

Federal Court



Cour fédérale

Date: 20140717

Docket: IMM-3980-13

Citation: 2014 FC 715

Calgary, Alberta, July 17, 2014

PRESENT: The Honourable Mr. Justice Hughes

Docket: IMM-3980-13

BETWEEN:

**JOSE LUIS CUEVAS MENDOZA
ALEJANDRO MALSONADO FLORES**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is the third time that this matter has come before this Court from judicial review and, for a third time, it will be returned for re-determination by a different Member. The matter should not become a ping-pong matter between the Court and the Refugee Protection Division (RPD), it should be done right this time.

[2] The Applicants are a husband and wife, both citizens of Mexico. They resided in Ciudad Juarez, arguable one of the most violent places in that country if not in much of the world. They are educated people, he is an engineer and she has an MBA. The undisputed evidence is that they were approached by a violent group known as the Zetas who demanded, and were not paid, a substantial sum of money; an extortion demand. The Applicants fled Mexico and came to Canada where they claimed refugee protection. That claim has been rejected three times as, each time the Member hearing the case, determined that the Applicants has an Internal Flight Alternative (IFA) in Mexico. The first time the IFA was said to be Mexico City, the second time Ensenada, the third time, Mexico City again.

[3] The first decision of the RPD was, by the Minister's own assessment, flawed. On the motion of the Minister and consent of the Applicants the matter was sent back for re-determination. There is little on the record concerning this first decision except the decision itself dated 17 June, 2011. The Member (paragraph 12) accepted that the Applicants have, individually, been targeted through the criminality of gang members which were, later in the reasons, identified as the Zetas.

[4] The second decision of the RPD was made by a different Member. It was dated 30 March, 2012. The Member (paragraph 33) found the Applicants to be credible. Concerning the Zetas the Member made certain findings, including the following:

[52] The Zetas are notoriously the most violent of all the cartels in Mexico. The Zetas are a sophisticated criminal enterprise with more than 1,000 members. Drawing on military-style skills and a penchant for the gruesome, the group has expanded its illegal activities and has established itself as the most feared and destructive player in the Mexican drug trade. The Zetas have

ruthlessly seized market share, raged a bloody campaign against the authorities, and use coercion and bribery to hollow out government institutions from within. They have done more than any other entity to foster the cycle of violent chaos, in which the country is currently trapped.

[53] The Zetas have distinguished themselves not only with their audacity but also with their savagery. The Zeta operatives subject their captives to prolonged torture before executing them, often by decapitation, immolation, strangulation, and other grizzly methods. The Zetas kill huge numbers of persons at once and bury their victims in mass graves.

[54] I find that the Zetas truly do have the capacity to hunt down anyone they want to hunt down and they are ruthless. The Zetas have this capability. They could use government databases, their own technological networks, and personnel to search out the claimants anywhere in Mexico. It is possible for the Zetas to find the claimants in Mexico.

[5] Thus the Member found that the Zetas were very violent, had capability and the technology to track down anyone in Mexico. The conclusion reached was that it was possible for the Zetas to find these Applicants in Mexico.

[6] Strangely however the Member then took a turn in the reasons. I repeat only a portion:

[61] The evidence of penetration into a certain region does not answer the question of whether the claimants would be subjected on a balance of probabilities to a risk to life in Ensenada.

...

[63] I have looked through the documentary evidence presented in this case and I cannot find one example of any cartel searching out such low level persons like the claimants – and I am only using the word “low level” in terms of their risk of harm that a person faces. I cannot find that the Zetas would be so incensed about the claimants not following through on paying them after the principal claimant was asked to do so, that the Zetas would use their muscle to hunt the claimants down anywhere in Mexico, and especially in Ensenada where the Zetas do not control.

[64] In this case, the Zetas are not missing cash, drugs or guns because of the claimants. Their sense of honour has not been violated by any action done by the claimants. The claimants do not know persons within the Zeta organization that would make the Zetas personally angry at them. The claimants have not been sexually involved with any Zeta member or a girlfriend of a Zeta member.

[65] The claimants merely were asked to turn over money, as countless persons have been asked to do, in Ciudad Juarez.

[66] The claimants have alleged that businesses are closing and many persons are fleeing Ciudad Juarez since they cannot comply with the Zetas' demands. There is no evidence that such persons are later hunted down in Mexico, in cross border areas of the United States or in Canada.

[67] I do not find that the claimants have irked the Zetas sufficiently that they would search for them anywhere in Mexico.

[68] The evidence is that a local Zeta gang had pursued the claimants at their home several years after they left the city. I find that this kind of search for claimants simply represents the efforts of a local Zeta gang to obtain money from a known source, that is the claimants. The Zetas use isolated cells that maintain control over a certain slice of the turf.

[69] Once the claimants left the area, the Zetas attempted to threaten them in a desperate act by breaking into their home and hanging out at the associated claimant's family's home. They still wanted easy money, right in the town where the local gang lives. The local zetas, who may have actually been associated with the local police force, asked the associated claimant's sister if she knew where the claimants were living. If the claimants' had been in Ciudad Juarez that day, or the day the Zetas had broken into their home, I find that the Claimants could have been killed. But since they were not in Ciudad Juarez, and because the claimants will not return to Ciudad Juarez, I find that the claimants are simply off the local Zetas' active list of targets. The local Zetas simply will look for other available cash cows locally, to gather all the money they can from the local citizenry of Ciudad Juarez. This is the claimants' evidence.

[70] Ciudad Juarez is one of the most dangerous cities in all of Mexico. The Zetas will stop at nothing in their attempt to make money there.

[71] To search for the claimants in Ensenada or anywhere would, in fact, be distraction from the Zeta's core business – making easy money. The claimants' utility to the Zetas is now over. Out of sight and a person's wealth or business loses their utility to the Zetas unless the Zetas are especially perturbed. The claimants did not annoy the Zetas to such a degree that the Zetas would use their arsenal to find the claimants. The claimants have not raised the ire of the Zetas; they just skipped town.

[72] I asked the claimants if their many family members in Mexico City had been contacted by the Zetas in all these years in search to find out where the claimants are. The principal claimant testified that no one has contacted their extended family in search to find out where the claimants are living. Likewise the Zetas have not contacted the associated claimant's parents who are residing in the very same state of Chihuahua, the same state where Ciudad Juarez is located.

[73] There are hot spots of violence, like Ciudad Juarez, and there are also places like Ensenada, where drug violence has diminished. As the Sinaloa cartel has tightened its control in Baja California, violence there has dropped in Ensenada.

[74] For these reasons, I find on a balance of probabilities that the claimants do not face a risk to their lives in Ensenada, the designated IFA.

[7] This reasoning was analyzed by Justice Kane of this Court in reviewing the decision.

(IMM-4016-12, December 20, 2012). She found that it was speculative and the matter should be sent back for re-determination. She wrote in part:

In this case, the Board's assessment of the risk faced by the applicants and their need for protection in the proposed IFA is based, to a great extent, on speculation. This Court has cautioned against speculative reasoning in several recent cases.

...

In this case the Board speculated that the applicants "are simply now off the local Zetas' active list of targets" and that they "did not annoy the Zetas to such a degree" that the Zetas would want to track them down. As noted above, such speculation is illogical given the Board's acceptance of the brutality of this gang and its

capacity to track down and harm anyone in Mexico. The Board had also accepted as a fact that the applicants had no previous connection with the Zetas, yet they had been targeted for extortion and threatened. The Board had also found that the Zetas could have killed them if they had been found.

The Board's finding that the applicants would not be at risk because the Zetas had no quarrel with them is inconsistent with the fact that the applicants were targeted for extortion and threatened, despite the Zetas having no quarrel or connection with the applicants in the first place. This speculation about how the Zetas would operate vis à vis the applicants is illogical and unreasonable.

...

Because I have found that the decision regarding the IFA was unreasonable, it is not necessary to determine if the Board erred in refusing to consider the humanitarian and compassionate factors in assessing the reasonableness of the IFA.

For the reasons noted above, the Board's finding that there was no serious possibility of the applicants being persecuted in the proposed IFA (Ensenada), on a balance of probabilities, was not reasonable. Given the evidence the Board accepted and the applicants' evidence which was found to be credible, the decision, which relied on speculation, was not justified or intelligible and it did not fall within a range of acceptable outcomes.

[8] Turning to the third decision of the Board, the one under review here, we find that, notwithstanding the Board's statement that speculation would constitute a reasonable error, it does just that. I repeat part of the reasons:

[8] I have reviewed the Court's judgment and I am cognizant that speculation on my part would constitute a reviewable error. I am also mindful that there is an appearance of inconsistency to say on the one hand, that the Zetas have the capacity to hurt anyone in Mexico and yet say on the other hand, that these particular claimants would not be at risk in the proposed IFA. In the reasons to follow, I will respond to this apparent inconsistency. I will rely on the facts of this case and where there is speculation, I will accord the appropriate weight to that particular evidence.

...

[16] The claimants were targeted by the Zetas in Ciudad Juarez. The Board's documents indicate that although the Zeta organization has a presence throughout large regions of Mexico, the Zetas organization is "a network comprised of isolated cells that all maintain control over a certain slice of turf". The claimants have not demonstrated that it is more likely than not that the Zetas would be motivated or inclined to seek the claimants, outside their "slice of turf," that is, Ciudad Juarez.

[17] The events occurred mostly in 2008, approximately five years ago. There is little persuasive evidence that members of the Zetas are still motivated or inclined to seek the claimants today, to harm them. The claimants testified that the Zetas left a cardboard note in their abandoned home, demanding the extortion payment. This occurred shortly after the claimants' flight to Canada. It is probable that the Zetas did this, as a follow up to the original threat. The claimants testified that members of the Zetas have repeatedly gone to the other family members, inquiring about the claimants' whereabouts. I find this implausible, based on the documents which demonstrate that the Zetas are notorious and brutal.

[18] They (the Zetas) can and do resort to bribery, but they lean toward intimidation and violence. Their mode of operation tends to be far less subtle than that of their Sinaloa counterparts, and with a leadership composed of former special operations soldiers, they are quite effective in employing force and fear to achieve their objectives.

[19] Based on the information on hand, and based on the claimants' own fear of the Zetas, it is more likely than no that the Zetas would have resorted to brutal intimidation tactics on the family members to force the claimants to pay the extortion, or as a punishment for not paying, rather than occasionally checking up on the family members over a period of five years to inquire about the claimants. Furthermore, the claimants testified that to their knowledge, the Zetas have not extorted the family members while in their pursuit of the claimants. This makes the story that the Zetas are still looking for the claimants even less credible. The statements made by the family members is not probative and so that testimony can only be assessed in light of the documents, which state clearly that the Zetas have no compunction towards violence, thus making the family members' allegations less believable, since they have not been harmed or extorted themselves in the past five years since the claimants fled.

[20] The claimants have family members living in the Mexico City. There was no evidence presented that the family members in the Mexico City have been approached by members of the Zetas to indicate that they were still looking for the claimants.

[21] The burden of proof in this instance is a balance of probabilities, which in the circumstances of this case, have not been established. There is the passage of time since these incidents occurred. There is the credibility factor that the Zetas have repeatedly contacted the family members in pursuit of the claimants, without themselves facing consequences. Then there is the fact that the family members in Mexico City have not been contacted by the Zetas in the past five years. These factors combined do not establish the risk to the claimants to that of a balance of probability.

[22] I have considered the evidence, and notwithstanding the testimony of the claimants, I determine that there is an IFA for the claimants in Mexico City. Therefore, under the first prong of the IFA test, the claimants has not established, on a balance of probabilities, that they would be subject personally to a risk to life or to a risk of cruel and unusual treatment or punishment in Mexico City members of the Zetas.

[9] Thus the Member has done precisely what Justice Kane has said not to do, engaged in speculation. The Member is not “balancing” the evidence, the Member is ignoring it. The evidence in this particular case us that the Zetas are extremely violent, that the Applicants have been menacingly threatened and that the Zetas have the capacity, whether through isolated cells or communicating cells, to find the Applicants.

[10] In paragraph 19 and again in paragraph 21 the Member is basing his speculation on credibility. In paragraph 19 he says that the Applicants says that the Zetas are still looking for them is “less credible”. In paragraph 21 the Member, in considering the “balance of probabilities” refers to the “credibility factor”.

[11] In considering credibility in these contexts the Member should have been mindful of two things. First, as stated by this Court in *Valtchev* [2001] F.C.J. No 1131 at paragraph 7 plausibility, i.e. credibility, findings should only be made in the clearest of cases. The second is that the Member, at the outset of the hearing, announced that credibility would not be an issue unless he raised it at the hearing. There was no credibility issues raised at the hearing. I repeat what the Member said at the outset of the hearing:

PRESIDING MEMBER: Okay. This hearing is a return from the Federal Court. The Court found fault with the Board's past decision and sent the hearing back to the Board for another hearing.

Counsel, we're going to raise the same issues essentially that were raised in the last hearing. And we'll have a discussion on that before we proceed with the rest of the hearing.

Credibility was defined at the last hearing. The member didn't have any credibility concerns, or didn't express any credibility concerns. Credibility is always an issue in refugee hearings. But I will accept the finding of the past member, unless I have my own concerns that are raised in this hearing.

COUNSEL: I will note they were found credible at their first hearing as well.

PRESIDING MEMBER: Okay.

COUNSEL: There was no issues at either hearing.

PRESIDING MEMBER: Okay. Okay so given that, we won't have to cover again the material aspects of their testimony.

[12] Therefore the matter must go back for re-determination for a fourth time. The Member hearing the matter must be mindful that:

- (1) Do not speculate

(2) Credibility is not an issue unless clearly raised and discussed at the hearing.

[13] No party requested certification.

JUDGMENT

THIS COURT THEREFORE ADJUDGES that:

1. The application is allowed;
2. The matter is to be re-determined by a different Member mindful of the Reasons and those of Justice Kane;
3. No question is certified; and
4. No Order as to costs.

"Roger T. Hughes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3980-13

STYLE OF CAUSE: JOSE LUIS CUEVAS MENDOZA AND ALEJANDRO
MALSONADO FLORES v THE MINISTER OF
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