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Docket: IMM-2099-07

Citation: 2007 FC 1211

Ottawa, Ontario, November 20, 2007

Present: The Honourable Mr. Justice Shore

BETWEEN:

DOMINGUEZ HERNANDEZ Gerardo Rene
RAMOS DE DOMINGUEZ Marisela

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] [34] . . . Now, the question is not so much whether remedies exist against corrupt public servants in Mexico, but is to determine whether in practice those remedies are useful in the circumstances. . . .

(as stated by Mr. Justice Luc Martineau in *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, [2006] F.C.J. No. 439 (QL)).

LEGAL PROCEEDING

[2] This is an application for leave and judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (Board) dated May 4, 2007, that the applicants, who are Mexican citizens, are neither Convention refugees nor persons in need of protection.

FACTS

[3] The applicants, Mr. Gerardo Rene Dominguez Hernandez and Ms. Marisela Ramos de Dominguez, claim that they are persons in need of protection under section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) because they would be subjected to a risk to their lives or to a risk of cruel and unusual treatment or punishment.

[4] The couple is originally from Mexico. The principal applicant worked as a hairdresser and travelled most of the time to do his work. He had clients from every sector of society. In the course of his work, he discovered that men connected to the authorities (the Treasurer for the Federal District of Mexico; a police commander) were involved in illegal activities (drug trafficking). In short, the applicant knew and saw things that he should not have known or seen. This had terrible consequences for him. He was kidnapped, threatened, persecuted.

[5] The principal applicant filed a complaint with the appropriate authorities, but the authorities did not want to accept his complaint. At the time of the deposition in question, Mr. Dominguez Hernandez made a written statement in which he described all his difficulties. However, he saw that the Public Ministry officials did not want to help him. He was told that they were unable to do

anything. They gave him unacceptable reasons for their inaction and did not want to give him a copy of what he had written.

[6] The principal applicant then consulted a lawyer who told him that he had made a serious error in trying to file a complaint and in talking about the problem. Following his (attempted) complaint, Mr. Dominguez Hernandez received death threats on the telephone. His situation deteriorated after he went to the Public Ministry. The principal applicant changed his home address, but he was found and threatened again.

DECISION OF THE BOARD

[7] The Board submits that the applicants could have obtained protection in their country of origin but does not doubt their credibility.

ISSUES

[8] Did the Board make a reviewable error in incorrectly assessing "state protection" (in determining that protection was available to the applicants)?

Standard of Review

[9] It is well established that the appropriate standard of review for such determinations is patent unreasonableness (See: *Aguebor v. Canada (Minister of Employment and Immigration)* (F.C.A.), [1993] F.C.J. No. 732 (QL); *R.K.L. v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, [2003] F.C.J. No. 162 (QL); *Khaira v. Canada (Minister of Citizenship and*

Immigration), 2004 FC 62, [2004] F.C.J. No. 46 (QL)). A decision is patently unreasonable where, considering all the circumstances, it is clearly abusive, patently unjust, contrary to common sense or has no basis in fact or in law.

ANALYSIS

[10] The applicants attempted to obtain state protection but did not succeed.

[11] It is patently unreasonable to contend that the applicants, who were considered credible by the Board, would have been able to find protection in their country of origin in light of all the circumstances of this case (problems involving members of the authorities—police officers, Treasurer—problems related to drug traffickers with ties to members of the authorities, etc.). In short, the applicants fulfilled their obligations.

[12] The Board erred in failing to take into account the particular situation of the applicants who, after attempting to file a complaint, saw their situation worsen (see: death threats).

[13] As stated by Mr. Justice Edmond Blanchard in *Burgos v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1537, [2006] F.C.J. No. 1537 (QL):

> [36] However, when it considers the issue of state protection, the Court cannot require that the protection currently available be perfectly effective. The following excerpt written by Mr. Justice James Hugessen in *Villafranca v. M.E.I.*, [1992] F.C.J. No. 1189 (F.C.A.) (QL), sets out this principle:
>
> > On the other hand, where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to

> justify a claim that the victims of terrorism are unable to avail themselves of such protection.
>
> [37] In spite of this, the mere willingness of a state to ensure the protection of its citizens is not sufficient in itself to establish its ability. Protection must nevertheless have a certain degree of effectiveness (*Bobrik v. M.C.I.*, [1994] F.C.J. No. 1364 (T.D.) (QL).
>
> . . .
>
> [42] By determining that there was adequate protection in Mexico and that the applicants could have made a complaint following the incidents of August 21, 2005, and October 2, 2005, the Board rendered an unreasonable decision, in that it failed to take into consideration that the situation of the applicants was aggravated on both occasions when they made complaints to two different authorities. This conclusion is contrary to the principle established by the Supreme Court in *Ward*, according to which an applicant does not have to "risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness". This error warrants intervention by this Court insofar as this determination could not stand up to a probing examination.

[14] Since the applicants were found to be credible, the Board should have shown that it had analyzed the relevant documents adduced in evidence in order to determine this question (see, for example, exhibit 2.1 of the National Documentation Package, June 23, 2006, document 2.1: *Country Reports on Human Rights Practices for 2005*, March 8, 2006). This is an excerpt from the introduction to this report:

> Mexico, with a population [of] 106 million, is a federal republic composed of 31 states and a federal district, with an elected president and bicameral legislature. In 2000 voters elected President Vicente Fox Quesada of the National Action Party to a six-year term in generally free and fair multiparty elections. While civilian authorities generally maintained effective control of the security forces, elements of the security forces frequently acted independently of government authority.
>
> The government generally respected and promoted human rights at the national level; however, violations persisted at the state and local level. The government investigated, prosecuted, and sentenced several public officials and members of security forces involved in criminal acts; however, impunity and corruption remained a problem. Local police released suspects who claimed to have been

> tortured as part of investigations, and authorities investigated complaints of torture, but authorities rarely punished officials for torture. There was a marked increase during the year in narcotics trafficking-related violence, especially in the northern border region. Violence against women continued to be a problem nationwide, particularly in Ciudad Juarez and the surrounding area. Government efforts to improve respect for human rights were offset by a deeply entrenched culture of impunity and corruption. The following human rights problems were reported:
>
> - unlawful killings by security forces
> - vigilante killings
> - kidnappings, including by police
> - torture, particularly to force confessions
> - poor, overcrowded, sometimes life-threatening prison conditions
> - arbitrary arrest and detention
> - corruption, inefficiency, and lack of transparency in the judicial system
> - statements coerced through torture permitted as evidence in trials
> - criminal intimidation of journalists, leading to self-censorship
> - corruption at all levels of government
> - domestic violence against women often perpetrated with impunity
> - criminal violence, including killings, against women
> - trafficking in persons, allegedly with official involvement
> - social and economic discrimination against indigenous people
> - child labor

[15] Document 2.2 Amnesty International (AI), 2006 "Mexico" *Amnesty International Report 2006*, states that:

> A number of factors contributed to undermining the right to a fair trial, including a failure to ensure immediate access to defence counsel and a lack of effective oversight of the prosecution service and judicial police. In May the recently founded National Council to Prevent Discrimination published a national survey illustrating the patterns of discrimination faced by socially disadvantaged groups.
>
> - In September Felipe Arreaga, a human rights defender and prisoner of conscience known for his environmental activism, was acquitted of murder charges after his defence demonstrated that the prosecution case had been fabricated as a reprisal for his activism.
>
> - Nicolasa Ramos was released from prison in Baja California on appeal for lack of evidence. She had served nearly three years in prison on the basis of reportedly fabricated criminal charges of stealing water from the local

authority on behalf of the long-standing squatter community of Maclovio Rojas, Tijuana.

- In June human rights defender and gay activist Octavio Acuña was murdered in Querétaro. He and his partner had filed a complaint against local police officers for discrimination in 2004 and had complained of homophobic harassment prior to the murder. Despite this, official investigators reportedly ignored evidence that the killing was motivated by homophobia.

[16] Also, document 2.3: Human Rights Watch (HRW), January 18, 2006, "Mexico", *World Report 2006*, establishes the following:

> Among Mexico's most serious human rights problems are those affecting its criminal justice system. Persons under arrest or imprisonment face torture and other ill-treatment, and law enforcement officials often neglect to investigate and prosecute those responsible for human rights violations.
>
> President Vicente Fox has repeatedly promised to address these problems and has taken important steps toward doing so—establishing a special prosecutor's office to investigate past abuses and proposing justice reforms designed to prevent future ones. Unfortunately, neither initiative has lived up to its potential.
>
> . . .
>
> ***Impunity***
>
> The criminal justice system routinely fails to provide justice to victims of violent crime and human rights abuses. The causes of this failure are varied and include corruption, inadequate training and resources, and a lack of political will. One prominent example is the unsolved murders of hundreds of young women and girls over the last decade in Ciudad Juárez, a city on the U.S. border in Chihuahua state. Several individuals facing charges for some of the Júarez killings have recanted confessions that they claim were coerced through torture.
>
> A major shortcoming of the Mexican justice system is that it leaves the task of investigating and prosecuting army abuses to military authorities. As Human Rights Watch documented in a 2001 report, the military justice system is ill-equipped for such tasks. It lacks the independence necessary to carry out reliable investigations and its operations suffer from a general absence of transparency. The ability of military prosecutors to investigate army abuses is further undermined by fear of the army, which is widespread in many rural communities and which inhibits civilian

> victims and witnesses from providing information to military authorities. The Mexican Supreme Court had an opportunity to address the problem of military jurisdiction in a 2005 case, but in September it upheld the military's authority over cases involving army members even when the alleged crimes were committed while off-duty.

[17] Moreover, exhibit 9.7 Canada, May 2005, Immigration and Refugee Board, *Mexico: State Protection (December 2003 – March 2005),* states:

> ***3.2 The judiciary***
>
> . . .
>
> In practice, international human rights sources reported in 2004 and in early 2005 that many of Mexico's human rights violations stem from structural deficiencies in its criminal justice system (HRW 8 Jan. 2005; AI 2004). For example, Amnesty International's 2004 annual report (ibid.) and Human Rights Watch's *World Report 2005* (8 Jan. 2005) noted that cases of torture, arbitrary detention, and extortion within the judicial system, especially at the state level, continued to be reported in an atmosphere of impunity in 2003 and 2004. *Country Reports 2004* added that while efforts to reform the judiciary were being made in 2004, concerns such as "lengthy pretrial detention, lack of due process, and judicial inefficiency and corruption persisted" (28 Feb. 2005).
>
> In June 2004, Alejandro Gertz Manero, then-Federal Secretary of the Secretariat of Public Security (Secretaría de Seguridad Pública, SSP) was quoted as describing the country's justice system as being outdated, lacking in credibility, and unresponsive to the needs of Mexican society (FBIS 30 June 2004). According to a 2004 public opinion poll conducted by Corporación Latinobarómetro, 58 per cent of the Mexican respondents claimed that it was quite possible to bribe a judge in order to receive a favourable sentence (*sentencia favorable*) (13 Aug. 2004).
>
> Key points discussed at a July 2004 conference on justice reform in Mexico, sponsored by the US-based Center for Strategic and International Studies (CSIS) and the Center for US-Mexican Studies, included statements that the criminal justice system was "both ineffective and unfair" (CSIS 16 July 2004). At the conference, numerous national and international justice reform experts claimed that in Mexico "[fewer] than 5 per cent of crimes are investigated and [fewer than] 2 per cent go to trial" (ibid.). Moreover, the criminal justice system was deemed unfair due to its use of arbitrary detention, delays in trial and

> sentencing, "incarceration without sentencing" or pretrial detention and "poor legal defence" (ibid.; see also AI 28 Sept. 2004).
>
> Various sources reported that, among the criticisms of the judicial process, the use of pre-trial detention (*prisión preventiva*) was of particular concern (ibid.; OSJI Nov. 2004; CSIS 16 July 2004). During the July 2004 justice reform conference sponsored by CSIS and the Center for US-Mexican Studies, experts concurred that pre-trial detention "impedes the prosecutorial process and contributes to a system that jails large numbers of people" (ibid.). In a November 2004 publication of the Open Society Justice Initiative (OSJI), author and public security expert Guillermo Zepeda stated that about 82,000 incarcerated individuals were then waiting for a court appearance in Mexico, some for having committed only minor offences (11 Nov. 2004). Zepeda's study also argued that pre-trial detention has not reduced crime rates, does not effectively guarantee victim compensation, and is not cost-efficient (OSJI 11 Nov. 2004).
>
> As well, *Country Reports 2004* noted that authorities did not ensure legal representation for poor defendants (28 Feb. 2005, Sec. 1.c). In particular, "[d]efendants in pretrial detention did not have immediate access to an attorney to discuss privately issues arising during the hearings. Moreover, the public defender system was not adequate to meet the need" (*Country Reports 2004* 28 Feb. 2005, Sec. 1.c).

[18] This case will be referred back to the Board for a new hearing. The notion of state protection requires that each case be reviewed on its own facts, using the relevant documentation about country conditions that are summarized in the encyclopedia of references, the dictionary of terms, and a gallery of portraits demonstrating state protection in this type of case.

[19] It would seem to defeat the purpose of international protection if a claimant is required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness (see: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; also: *Aramburo v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1873 (QL)).

[20] In *Howard-Dejo v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 176 (QL), the Court noted that, in that case, the evidence showed not only that the state had not always succeeded in protecting the targets of terrorism, but that the authorities were unable to provide protection proportionate to the threat.

[21] In *G.D.C.P. v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 989, [2002] F.C.J. No. 1331 (QL), Madam Justice Elizabeth Heneghan confirmed that applicants are not required to show that they have exhausted all avenues of protection. Rather, applicants must demonstrate that they have taken all reasonable steps, considering the context of the country of origin in general, all the steps that they did in fact take and their interaction with the authorities (see also: *D'Mello v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 72 (QL), by Mr. Justice Frederick Gibson).

[22] In *Bobrik v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1364 (QL), Madam Justice Danièle Tremblay-Lamer noted:

> [13] . . . [E]ven when the state is willing to protect its citizens, a claimant will meet the criteria for refugee status if the protection being offered is ineffective. A state must actually provide protection, and not merely indicate a willingness to help. Where the evidence reveals that a claimant has experienced many incidents of harassment and/or discrimination without being effectively defended by the state, the presumption operates and it can be concluded that the state may be willing but unable to protect the claimant.

[23] On the other hand, the fact that civil rights groups are able to conduct investigations of alleged abuses is not relevant to the issue of protection (see: *Thakur v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 600 (QL), by Mr. Justice Jean-Eudes Dubé;

Mendoza v. Canada (Minister of Citizenship and Immigration), [1996] F.C.J. No. 90 (QL), by Mr. Justice Francis C. Muldoon; *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1081, [2002] F.C.J. No. 1425 (QL), by Tremblay-Lamer J.)

[24] In *Molnar*, above, Tremblay-Lamer J. held that the Board erred in imposing on the applicants the burden of seeking redress from agencies other than the police.

[25] In *Elcock v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1438 (QL), Gibson J. wrote:

> [15] . . . I am satisfied that the same result must follow here and that the CRDD committed a reviewable error in failing to effectively analyse, not merely whether a legislative and procedural framework for protection existed, but also whether the state, through the police, was willing to effectively implement any such framework. Ability of a state to protect must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework.

[26] In the case before us, the state did not demonstrate that it had the capacity to implement a framework for the applicants' protection. It must be reiterated that, with respect to "state protection", each case turns on its own facts.

[27] The applicants had no obligation to [TRANSLATION] "file a complaint at a higher level" subsequent to the steps they took (in light of the facts described in the objective documentation on country conditions, specific to their problems).

CONCLUSION

[28] For all the foregoing reasons, the application for judicial review is allowed, and the matter is remitted for redetermination by a differently constituted panel.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed and that the matter be remitted for redetermination by a differently constituted panel.

"Michel M.J. Shore"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jorge Colasurdo	FOR THE APPLICANTS
Sherry Rafai Far	FOR THE RESPONDENT

SOLICITORS OF RECORD:

JORGE COLASURDO, Lawyer Montréal, Quebec	FOR THE APPLICANTS
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT