

Federal Court



Cour fédérale

**Date: 20111129**

**Docket: IMM-3060-11**

**Citation: 2011 FC 1388**

**Toronto, Ontario, November 29, 2011**

**PRESENT: The Honourable Mr. Justice Hughes**

**BETWEEN:**

**GIORDANA MOSQUEDA COSTA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Applicant is an adult female citizen of Mexico. She entered Canada in April 2009 as a visitor and made a refugee claim in May 2009. That claim was adjudicated by the Refugee Protection Division of the Immigration and Refugee Board. On April 6, 2011, a Member of that Board provided a written decision rejecting the Applicant's claim for refugee status. This is a judicial review of that decision. For the reasons that follow, I find that the application is allowed and returned for re-determination by a different Member.

[2] The Applicant represented herself at the hearing before the Board. The assistance of a Spanish/English translator was required for much of the testimony.

[3] The Applicant's claim was based essentially on her fear of two different persons, arising out of two different occasions. One had to do with the death of her father when she was a young teenager. A newspaper report states that this death was due to a botched attempt to hijack a truck the father was driving. The Applicant asserts that the death arose as a result of a love triangle in which the father had a mistress who had another lover, a high-ranking police officer, who murdered the father. The Applicant fears this officer will seek her out and cause harm to her if she were to return to Mexico.

[4] The other fear is that of an uncle who lives with the Applicant's family in Mexico. That uncle is apparently crippled and given to violent moods.

[5] The Board Member heard the Applicant's evidence and largely found the Applicant not to be credible. The Member also found that the Applicant had not rebutted the presumption of state protection. Accordingly, the claim for refugee protection was rejected.

[6] The Applicant now has Counsel representing her. Counsel raises three issues in this application:

1. Did the Applicant receive a fair hearing, or did the Member interrupt and harass her to the extent that she was unable to present her case properly?

2. Did the Member conduct a proper analysis of state protection or simply dismiss the matter without proper reasons?
  
3. Did the Member improperly prevent the Applicant from submitting relevant evidence at or after the hearing?

[7] As to the first issue, it is very difficult for a Court, reading only a transcript, to get the real flavour of what went on at a hearing. While the transcript here shows that the Member did frequently interject, it is difficult to know if the Member was endeavouring to be helpful rather than, as is argued by Applicant's Counsel, interruptive and brusque.

[8] As to the second issue, the Member in the reasons at paragraph 8 provides a mention of state protection that is confused with evidentiary findings as to credibility. The reasons conclude in paragraph 11 by stating: "*Furthermore she failed to rebut the presumption of state protection with clear convincing evidence.*" There has been no proper analysis as to state protection.

[9] It is principally on the third issue that this matter will be returned for re-determination. The issue has to do with whether the Applicant should have been given the opportunity at or after the hearing to file further evidence as to denunciations she made to the Mexican authorities with respect to the persons she alleged were troubling her. The Member wrote the following in the reasons at paragraph 11:

*[11] The Member asked the claimant whether she had ever filed any denunciations naming either of the two men she allegedly feared*

*as the RPD had not been provided with anything naming problems she had with Jose or Gamalier Guillen. The only denunciation regarding Jose was filed by her mother as previously described. The only other denunciations<sup>14</sup> provided to the RPD and filed by the claimant in either June 2007 or June 2008 (both dates appear on the document) and April 2009 were regarding rude threatening calls received on her cell phone, and a man approaching her and rudely threatening her. No names were provided to the police by the claimant. She said there were a number of them. She was asked to explain if such documents existed why she had not provided those instead of the ones referring to anonymous phone calls<sup>15</sup> and she said she thought what she provided was sufficient to make her case. The panel does not agree. I find that the claimant lacked credibility and she failed to provide sufficient credible and trustworthy evidence that if returned to Mexico she faces a reasonable chance of persecution for a Convention ground or that on a balance of probabilities she would be personally subject to a risk to her life or to cruel and unusual treatment and punishment. Furthermore she failed to rebut the presumption of state protection with clear and convincing evidence.*

[10] Turning to the transcript of the hearing, it is clear that the Applicant offered to provide further evidence as to denunciations, but the Member said she could not do so. This occurs at several places in the transcript, for instance at pages 19 and 25. I provide by way of example an excerpt from pages 26 and 27 of the transcript, where the following exchange between the Member and the Applicant is recorded:

*MEMBER: Is there denunciation that you filed against Mr. [X]?*

*CLAIMANT: No. Not exactly. I never mentioned his name out of fear.*

*MEMBER: So, I guess he would know that much wouldn't he? He could easily have found out whether or not this individual filed any denunciations against me. That is something a police officer could find out, right?*

*CLAIMANT: Yes, of course.*

*MEMBER: And there is none.*

*CLAIMANT: No, there is no denunciation that I would... I would have physically made with his name.*

*MEMBER: Well, those are my questions. I want to make sure that I have handed back these originals. Anything else you want to tell me? I've finished my questions.*

*CLAIMANT: Let me think about it please, quickly. No I think I have already explained the why. I think I explained how the situation is in Mexico. If you, ma'am chair feel it necessary that I should obtain some more documents.*

*MEMBER: No.*

*CLAIMANT: That's all I can tell you.*

*MEMBER: O.K. Well, thank you for coming. Thank you to the interpreter for his assistance. I am not going to render my decision from the bench, so you will be advised in writing. We have your address and you will get the decision and the reasons for the decision. O.K. Thank you.*

*CLAIMANT: O.K.*

*MEMBER: This hearing is concluded.*

[11] Section 37 of the *Refugee Protection Division Rules*, SOR/2002-228 clearly provides that an Applicant can, by application, seek to provide a further document in evidence after a hearing:

*37. (1) A party who wants to provide a document as evidence after a hearing must make an application to the Division.*

*Written application*

*(2) The party must attach a copy of the document to the application. The application must be made under rule 44, but the party is not required to give evidence in an affidavit or statutory declaration.*

*Factors*

*(3) In deciding the application, the Division must consider any relevant factors, including:*

*(a) the document's relevance and probative value;*

*(b) any new evidence it brings to the proceedings; and*

*(c) whether the party, with reasonable effort, could have provided the document as required by rule 29.*

[12] The dismissal by the Member of what amounted to the self-represented Applicant's attempt to do so, without advising the Applicant or considering Rule 37, is an error in law and failure to provide due process. It is clear from the Member's reasons that the denunciations were material to the decision being made. Refusal or neglect or oversight in not permitting the Applicant an opportunity to provide such documentation is a reviewable error.

[13] The application is allowed, and the matter is sent back to the Board for re-determination by a different Member. The matter is fact-specific; there is no question for certification. There are no special reasons to award costs.

**JUDGMENT**

**FOR THE REASONS PROVIDED:**

**THIS COURT'S JUDGMENT is that:**

1. The application is allowed;
2. The matter is returned to the Board for re-determination by a different Member;
3. No question is certified; and
4. No order is made as to costs.

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"Roger T. Hughes"

Judge

Federal Court



Cour fédérale

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-3060-11

**STYLE OF CAUSE:** GIORDANA MOSQUEDA COSTA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** November 29, 2011

**REASONS FOR JUDGMENT AND JUDGMENT BY:** HUGHES J.

**DATED:** November 29, 2011

**APPEARANCES:**

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