

Federal Court



Cour fédérale

Date: 20100520

Docket: IMM-5572-09

Citation: 2010 FC 557

Montréal, Quebec, May 20, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

WILLY ELIEU DOMINGUEZ

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In 1984, the applicant, a citizen of Guatemala, claimed refugee protection in Canada, alleging a fear of the army, but returned to his country because, he claims, of the poor state of his father's health. The refugee claim was rejected.

[2] Back in Guatemala, he was ordained as a priest in 1990. In 2003, he was assigned as priest to the St. Peter and St. Paul parish, where there were conflicts. He received death threats and

someone fired shots at the church. On February 20, 2008, he was kidnapped by four individuals. He was hospitalized for two days. He fled and went into hiding in Quetzaltenango. He learned that the Maras (gangs) were looking for him. He once again decided to leave the country.

[3] In April 2008, the applicant returned to Canada and claimed refugee protection a second time, after having spent two days in the United States without seeking asylum there.

[4] The panel found that there was a lack of subjective fear, and that the applicant had failed to rebut the presumption of state protection. This is a judicial review of that decision.

ISSUES

[5] The following issues must be examined:

- a. The finding of a lack of subjective fear.
- b. The finding that the applicant had not rebutted the presumption of state protection.

FEAR

[6] The case law clearly establishes that a refugee claimant's fear of persecution must contain two elements. The claimant must have a subjective fear and, furthermore, there must be an objective basis for that fear. Given that Mr. Dominguez had family in Canada and was simply passing through the United States, I do not think the RPD was justified in finding that the fact that he did not seek asylum in the United States demonstrated a lack of subjective fear on his part. However, it is

not necessary to examine that aspect of the decision given that I am satisfied that the finding that Mr. Dominguez had not rebutted the presumption of state protection was reasonable.

STATE PROTECTION

[7] As a preliminary issue, counsel for the Minister objected to the allegation in the applicant's memorandum that [TRANSLATION]“ [t]he current president of Guatemala was directly accused of killing a lawyer...”, on the ground that this alleged fact was not before the panel.

[8] Except under circumstances that do not apply here, a judicial review is based on the record of the tribunal whose decision is under review. Mr. Dominguez's counsel admitted that this allegation had not been submitted to the panel; therefore, I will not take it into consideration.

[9] The panel found that Mr. Dominguez had made no reasonable effort to seek state protection in Guatemala. This finding is completely reasonable. However, the next issue is to determine what would have probably happened had he sought protection from Guatemala.

[10] Mr. Dominguez submits that this decision is overly optimistic in that, while the panel did acknowledge that there were many problems with corruption, it failed to analyze the nature of the corruption.

[11] In my view, it was open to the panel to reach the finding that it did with regard to state protection. For example, as the Minister stated:

[TRANSLATION]

22. The documentary evidence in the record shows that, in spite of numerous problems linked to crime and to the conduct of police in Guatemala, the authorities are making efforts to fight street gangs and to improve the judicial system, including:

- Convictions against police officers for extrajudicial killings of gang members;
- A high incarceration rate for gang members;
- Raids and operations against gangs in high-crime neighbourhoods, despite some problems of police conduct with regard to suspects;
- Hundreds of arrests of gang members, forcing these gangs to change locations;
- An increase in the number of murder charges laid;
- More resources for the public prosecutor to investigate crimes;
- The deployment of troops from the Guatemalan army to help police forces who have trouble reining in street gangs;
- Logistical support provided to police by secret military services to find members of criminal gangs;
- Cooperation with a number of Canadian state entities, including the Canadian government, the *Law Courts Education Society*, the government of British Columbia and the Royal Canadian Mounted Police, in order to improve Guatemala's criminal justice system.

[12] While the state protection available might not have been perfect, the finding that it was adequate was not unreasonable within the meaning of *Dunsmuir v. New Brunswick*, 2008 SCC 9,

[2008] 1 S.C.R. 190. The applicant is asking this Court to re-weigh the evidence. This would be inappropriate.

JUDGMENT

FOR THESE REASONS,

THE COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.
2. The matter raises no serious question of general importance for certification.

“Sean Harrington”

Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5572-09

STYLE OF CAUSE: Willy Elieu Dominguez v. MCI

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 19, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** HARRINGTON J.

DATED: May 20, 2010

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