Federal Court  Cour fédérale

Date: 20121031

Docket: IMM-1509-12

Citation: 2012 FC 1273

Ottawa, Ontario, October 31, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ISRAEL MORENO SANDOVAL
GABRIELA BALDERAS HERNANDEZ
ZURY YETLANEZY MORENO BALDERAS (Minor)
YITZHAK MISRAIM MORENO BALDERAS (Minor)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated January 11, 2012, wherein the applicants were determined to be neither Convention refugees within the meaning of section 96 of the Act nor persons in need of protection as defined in subsection 97(1) of the Act.

[2] This conclusion was based on a lack of nexus to the Convention grounds, the lack of credibility of the applicants, a failure to rebut the presumption of state protection and a lack of individualized risk.

[3] The applicants request that the Board's decision be quashed and seek a declaration that they are Convention refugees or persons in need of protection or in the alternative, that the matter be referred back for redetermination by a differently constituted panel.

Background

[4] The applicants are citizens of Mexico. They lived in Irapuato, in the state of Guanajuato. Violence in this city rose dramatically due to drug cartels, with violent killings in the news on a daily basis.

[5] Israel Moreno Sandoval, (the principal applicant) worked in dairy sales. He alleges that he was approached by a man who invited him to join in business. At a later time, he and his wife were attacked by two men who told him he must sell drugs for them or they would kill him and his wife and children. They told him not to make a police report because they would be aware of a report due to their connections.

[6] After this incident, the applicants received threats of decapitation on their home telephone. The principal applicant was again attacked and threatened on his way home and told that if he did not agree to sell drugs, his family would be tortured.

between their fear of persecution and one of the Convention grounds. Therefore, the applicants' claim failed under section 96.

[11] The Board performed a separate analysis of the applicants' claim under subsection 97(1)(b) of the Act. The Board held that the applicants' risk did not become personalized because the principal applicant failed to comply with the criminals' demands or because the applicants were pursued after not complying. The Board highlighted the Federal Court's holding that a person's risk is not personalized where the risk of actual or threatened violence is faced generally by others and not specific to the claimant. The Board relied on documentation showing that thousands of citizens of Mexico have been victims of violence at the hands of criminals and drug cartels in Mexico.

[12] The Board reviewed several past Board decisions rejecting claims of those fleeing criminal violence which were subsequently upheld by the Federal Court. The Board found that in Mexico, extortion of business owners is a *modus operandi* of the Zetas cartel. Business owners and salespersons are more exposed to this risk but it is still a generalized risk faced by the general population in Mexico. Therefore, the Board found that the applicants had not established that they face a risk to their lives or a risk of cruel and unusual treatment or punishment or danger of torture and are not persons in need of protection within the meaning of subsection 97(1)(b).

[13] Next, the Board turned to credibility. The Board found that the principal applicant was not credible based on material omissions and inconsistencies between his oral and documentary evidence that were not satisfactorily explained. The Board was also concerned about the credibility of the principal applicant's allegations as to who he specifically fears.

[14] The Board accepted the claims about the dramatic rise in violence in Mexican cities and queried whether the applicants had left Mexico due to these inherent dangers in search of a better life and more productive society.

[15] The Board found that the police complaints produced by the principal applicant did not corroborate his claims. He had claimed that when he went to the Irapuato police on June 26, 2009, he told them about the demands to sell drugs and threats and the police told him to stay away from the cartel. He testified that in the original petition he submitted, he identified La Familia Michoacana. The documents disclosed to the Board did not support this claim and no document or evidence was adduced to explain the inconsistency.

[16] The police complaint submitted by the principal applicant was a brief document that only contains his name and address and that he made a complaint of a threat by "QNN". It made no mention of a demand to sell drugs and the principal applicant could not explain what QNN stood for. In oral evidence, he failed to explain this inconsistency. The Board found that the principal applicant did not tell the police he was asked to sell drugs for the Michoacana and that the police were not given sufficient information or time to make an investigation.

[17] The Board indicated its concern about the late addition of information about the Michoacana to the PIF narrative. A Public Ministry declaration made by the sister of the principal applicant's wife dated April 27, 2011, indicated that her uncle had been taken after a male person came looking for the principal applicant. A lawyer's declaration indicated that the sister-in-law told him that this disappearance was three months after the applicants' departure. The applicants' PIF narrative was

not updated to reflect the 2009 disappearance until May 2011. Neither document made mention of the Michoacana.

[18] The Board found that the principal applicant failed to satisfactorily explain why he omitted this important information from his PIF narrative and in his answers to an immigration officer. The Board noted the principal applicant's slow responses to the Board's questions about what the threatening men had told him. The Board drew an adverse inference based on these omissions and late inclusion and suggested that this information was added later in an effort to bolster the claim for protection.

[19] The Board also alternatively rejected the applicants' claim due to their failure to rebut the presumption of state protection. The Board reviewed the jurisprudence on state protection and noted that Mexico is a democratic country with functioning political and judicial systems and an official apparatus sufficient to provide a measure of protection to its citizens. Therefore, the burden on the applicants to seek protection is a high one. The Board recognized inconsistencies in the documentary sources, but held that the preponderance of the objective evidence regarding current country conditions that, although not perfect, there is adequate state protection in Mexico for victims of crime.

[20] The Board noted that when a claimant swears that certain facts are true, this creates a presumption that they are indeed true unless there is a reason to doubt their veracity. The Board was of the opinion that due to the inconsistencies in evidence central to the applicants' claims, that the principal applicant is not credible with regards to allegations against the perpetrators of harm. The

principal applicant did not identify the Michoacana as the source of his fear in his port of entry interview, a subsequent interview or his initial PIF. Information provided at an interview contradicted his oral testimony and PIF narrative. The Board was of the opinion that the detail of the Michoacana being behind the threats to the principal applicant was an embellishment.

[21] The Board found the applicants have failed to rebut the presumption of state protection because they chose never to disclose the identities of the individuals they feared, did not provide reasonable leads to the authorities, did not afford officials a real opportunity to protect them and did not avail themselves of any of the recourses available to them in Mexico. The Board held it was not reasonable for the applicants to expect the police to seek out and arrest their persecutors when they did not provide their identities to the police. Therefore, the Board found that there was no objective basis for the applicants' claim under section 97 of the Act as state protection is available in Mexico.

Issues

[22] The applicants submit the following point at issue:

Did the Board breach the procedural fairness right of the applicants?

[23] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board breach procedural fairness?

Applicants' Written Submissions

[24] The applicants submit that the standard of review for procedural fairness is correctness. The applicants argue that procedural fairness was breached by the Board's decision to proceed with the hearing over the objection of the applicants to the quality of interpretation. The Board also erred by failing to consider counsel's written request after the hearing to investigate the allegation of poor interpretation and to order a new hearing.

[25] An informed person viewing the matter realistically and practically would have concluded that the applicants' right to procedural fairness was breached. The issue was raised as soon as it was discovered by the applicants so there is no issue of waiver. The applicants have discharged their duty by raising the issue, but the Board has not discharged its duty as the issue was brushed aside at the hearing and ignored after the hearing.

[26] The remedy for the denial of the right to a fair hearing must be to render the decision invalid, regardless of whether it would have likely resulted in a different decision. Therefore, the Board's decision must be quashed.

Respondent's Written Submissions

[27] The respondent submits that interpretation does not have to conform to a standard of perfection and that the errors identified by the applicants do not satisfy the test established in case law for inadequate translation.

[28] The respondent further submits that any inadequacy of interpretation is immaterial, as it would only pertain to the Board's finding of credibility. Any translation errors had no bearing on the Board's determination as to lack of nexus, generalized risk and the presumption of state protection.

[29] The respondent submits that decisions of the Board are reviewable on the reasonableness standard, except where they concern pure questions of law. The existence of contradictions of inconsistencies in the evidence of a claimant is a well accepted basis for finding a lack of credibility. The Board is entitled to reject even uncontradicted evidence if it is not consistent with the probabilities affecting the case as a whole and to make an adverse finding of credibility based upon the implausibility of the applicant's story alone.

[30] In this case, the Board provided numerous reasons why it doubted the credibility of the applicants' evidence, including omissions from the principal applicant's statements to immigration authorities and his original PIF. There were inconsistencies between the principal applicant's evidence and the copy of the police report he submitted to the Board. There is no reason to disturb the credibility findings of the Board in this case since the applicants have failed to properly link the alleged interpretation errors to the Board's credibility findings.

[31] There is also no reason to disturb the finding of a lack of nexus. Neither fear of criminals nor victims of criminal activity are Convention grounds.

[32] The Board also properly considered the applicants' claim under section 97 of the Act. The text of subsection 97(1)(b)(ii) requires that the risk must be faced in every part of the country and

must not be faced generally by other individuals from that country. Wealth does not constitute personalized risk. An increased risk experienced by a subcategory of the population is not individualized where that risk is experienced by the population generally at a reduced frequency.

[33] Finally, the applicants' filing of a single complaint to police with insufficient information to allow investigation does not rebut the presumption of state protection, particularly given the number of agencies available in Mexico.

Analysis and Decision

[34] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[35] It is trite law that the appropriate standard of review for issues of procedural fairness is correctness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 798 at paragraph 13, [2008] FCJ No 995 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 43). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

[36] **Issue 2**

Did the Board breach procedural fairness?

Interpretation in Board hearings must be "continuous, precise, competent, impartial and contemporaneous" but should not be held to a standard of perfection (*Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 at paragraphs 4 to 6, [2001] FCJ No 916).

[37] When applicants' counsel objected to the translation, this exchange followed (pages 652 and 653 of certified tribunal record):

> COUNSEL FOR THE CLAIMANTS: I don't know what was said. And I believe you don't speak Spanish as well. But Ms. McNamee speaks English and Spanish.
>
> MEMBER: Well, I know she does because she indicated that at the beginning and I do remember asking her if she here [sic] in the capacity as an interpreter, which she indicated she was not.
>
> COUNSEL FOR THE CLAIMANTS: Yeah.
>
> MEMBER: That's fine. There's a remedy for that, Counsel, and you can seek that remedy at the conclusion of the hearing. You can request an audit and you can give examples, such as what you've just done to me.
>
> COUNSEL FOR THE CLAIMANTS: Okay.
>
> MEMBER: It's usually in writing.
>
> COUNSEL FOR THE CLAIMANTS: Okay.
>
> . . .
>
> MEMBER: And they have a unit for that. You just say that you want an audit, if that's what you're –
>
> COUNSEL FOR THE CLAIMANTS: Okay.

> MEMBER: -- you're requesting.
>
> COUNSEL FOR THE CLAIMANTS: That's fine. Thank you.

[38] The Board's document "Complaints Regarding Interpretation" puts the onus on individual Board members to resolve such complaints:

> Parties must raise concerns with respect to interpretation during the course of the hearing, at the first opportunity, unless there are exceptional circumstances for not doing so. The Member who is hearing the case will decide on the appropriate course of action in accordance with the rules of natural justice.

[39] In this case, the applicants' counsel raised the complaint at the hearing in accordance with this policy. The Board responded that counsel should address his complaint to the Registrar after the hearing in writing. The applicants did so. There is nothing in this record which indicates this complaint was considered by either the Board or the Registrar.

[40] The respondent is correct that the applicants have offered paltry evidence of flawed translation. However, this is a case where the applicants made a procedural fairness complaint which was unaddressed by the decision maker during and after the hearing and based on this record, remains so to date.

[41] The question of whether the applicants were entitled to have that complaint responded to is a question of procedural fairness that should be addressed through the framework of *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 23 to 27.

[42] In this case, the issue of translation is extremely important to the applicants, given the centrality of credibility to the refugee determination process (the third factor). The combination of the Board policy and the instructions of the Board at the hearing created a legitimate expectation the complaint would be addressed (the fourth factor). Those same facts suggest that taking into account the choice of procedures of the agency itself point towards requiring a response, since the Board itself instructed the applicants to make this complaint (the fifth factor). There is no appeal mechanism for translation complaints in the Act (the second factor). While the Board's consideration of translation complaints does not resemble a trial process and therefore points to less procedural fairness (the first factor), given the heavy weight of the other four factors, I do find that the applicants were entitled to a level of procedural fairness that includes a response to the complaint. Given the lack of any evidence of a response before me, procedural fairness was breached. Clearly, this breach affects the Board's credibility finding, as oral testimony is crucial to such determination.

[43] The respondent submits that even if the interpretation was inadequate, this decision should stand as the credibility finding had no material effect on the outcome (*Neginskay v Canada (Citizenship and Immigration)*, 2009 FC 1072 at paragraph 11, [2009] FCJ No 1328). For credibility to have had no effect on the outcome, the Board would have had to accept all of the applicants' evidence and still reject the claim. This cannot be true of the Board's determination on state protection, as the Board found as part of this analysis that the applicants had not taken all reasonable steps to seek protection, presumably because the applicants' evidence of complaining to the police was rejected due to the lack of credibility.

[44] The Board's determination of generalized risk does not make clear whether it is based on accepting or rejecting the applicants' evidence. The issue of generalized risk is closely linked to credibility of a claimant's testimony because determination will depend on which facts are accepted by the Board (*Henriquez de Umana v Canada (Minister of Citizenship and Immigration)*, 2012 FC 326 at paragraph 26, [2012] FCJ No 371). The Board's finding was that the applicants face a generalized risk of violence at the hands of criminals and drug cartels, while the principal applicant claimed he was attacked and threatened by a cartel in two different cities and that his brother-in-law disappeared after unknown males came looking for the principal applicant. It is difficult to understand how the Board could have come to its conclusion on generalized risk while accepting this evidence and the Board's reasons are opaque on the subject.

[45] While the Board's finding on nexus may have been unaffected by credibility, its relevance to the section 97 finding alone warrants redetermination. Therefore, I would allow the application for judicial review and set aside the decision of the Board.

[46] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Federal Courts Act*, RSC 1985, c F-7**

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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.
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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1509-12
STYLE OF CAUSE:	ISRAEL MORENO SANDOVAL GABRIELA BALDERAS HERNANDEZ ZURY YETLANEZY MORENO BALDERAS (Minor) YITZHAK MISRAIM MORENO BALDERAS (Minor) - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 15, 2012
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	Octoer 31, 2012

APPEARANCES:

Richard Odeleye	FOR THE APPLICANTS
Suran Bhattacharyya	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Babalola, Odeleye Toronto, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT