized in view of the fact that they were thrown out of their house. In other words, it was the applicants who were abused, not their house. Second, regarding the existence of an internal flight alternative, they argue that the documentary evidence highlights the presence of MS members in the states of Yucatán and Zacatecas, which makes an internal flight alternative in those states unreasonable. They also allege that, if they were to try to reclaim their home, MS members would be able to locate them throughout Mexico.

[18] The respondent submits that the RPD's finding of an internal flight alternative in the states of Yucatán and Zacatecas is reasonable and meets the test from *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (CA). According to the respondent, it is apparent in the evidence that the applicants were not personally targeted by the MS. Furthermore, there would be no impediment to them moving to the two above-mentioned states apart from a purely speculative fear.

VIII. Analysis

[19] It is settled law that IFA findings must meet the following two tests: the suggested IFA must be safe and must be such that it would not be objectively unreasonable for an applicant to seek refuge there (*Rasaratnam*, above; *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589, [1993] F.C.J. No. 1172 (QL/Lexis)).

[20] Even though the Court must show deference to the findings of fact of an administrative body, it may infer that the RPD did not consider the evidence contrary to its position if this evidence was not mentioned in its decision.

[21] In *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425 (QL/Lexis), Justice John Maxwell Evans stated the following:

> [15] The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.
>
> . . .
>
> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency"s burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite

> conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact. [Emphasis added.]

[22] In this case, crucial parts of the documentary evidence and the transcript of the principal applicant's testimony were not examined and analyzed by the RPD. For the following reasons, it seems difficult to make a finding as to a viable IFA.

[23] First, the finding that the states of Yucatán and Zacatecas are valid IFAs is unreasonable. In fact, this finding is not supported by the documentary evidence cited by the RPD.

[24] This is a summary of the RPD's finding:

> [18] . . . Once again, the panel is of the opinion that the assailants achieved their goal of taking possession and occupying the claimant's home, not of threatening or assaulting the claimant and his family. Therefore, despite the opportunity the panel gave the claimant to support his evidence, he did not give a reason why it would be unreasonable, as set out in the case law, to travel to the states of Yucatán or Zacatecas to seek refuge there. He also failed to submit actual and concrete evidence of conditions that would subject him to a risk to his life or to a risk of cruel and unusual treatment. [Emphasis added.]

[25] The RPD relied on the National Documentation Package to find that the states of Yucatán and Zacatecas are true IFAs (National Documentation Package on Mexico, November 26, 2010, tab 7.11, MEX103272.FE. October 7, 2009. The presence and activities of the Mara Salvatrucha (MS) and the Mara 18 in Mexico, specifically in Mexico City, including the measures taken by the government to fight the Maras and the protection available to their victims (2004-September 2009), and tab 7.12 MEX103264.FE. September 17, 2009. The presence of Mara Salvatrucha (MS) and Mara 18 groups, including the cities or municipalities where they are active (2006-September 2009)).

[26] However, tab 7.11 clearly states that the Mexican authorities do not have the spreading of the MS criminal gang in Mexico under control. The following excerpt from tab 7.11 is telling:

> Several sources noted the Mexican government's ineffectiveness in its fight against the maras (AP 2 Apr. 2008; US Apr. 2006, 116; EIU 22 Jan. 2008; IPS 3 Nov. 2005). Cited in an article published by the Associated Press (AP) in 2008, the CNDH president stated that the Mexican police were not prepared to combat street gangs and that they are often unable to identify detainees as mara members (AP 2 Apr. 2008). Mexico has not adopted an anti-mara law (EIU 22 Jan. 2008; US Apr. 2006, 116), although El Salvador and Honduras have (ibid.). Despite the presence of the maras and the fact [translation] "that they have clearly joined forces with the cartels," the government's attention has been mainly focused on the cartels (EIU 22 Jan. 2008). An article published by IPS in 2005 stated that a report from Mexico's National Institute for Migration (Instituto Nacional de Migración, INAM) had concluded that efforts to prevent the gangs in Central America from spreading in Mexico have been futile (IPS 3 Nov. 2005). [Emphasis added.]

(Tribunal Record (TR) at page 12).

[27] This passage strongly states that the presence of the MS is not necessarily restricted to the 24 states mentioned in tab 7.12. Upon analysis of the text in its entirety, it would instead seem as though the Mexican authorities are faced with an actively expanding criminal gang. As the text indicated, "Mexico is the marketplace for mara members" (TR at page 11). Nothing in the National Documentation Package suggests with certainty, as the RPD did, that "the Mara Salvatrucha are not active throughout Mexico and that they are not present or not active in the states of Yucatán and Zacatecas" (Decision at paragraph 18).

[28] Then, the RPD did not take into account certain aspects of the testimonial evidence presented. According to *Al-Shammari v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 364, an applicant must establish a connection between the personal situation he or she is relying on and the documentary evidence presented.

[29] The principal applicant alleges that he and his family were the subject of death threats when they were thrown out of the house. He submits that, as a result, he was personally targeted; the supposed assailants had the opportunity to search the home and gather information on him. He also maintains that he and his family lived in fear of being found by the MS when they briefly sought refuge in Tlaxcala (Personal Information Form (PIF), TR at pages 31 and 32).

[30] The RPD noted in its decision that "the claimant's testimony was spontaneous and contained no contradictions" (Decision at paragraph 15). Because the applicant's credibility was not challenged, it is important to consider the testimony untainted (*Garcia v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 79, [2007] 4 F.C.R. 385).

[31] However, the testimonial evidence does not support the RPD's finding that the MS would not locate the applicants in the states of Yucatán and Zacatecas. In this case, the RPD used the passage of time since the incident in September 2008 to support its finding that the applicants would no longer be targeted by the MS.

[32] In fact, it found that the principal applicant and his family had not experienced incidents in connection with MS members for more than two years, whereas the principal applicant testified during the hearing that his uncle had been threatened by MS members in Tlaxcala:

> [TRANSLATION]
>
> Q. Then why, if you return to Mexico, would they put energy and effort into finding you throughout the country?

A. Where my uncle lived, it was not his house; he rented it. My uncle told me that he moved because there were Mara in Tlaxcala too. Precisely because of that, in fact, there was something to do with the Mara. He felt like he was being attacked, like the same thing we went through.

. . .

Q. Is this something concrete or only a presumption?

A. That night when we spoke to my uncle, he did not have any problems with anyone. Everything he told us about what he was going through was after what happened to us.

. . .

Q. What year did he receive threats?

A. In 2009.

(Transcript, TR at pages 200 and 202).

[33] This testimonial evidence indicating that the applicant could have been personally targeted was never taken into account or noted in the RPD's decision. On the contrary, the RPD noted several times in its decision that the MS had not bothered the applicant and his family since the incident in September 2008 (Decision at paragraphs 17, 18, 19 and 20). In failing to mention a testimony, an administrative body may be committing a reviewable error (*Pineda v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 81).

[34] Even if those threats against the applicant's uncle were not made by the same individuals who displaced and mistreated the applicants, the fact remains that they are part of the same criminal group, that is, the MS. It would be illogical to not acknowledge the danger the applicants could face further to the subjective and objective evidence surrounding their situation.

[35] Finally, the RPD's presumption that the applicants were victims of generalized crime is not supported by the objective evidence. The RPD based its argument on the fact that the MS apparently targeted the applicants' house because of its features and because the applicant did not own the house. This reasoning is problematic for two reasons.

[36] First, it denies the testimonial evidence that the occupants of the house were threatened with death. In fact, the RPD placed great emphasis on the MS's supposed intention of taking possession of the house. However, testimonial evidence must be analyzed in its entirety. Even if it is true that the applicant testified that the MS [TRANSLATION] "liked the location" (TR at page 185), he also testified to the abuse he and his family experienced.

[37] Second, the RPD's reasoning does not rely on documentary evidence of generalized crime (*Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 622). In its decision, the RPD did not explain the generalized crime to which it referred; the RPD did not refer to the eviction from the house in Mexico as a situation affecting the population of Mexico in general.

[38] The reasoning of Justice Yvon Pinard in *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 550, applies to this case:

> [28] . . . The Board correctly identified the IFA to be determinative of both a claim for protected status pursuant to section 96 as well as section 97 of the Act. To the extent that the Board uses its conclusion that a risk of *maras* gang violence is a generalized risk to refute the applicant's assertion that she would be persecuted in the proposed IFA, the reasoning in *Pineda, supra*, illustrates such assumed generalization to be faulty. . . . [Emphasis added.]

[39] The RPD relied on the theory of generalized crime to rebut particular facts surrounding individuals rather than the population as a whole. In finding that “it is implausible that criminals whose obvious objectives were to possess and occupy the claimant’s home would put so much effort into tracking him down throughout Mexico”, the RPD inaccurately applied the first test in *Rasaratnam*, above (also, *Zacarias v. Canada (Minister of Citizenship and Immigration*) 2011 FC 62).

[40] *Cepeda-Gutierrez*, above, teaches us that an administrative body has an interest in mentioning probative evidence even if it does not support its arguments. After analysis, it can be inferred that the RPD did not take into account certain parts of the documentary and testimonial evidence categorically contrary to its findings.

IX. Conclusion

[41] For the above-mentioned reasons, the RPD’s decision is unreasonable. It lacks a view of the evidence as a whole, especially since the RPD failed to consider important evidence at the heart of the internal flight issue.

[42] In fact, designating the states of Yucatán and Zacatecas as viable IFAs is in contradiction to both the documentary and the undisputed testimonial evidence in the record.

[43] As demonstrated, it should have considered the documentary evidence that shows the spreading of the MS criminal gang. It also should have carefully analyzed the applicant’s testimony, the crux of the claim, in order to understand the full significance of the context of the situation.

[44] It is important to note that this case turns on its own facts. Consequently, a different finding could be made even with respect to facts that are slightly different.

[45] For these reasons, the applicants' application for judicial review is allowed and the matter is referred back to a differently constituted panel for redetermination.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be allowed and the matter be referred back to a differently constituted panel for redetermination. No question of general importance arises for certification.

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-394-11
STYLE OF CAUSE:	ARMANDO PEREZ ROMANO LETICIA MARTINEZ LOPEZ ARMANDO PEREZ MARTINEZ KAREN DAYANA PEREZ MARTINEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 27, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	October 7, 2011

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