Federal Court  Cour fédérale

Date: 20100707

Unrevised certified translation **Docket: IMM-128-10**

Citation: 2010 FC 727

Montréal, Quebec, July 7, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

JOSE WALTER TROYA JIMENEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application by Jose Walter Troya Jimenez (the applicant) under sections 72 *et seq.* of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision of a panel of the Refugee Protection Division of the Immigration and Refugee Board (the panel), dated December 8, 2009, and bearing the number MA8-12101. This judgment is rendered by the undersigned judge as *ex officio* judge of the Federal Court as provided by subsection 5.1(4) of the *Federal Courts Act*, R.S.C. (1985), c. F-7.

[2] The panel determined that the applicant is not a refugee or a person in need of protection on the ground that state protection was available to him in Ecuador. The applicant is challenging that decision.

[3] The application for judicial review will be allowed, primarily on the ground that the analysis of the availability of state protection should normally be preceded by an analysis of the refugee claimant's subjective fear of persecution, which includes an assessment of the applicant's credibility and the plausibility of his or her account.

[4] In a recent decision of mine, *Flores v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 503, [2010] F.C.J. No. 607 (QL) (*Flores*), I concluded that the availability of state protection should not be decided in a factual vacuum with regard to a refugee claimant's personal circumstances. A decision with regard to the subjective fear of persecution, which includes an analysis of the refugee claimant's credibility and the plausibility of his or her account, must be made by the Immigration and Refugee Board to establish an appropriate framework for an analysis, where necessary, of the availability of state protection that takes into account the individual situation of the refugee claimant in question. The principles established in *Flores* apply equally to this case.

Background

[5] The applicant is a citizen of Ecuador who is currently 33 years of age and who formerly taught philosophy at Borja Military Academy #3, in Quito, Ecuador. The academy is a private school for the children of military personnel, police officers and other members of Ecuador's elite.

[6] The applicant alleges that he became romantically involved with a leftist militant who introduced him to certain members of FARC who were conducting operations in Ecuador. The FARC allegedly demanded information from the applicant about students at his school in order to organize kidnappings for the purposes of extortion. The FARC allegedly threatened the applicant to ensure his cooperation so that they would be able to carry out their criminal and terrorist operations. The applicant claims that he refused to be complicit in these criminal conspiracies.

[7] He therefore fled to the United States in July 2005. After his visitor's visa to the United States expired in November 2005, he decided to remain there without status until he was arrested by U.S. authorities in May 2008. He was released by the U.S. authorities in July 2008, and subsequently fled to Canada.

[8] The applicant entered Canada illegally. Nonetheless, he appeared before Canadian authorities in September 2008 to claim refugee protection.

Decision of the panel

[9] The panel did not analyze the applicant's credibility or question the plausibility of his account. There is therefore no analysis or decision regarding the subjective fear of persecution in the panel's decision.

[10] The panel made no comment on the applicant's long stay in the United States, on his refusal to seek asylum there, or on his illegal entry into Canada. No analysis of the impact these facts could

have on the claim for refugee protection in Canada was undertaken by the panel. Moreover, the panel does not refute the applicant's allegations regarding the FARC kidnapping plot or the death threats against him.

[11] The panel based its decision strictly on the question of the availability of state protection in Ecuador. The panel noted that the applicant failed to seek state protection before fleeing the country. The panel was of the view that protection would surely have been provided, given that the FARC's intended victims were the children of military personnel and police officers. The panel therefore concluded that the applicant had failed to rebut the presumption of state protection.

Applicable standard of review

[12] In *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 282 D.L.R. (4th) 413, [2007] F.C.J. No. 584 (QL), at paragraph 38, the Federal Court of Appeal confirmed that questions as to the adequacy of state protection are ''questions of mixed fact and law ordinarily reviewable against a standard of reasonableness''.

Analysis

[13] In *Flores*, I undertook a lengthy analysis of the decisions of the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 and *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R 177, as well as the decisions of the Federal Court of Appeal in *Rajudeen v. Canada (Minister of Employment and Immigration)*, (1984), 55 N.R. 129, [1984] F.C.J. No. 601 (QL), in *Zhuravlvev v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 3,

[2000] F.C.J. No. 507 (QL), in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 282 D.L.R. (4th) 413, [2007] F.C.J. No. 584 (QL), and in *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 F.C.R. 636, [2008] F.C.J. No. 399 (QL), and the decisions of the Federal Court in *L.A.O. v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1057, [2009] F.C.J. No. 1295 (QL), in *Torres v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 234, and in *Mendoza v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 119. I also analyzed the administrative framework of the Act, including the links between refugee claims determined by the Immigration and Refugee Board and applications for pre-removal risk assessment.

[14] This allowed me to conclude in *Flores* that the analysis of the availability of state protection should be done only where the refugee claimant's subjective fear of persecution has first been established by the panel. It is only once the subjective fear of persecution has been established that the analysis of the availability of state protection can be properly carried out.

[15] In other words, other than in exceptional cases, the analysis of the availability of state protection should not be carried out without first establishing the existence of a subjective fear of persecution. The panel responsible for questions of fact should therefore analyze the issue of subjective fear of persecution, or, in other words, should make a finding as to the refugee claimant's credibility and the plausibility of his or her account, before addressing the objective fear component, which includes an analysis of the availability of state protection.

[16] The analysis of the objective fear should therefore normally be done after the analysis of subjective fear, since the particular context that is unique to each case is often determinative in the objective analysis. As such, a refugee claimant who has no subjective fear of persecution cannot normally allege absence of state protection. As well, the analysis of the availability of state protection will vary considerably, depending on the subjective fear in issue.

[17] Furthermore, a prior analysis of subjective fear means that the panel can avoid having to engage in truncated analyses of the availability of state protection. In this case, the panel carried out no analysis and made no determination concerning the subjective fear of persecution, specifically the applicant's credibility and the plausibility of his account. No context unique to the applicant was established to guide the analysis of the availability of state protection. This is an error that is reviewable by this Court. The analysis of the availability of state protection should not become a means of avoiding making a determination concerning the subjective fear of persecution.

[18] The reasonableness of a decision is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 47. In the circumstances of this case, no reasoned analysis of the applicant's credibility and the plausibility of his account was carried out by the panel. The panel's decision concerning the availability of state protection is therefore flawed, given that the factual framework in which that analysis must be carried out was not first established.

[19] Accordingly, the matter will be referred back for reconsideration and rehearing in order to carry out the necessary prior analysis of the applicant's subjective fear.

[20] The parties did not propose a question for the purposes of paragraph 74(*d*) of the Act, and accordingly no question will be stated.

JUDGMENT

THE COURT:

1. Allows the application for judicial review;

2. Refers the matter back to the Immigration and Refugee Board to be heard by a different panel of the Refugee Protection Division, which shall, in particular, analyze the applicant's subjective fear, which includes an assessment of the applicant's credibility and the plausibility of his account, prior to analyzing the availability of state protection.

''Robert Mainville''
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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