



Date: 20120209

Docket: IMM-4512-11

Citation: 2012 FC 188

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 9, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

**JOSE OTONIEL VARGAS MONTOYA
MARLYN EMELINA CASTILLO SOLANO
CARLOS ENRIQUE VARGAS CASTILLO
JOSEPH STEPHEN VARGAS CASTILLO**

Applicants

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 (the Act), of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the panel) dated June 16, 2011. The panel determined that the applicants were neither refugees nor persons in need of protection under sections 96 and 97 of the Act and therefore rejected their refugee claim.

I. Background

A. *Facts*

[2] José Otoniel Vargas Montoya (Mr. Montoya), his wife, Marlyn Emelina Castillo Solano (Ms. Solano), and their sons, Carlos Enrique Vargas Castillo and Joseph Stephen Vargas Castillo (together, the applicants), are citizens of Nicaragua. On December 16, 2009, they left Nicaragua to come to Canada, claiming refugee status on December 21, 2009, by reason of their fear of the Sandanista Front government and members of the Citizens' Power Councils (CPC). The applicants allege that they were persecuted by the government because they and their family were politically involved in the Constitutional Liberal Party (PLC).

[3] Ms. Solano's brothers were involved with the PLC, and Ms. Solano was an "aspiring member" representing the party at the polling station in the 2006 elections. She attended meetings and participated in marches. As a result, one of her sons was threatened by young Sandanistas wanting him to join their party; the applicants began to receive death threats and were attacked by unidentified persons. On election day in 2006, they even allege that people chanted slogans in front of their house. The applicants contend that, from then on, they received threatening telephone calls constantly until they left. The applicants say that they filed a complaint with the police following these incidents but that no action was taken.

[4] In addition, Mr. Montoya, a missionary for the Catholic church, was attacked by an unknown assailant in 2008 while leaving a church and was hit in the face with stones. After this first attack, he filed a complaint with the police and received medical care. A second incident occurred in

2009, again as he left a church. Mr. Montoya filed a complaint with the authorities and with the Nicaraguan Centre for Human Rights (CENIDH).

[5] The panel heard their refugee claim based on this fear on June 7, 2011. Following the hearing, the panel issued its negative decision on June 16, 2011.

B. Impugned decision

[6] In its decision, the panel stated that, after reviewing the documentary and testimonial evidence, the applicants were not considered credible and the documents filed had no probative value.

[7] Thus, because the applicants failed to prove essential elements in support of their refugee claim and their fear of persecution, the panel rejected their claim.

II. Issue

[8] The only real issue this case raises is the following:

Did the panel err in its assessment of the evidence and the applicants' credibility by basing its conclusions on erroneous findings of fact that it made in a capricious manner without regard to all the evidence?

III. Applicable statutory provisions

[9] The relevant sections of the *Immigration and Refugee Protection Act* are as follows:

REFUGEE PROTECTION, CONVENTION REFUGEES AND PERSONS IN NEED OF PROTECTION	NOTIONS D'ASILE, DE RÉFUGIÉ ET DE PERSONNE À PROTÉGER
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Convention refugee

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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
(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.

Définition de « réfugié »

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) 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) 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.

IV. Standard of review

[10] The appropriate standard of review in this case, which involves a pure question of the assessment of the evidence, is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]; *Aguebor v Canada (Minister of Employment and Immigration)* (FCA), (1993) FCJ No. 732, 42 ACWS (3d) 886 [*Aguebor*]). The Court must therefore show deference (*Dunsmuir*, above, at paragraph 49). Consequently, it is for the Court to determine whether the panel’s findings are justified, transparent and intelligible and fall within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, above, at

paragraph 47). Accordingly, it is not appropriate for the Court to reassess the evidence that was before the panel.

V. Analysis

[11] Before the Court, counsel for the respondent argued that the panel's decision, viewed in its entirety, is reasonable because it rejected the applicants' refugee claim based on their lack of credibility with respect to the essential elements underlying their application. In the respondent's view, the panel clearly explained why it did not consider the applicants credible, in particular because of the lack of corroborating documents; the female applicant's lack of knowledge about the PLC; the inconsistencies in the applicants' testimony and prior statements, and the female applicant's lack of spontaneity in her testimony.

[12] After reviewing the relevant evidence and hearing the representations of the parties, the Court is not satisfied that the panel's decision is reasonable.

[13] Although assessing the applicants' credibility is a matter for the panel, and it is presumed to have reviewed all the evidence, the Court is of the view that the panel unreasonably disregarded two documents that are at the heart of the dispute. The panel should have taken the two documents into consideration and integrated them into the analysis of its decision for the following reasons.

[14] The first document is Exhibit A-4 entitled "2010 Report on International Religious Freedom - Nicaragua", which covers the period from July 1, 2009, to June 30, 2010.

[15] The evidence in the record indicates that this report was sent to be filed in the record on June 6, 2011 (Applicants' Record, page 161), and that the presiding panel member was aware of the document at the hearing on June 7 (Applicants' Record, page 356). The report states that religious freedom is generally respected in Nicaragua but that there is also intolerance:

Restrictions on Religious Freedom

The government generally respected religious freedom in practice. There was no change in the status of respect for religious freedom by the government during the reporting period. The government showed intolerance toward those who commented on sociopolitical matters, including religious groups.

On April 23, 2010, the Catholic Episcopal Conference denounced the use of religious institutions for political purposes and demanded respect for the rule of law. Religious leaders also felt constrained when expressing negative commentary on government structures. ...

There were no reports of any official action limiting the physical practice of religious worship and church attendance during the reporting period.

However, FSLN activity, sometimes expressed in official government activities or carried out by government workers, disrupted church functions and the freedom to worship. CPCs organized protests to disrupt religious activities and harassed religious leaders when they encroached upon the government's political agenda. Catholic authorities reported that the CPCs continued a systematic strategy of harassment whenever clergy publicly criticized the government. ... (Applicants' Record, pages 164-165)

(Emphasis added)

[16] At the panel hearing, the presiding member summarized that the applicant was a missionary and that his preaching was perceived as a political activity, that is, to urge people to not join the Sandanista Front. The applicant replied [TRANSLATION] "precisely" (see Tribunal Record, page 355). The panel should therefore have referred to this document, which relates to the applicant's claim on the basis of religion. The panel did not do so. In addition, although the transcript shows that the panel was aware of document A-4, as stated above, document A-4 was not in the Tribunal

Record. Not only did the panel not refer to it in its decision, but the absence of document A-4 in the Tribunal Record may cast doubt on whether the panel examined this evidence.

[17] The second document is Exhibit P-8, a letter sent by the CENIDH. Although the panel referred to it in its decision at paragraphs 38-39, it disregarded the letter and assigned it no probative value. A review of this document signed November 30, 2009, indicates that an individual representing the interests of the government and [TRANSLATION] “who, it is assumed, attacked Mr. Vargas Montoya”. The letter also states that police officials [TRANSLATION] “get along well” with the current government. Furthermore, the letter is typed on letterhead, signed and contains the seal of the organization for the defence of human rights. Without making a finding that it is authentic, on its face, it is clear that Exhibit P-8 has certain hallmarks of authenticity. In these circumstances, although the panel could disregard this evidence, it had to explain why the letter had no probative value. In this case, it was unreasonable for the panel to rely solely on its findings to disregard – without further explanation – a document that, on its face, seems authentic, comes from an organization for the defence of human rights and corroborates the applicants’ claims in part. The panel’s decision should have analyzed the authenticity of this evidence, which contradicts some of its findings. With respect, the panel’s cursory analysis on this issue and its finding that the CENIDH had not written the letter are unfounded and unreasonable.

[18] For all these reasons, the Court’s intervention is warranted. There is no question to certify.

JUDGMENT

THE COURT RULES that the application for judicial review is allowed and that the matter will be remitted for redetermination by a differently constituted panel. No question is certified.

“Richard Boivin”

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4512-11

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v. MCI

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