Date: 20080328

Docket: IMM-2752-07

Citation: 2008 FC 397

Ottawa, Ontario, March 28, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

SERGIO MORALES LOZADA
VERONICA REYES VILLA
OSCAR MORALES REYES
KARLA ALEJANDRA MORALES REYES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Sergio Morales Lozada (the "Applicant"), his spouse, Veronica Reyes, and their children, Oscar Morales Reyes and Karla Alejandra Morales Reyes, apply for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the "IRPA") of a decision made by the Refugee Protection Division of the Immigration and Refugee Board (the

"Board"), dated June 19, 2007, wherein it was determined that the Applicant and his family are not Convention refugees nor persons in need of protection under sections 96 and 97 of the IRPA.

[2] The Applicant is a citizen of Mexico who had been a police officer assigned to a special drug squadron. He left the police service and eventually fled to Canada with his family because he feared persecution by corrupt police and drug cartel members due to his knowledge concerning the disappearance of illegal drugs turned over to senior police officials.

[3] I have decided the application for judicial review does not succeed. My reasons follow.

BACKGROUND

[4] The Applicant testified that he had joined the police force in Mexico in 1992. He was a member of a squadron that confiscated a large quantity of drugs from a drug cartel. The drugs were turned over to senior police officers and subsequently disappeared. The squadron members made inquiries and reported the matter to supervising authorities. They were subjected to harassment and warnings not to take the matter further. The Applicant said that in 1993 several of his fellow squadron members were ambushed, injured and killed. This action caused him to leave the police force in 1994.

[5] The Applicant married in 1995 and moved to the state of Coahuila where he worked as a security guard. The Applicant said he was compelled to change jobs several times as he feared being followed. He eventually returned to the Federal District of Mexico. In October 2005, four

years after his return to the Federal District, the Applicant claims several men shot at his house causing significant damage. He reported the attack to the local police but did not tell them that he believed his attackers to be connected to corrupt police and drug cartel members. He said the police came to investigate and he told the police he had received threats over the years but stated nothing more.

[6] The following month the Applicant travelled to Canada and claimed refugee protection. The Applicant makes his claim for refugee status under sections 96 and 97 of IRPA. The family's claim is based on that of the Applicant.

DECISCION UNDER REVIEW

[7] The Board found Mexico to be a fully functioning democracy. The Board observed that the more democratic a state's institutions, the more a claimant must do to exhaust all avenues of action available for state protection. It applied the presumption that the Applicant must provide clear and convincing proof that the state of Mexico is unwilling or unable to protect him and his family.

[8] The Board acknowledged that there was considerable crime and corruption in Mexico, but noted the documentation clearly demonstrates the government is making substantial and meaningful efforts to combat crime and corruption. The Board concluded that there was objective documentary evidence that the government and state officials were making serious efforts to provide state protection for its citizens and that state protection was available for victims of corruption.

[9] The Board noted that while the Applicant reported the October 2005 attack to the police, he could not identify the assailants. As a result, no arrests were made.

[10] The Board noted that the documentary evidence reported a number of significant measures had been taken to address police corruption. Victims of corruption and organized crime can report offences directly to the public ministry when local police might be involved. The Board found it unreasonable for the Applicant not to have made greater effort to seek police protection or protection of another state agency.

[11] The Board placed more weight on the documentary evidence than it did on the Applicant's evidence. The Board considered it not unreasonable for the Applicant to return to Mexico and seek protection there.

[12] The Board concluded that the Applicant is not a Convention refugee as he did not have a well founded fear of persecution on a Convention ground in Mexico. The Board also found that he was not a person in need of protection in that his removal to Mexico would not subject him personally to a risk to his life or a risk of cruel and unusual treatment or punishment, and there were no substantial grounds to believe that his removal to Mexico would subject him personally to a danger there. As the Applicant's claim failed, so did his family's.

ISSUES

[13] The Applicant submits that the Board erred in failing to consider and address documentary evidence which confirms the Applicant's assertion that state protection was inadequate. He also submits that the Board breached procedural fairness by referring to two country condition documents that were not before the Board at the hearing and were not provided to the Applicant before making its decision.

[14] The issues are:

1. Did the Board err in its finding of adequate state protection and in its finding that the Applicant failed to rebut the presumption of state protection?
2. Did the Board breach procedural fairness by referring to two extrinsic documents in its decision that where not before it at the hearing and which were not provided to the Applicants prior to the decision?

STANDARD OF REVIEW

[15] The landscape of judicial review was recently changed by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9. The Court held that there are now only two standards of review: correctness and reasonableness (*Dunsmuir* at para. 34).

[16] The Court also elucidated that the process of judicial review now involves two steps (*Dunsmuir*, above, at para. 62):

> [i]n summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[17] In *Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, the Federal Court of Appeal considered the issue of state protection where an applicant claimed refugee status in Canada because she felt she could not get state protection from spousal abuse in Mexico. The Federal Court of Appeal determined the standard of review for the Board's assessment of state protection and the failure to seek state protection was reasonableness (*Carillo* (F.C.A.) at para. 36). While neither party made extensive written submissions with respect to standard of review on decisions related to state protection, there is a long line of jurisprudence emanating from this Court where it has been found that the standard of review for a finding of state protection, using pre-*Dunsmuir*, above, terminology, is reasonableness *simpliciter* (see: *Monte Rey Nunez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1661; *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1249; and *Fernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1132).

[18] The Board's reference to two extrinsic country documents raises an issue of procedural fairness. Where procedural fairness is breached in the process of decision making, the decision in question must be set aside (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at para. 53).

ANALYSIS

Did the Board err in its finding of adequate state protection and in its finding that the Applicant failed to rebut the presumption of state protection?

[19] The Applicant submits that the Board applied the wrong legal test by failing to assess the reality of the state protection offered. The Applicant relies on Justice Russell's decision in *Torres v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 660 at para. 16 where he states:

> When I review the decision as a whole, it is not clear to me if, or where, the Board addressed the Applicant's expressed fear of the lack of police support and the difficulty of her taking advantage and having recourse to the existing legislative and procedural framework, of state protection in Nicaragua. It looks to me as though the Board never really engaged with the Applicant's concern that the police and other support groups could not provide effective protection. I believe her evidence was clear and convincing that they could not protect her against her father in the past and would not be able to do so in the future. The Board should have turned its mind to this issue and addressed it directly in its reasons.

[20] The Applicant stresses that the documentary evidence includes reports of continuing problems of police corruption and that impunity and corruption remain significant issues. The Applicant argues that Mexico's ability to offer him state protection has not improved and, as shown by the country reports, is still not available to him. The Applicant claims that the Board failed to address the reports of impunity and corruption and, as such, its decision is flawed.

[21] The Applicant relies on *Herrera Villalva v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 314 at para. 22, where Justice Kelen found that the evidence established that individuals in the applicant's situation were unable to secure state protection. Justice Kelen concluded that the board failed to address this evidence.

[22] The Respondent essentially resubmits the Board's reasoning that the state of Mexico is making efforts to address problems of police corruption and organized crime. As Mexico is a functioning democracy, there is a presumption of state protection for its citizens. The documentary evidence does show widespread problems but not to the extent that the presumption of state protection is rebutted. The Respondent maintains that the Applicant must rebut the presumption of state protection by making efforts to secure such protection. The Respondent relies on *Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 944 at paras. 7-8 where Justice Snider stated:

> In Ward, supra at 724, the Supreme Court of Canada held that, when state protection "might reasonably have been forthcoming", the Board is entitled to draw an adverse inference based on a claimant's failure to approach state authorities for assistance:
>
> > Like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection "might reasonably have been forthcoming", will the claimant's failure to approach the state protection defeat his claim. Put another way, the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state.

> In my view, whether it is objectively unreasonable for the claimant not to have sought the protection of home authorities invites the Board to weigh the evidence before it and make a finding of fact. For example, although the agent of persecution might be a stage [sic] agent, the facts of the case might suggest that purely local or rogue elements are at work and that the state in question is democratic and offers protection to victims similarly situated to the claimant. It might, therefore, be objectively reasonable to expect a claimant to seek protection. In other instances, the identity of the state agent and documentary evidence of country conditions might mean that state protection would not be reasonably forthcoming and, therefore, the claimant is not expected to have sought protection. Given that the Board's analysis of Costa Rica's political and judicial institutions was not patently unreasonable, meaning it was supported by the evidence before the Board, the imposition of an obligation to seek protection based on this evidence does not constitute a reviewable error, in my opinion.

[23] The Respondent also refers to *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para. 57, for the proposition that an applicant coming from a democratic country will have a heavy burden to show he need not exhaust all recourses available in his country before seeking refugee status.

[24] The Respondent submits that individual failures in state protection do not mean state protection is not available. The Respondent argues that this Court has previously held that Mexico provides adequate state protection notwithstanding individual police officers have been persecutory agents (*Ortiz Juarez v. Canada (Minister of Citizenship and Immigration),* 2006 FC 288 at para. 10). The Applicant must provide evidence of a pervasive undermining of democratic institutions. It is not sufficient for the Applicant to show the state has not always been effective in protecting

people in his situation (*Canada (Minister of Employment and Immigration) v. Villafranca*, [1992] F.C.J. No. 1189 (F.C.A.).

ANALYSIS

[25] The law of state protection was well summarized by Justice O'Reilly in *Carrillo v. Canada*, [2007] F.C.J. No. 439 at paras. 10-14. To briefly recap relevant portions:

- A refugee is a person who "has a well-founded fear of persecution" and is "unable or, by reason of that fear, unwilling" to obtain protection from their country of nationality (s. 96(a) IRPA).
- A person's fear is not well-founded if state protection is available. Conversely, a person's fear is well-founded if state protection is not available (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at para. 52).
- Where a person claims persecution by the state it is assumed no state protection is available (*Zhuravlvev v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 507 at para. 19).
- The burden of proof is on a claimant. He must show that he meets the definition of a refugee: that he actually fears persecution and his fear is "well-founded". The claimant must show there is a reasonable chance; a serious possibility he will be persecuted if returned to his country of nationality (*Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (F.C.A) at para. 8).

- Decision-makers are entitled to presume that states are able to protect their citizens (*Ward*, above) except where there is a complete breakdown of a state (*Villafranca*, above).
- The claimant must prove he made efforts to obtain state protection. The more democratic the state and its institutions, the more the claimant must have done to exhaust the courses of action available to him (*Kadenko v. Canada (Minister of Citizenship and Immigration)* (1996), 143 D.L.R. (4th) 532 (F.C.A.)).

[26] Further analysis on state protection and the rebutting of the presumption of state protection was undertaken by Justice Létourneau of the Federal Court of Appeal in *Carillo* (F.C.A.), above. He observed that the burden of proof, the standard of proof and the quality of the evidence are three different legal concepts that should not be confused.

[27] To rebut a presumption of state protection, the claimant bears an evidentiary burden and a legal burden. The claimant must satisfy the evidentiary burden by introducing evidence of inadequate state protection. He must satisfy the legal burden by convincing the tribunal that, on the balance of probabilities, state protection is inadequate. The quality of the evidence required to rebut the presumption of state protection must be reliable and be of sufficient probative value (*Carrillo* (F.C.A.), above, at paras. 18, 20, 30).

[28] Local failures by police do not by themselves prove a lack of state protection (*Zhuravlvev*, above). In *Kadenko*, above, a single request for police assistance and a refusal was considered

insufficient evidence to rebut the presumption of state protection. Federal Court decisions recognize that state protection may not always be perfect. However, the board may have to address whether state protection could effectively extend to a claimant (*Torres*, above*)*.

[29] In the case at hand, the Applicant testified he protested police corruption at the time of his resignation from police services in 1994. He married and moved several times, fearing he was followed. When assailants attacked his home, he reported it to the police. He did not tell the police that he believed that the attack was related to the earlier drug confiscation or that he suspected the attackers were either corrupt police or drug dealers. He testified the police surmised the perpetuators were drug dealers.

[30] The Applicant approached the police for protection once. He acknowledged the police searched the house and area for the attackers and for clues. He could not identify the assailants nor did he offer the police information as to his suspicions about the attack. The Applicant did not do all he could to make the police investigation more effective. To the extent that the police could help, they did.

[31] The Board took note of the documentary record which included reports of problems with police corruption and measures to address those issues. The Board concluded the Applicant had not pursued further options available to him, namely providing further information to the police or filing

a complaint directly to Ministry officials. The Board concluded the Applicant had not rebutted the presumption of state protection.

[32] The Applicant's evidence, such as it was, fell short of being sufficient to prove the police investigation was deliberately curtailed and that state protection was not available. The Applicant himself did not make further effort to secure state protection by pursuing other options to obtain police or other state protection.

[33] A decision which is not reasonable is one where there is no line of analysis within the given reasons that could reasonably lead the Board from the evidence before it to the conclusion at which it arrived. "If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination" then the decision will not be unreasonable (*Rey Nunez*, above, at para. 11).

[34] This Court must also be concerned with whether the Board's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para. 47). On the facts of this case, I cannot say the Board's decision was unreasonable. It was based on accepted country condition documents and evidence confirming the Applicant's own limited efforts. It follows the legal principles set out in *Ward, Carrillo* (F.C.A.) and *Kadenko*, above.

Did the Board breach procedural fairness by referring to two extrinsic documents in its decision that where not before it at the hearing and which were not provided to the Applicants prior to the decision?

[35] The Applicant argues that the Board referred to two Response to Information Requests ("RIRs") that were not submitted as exhibits. These RIRs, referred to in footnotes 5 and 12 of the Board's reasons, were not before the Board at the hearing and were not provided to the Applicant for his review and comment before the decision. The Applicant submits that this results in a breach of procedural fairness which requires the Board's decision to be set aside.

[36] The Respondent argues that the RIRs referred to by the Board were earlier country condition documents that had been replaced with more recent country condition documents with substantially the same information. The scheme of the country conditions documentation requires ongoing updating as earlier documents are replaced by more current documentation. The Respondent submits that there was no breach of procedural fairness since the more recent documentation, which the Applicant had available to him, conveys substantially the same information.

[37] The Board states and references the underlined to footnote 5:

> Notwithstanding that, the documentary evidence makes it clear that there is considerable crime and corruption in Mexico, and that the panel would not state otherwise; however the documentation also makes clear that the government is

> making substantial, meaningful and often successful efforts to combat crime and corruption.

[38] The Board notes in footnote 5 that RIR MEX38312.E (September 2002) is "not in these exhibits". However, upon review of the July 4, 2006 National Documentation Package contained at page 93 Tribunal Record, RIR MEX101376.E (June 2006) makes similar statements with respect to reforms undertaken to combat corruption.

[39] The Board states and references to footnote 12:

> When victims are ignored or their claims not processed, they have recourse to report the offence directly to the internal controller of the *Procuraduria General de la Republica* (PGR).

[40] The Board notes in footnote 12 that RIR MEX39540.E (September 2002) is "not in these exhibits". The Tribunal Record does not make reference to any document that provides for filing reports directly to the PGR. However, the Applicant's report of the attack on his house to the police was not ignored and was processed as the police did investigate the attack. It is difficult to see what prejudice arises to the Applicant by the Board's reference to this extrinsic document.

[41] I do not find a breach of procedural fairness arises in respect of the Board's reference to the two extrinsic RIRs.

CONCLUSION

[42] I conclude the Board's findings, that state protection exists and that the Applicant did not rebut the presumption of state protection in Mexico, are reasonable based as they are on objective documentary evidence as well as the Applicant's own evidence.

[43] I further conclude that the Board's reference to two earlier country condition reports no longer in the IRB Documentation List is of minor consequence since the documentation before the Board, and which the Applicant had access to, either covers substantially the same subject matter or is not applicable in the Applicant's circumstances.

[44] The application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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