Date: 20061025

Docket: IMM-6995-05

Citation: 2006 FC 1265

Ottawa, Ontario, October 25, 2006

Present: The Honourable Mr. Justice Lemieux

BETWEEN:

JESUS MANUEL RINCON ARELLANO
CLAUDIA LORENA SANCHEZ RODRIGUEZ
JESUS DANIEL RINCON SANCHEZ

Applicant

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On October 27, 2005, the Refugee Protection Division (the panel), refused the refugee claim of the Arellano family, made up of the father, Jesus Manuel, the mother, Claudia Sanchez Rodriguez, and their minor child, Jesus Daniel Sanchez, all citizens of Mexico. The only basis of this decision was that they had not sought protection in Mexico before turning to the international community, in this case, Canada.

[2] To decide this issue, the Court must determine whether it was objectively unreasonable that the applicants had not sought reasonably available protection from Mexico.

[3] The panel did not in any way impugn the credibility of the principal claimant, Mr. Arellano.

Facts

[4] Mr. Arellano worked as a mechanical engineer for a Mexican company.

[5] On June 1, 2005, he discovered bags of cocaine in tubes which were normally verified by his supervisor. At that time, his supervisor accosted him, telling him not to say anything to anyone and that he would explain everything to him later on.

[6] He nevertheless went that very day around noon to see the Public Ministry of the State of Colima closest to the business, in order to report his supervisor.

[7] Once he had filed the report, he went home. His wife, pregnant, was very worried and told him that his supervisor had called several times during the day, saying that he had to contact him immediately when he got back and not do anything stupid.

[8] At the end of the afternoon of June 1, the applicant called his supervisor and told him everything. When his supervisor learned that he had filed a report, he advised him to leave the country. After his supervisor confessed to working for one Vincente Carrillo, a major drug dealer, he told him [TRANSLATION] “they are going to kill you”.

[9] After hanging up the telephone, Mr. Arellano told his wife everything. She then became very agitated and her condition worsened. After consulting a doctor, accompanied by her husband, she spent the night of June 1 at the hospital.

[10] When they returned home, they saw that their house had been vandalized and the walls painted with death threats against him because he had talked. They decided to flee Mexico.

[11] While they were preparing to leave the house to get their passports and purchase plane tickets, the police arrived: they wanted to know what had happened the night before because they had received a phone call from the owner saying that strangers had broken in.

[12] Mr. Arellano mentioned the name of Vincente Carrillo to the police. Very alarmed, one of the police officers told him: [TRANSLATION] "You have put yourself in a very serious predicament, you must make a statement to the PGR [Procuraduría General de la República ("Attorney General of the Republic")]".

[13] The police offered to accompany him to the PGR but he refused because he did not trust anyone, did not want to leave his family alone, had already reported his supervisor and thought the State was unable to protect an informer.

[14] Mr. Arellano purchased plane tickets the same day, i.e. June 2, 2005, but unfortunately the earliest departure was on June 19, 2005. The family also obtained their passports on June 2, 2005. During the 17-day wait, the family stayed in hiding.

The panel's decision:

[15] The panel's reasoning regarding the protection of the State in Mexico is as follows:

> . . . there is a jurisprudential rule to the effect that a refugee protection claimant must have sought assistance in his or her own country before turning to international protection, in this case, in Canada.
>
> Except in the case of a complete breakdown of the state apparatus, it must be assumed that the state is capable of protecting its citizens. This presumption can be rebutted only through "clear and convincing" evidence of the state's inability to protect.
>
> The case law requires that the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her.
>
> The claimant clearly testified that all he did was file a complaint with the bureau of justice when he discovered the cocaine, but after the telephone calls and the vandalism at his house, he did not want to go to the attorney general's office as the police suggested:
>
> > [Translation]
> >
> > They offered to take us, but I did not accept. At that point, I did not trust anyone and I would not think of leaving my family alone.
>
> He explained that he did not want to do this because he wanted to protect the lives of his family and his own life.
>
> [Emphasis added.]

[16] The panel dismissed Mr. Arellano's explanation, writing:

> The panel finds this explanation unsatisfactory because it was more dangerous for the claimant and his family to stay in his country without protection than to follow the police officers to the attorney general's office, especially since he said that he had had no problems going to the passport office with his wife and son and then to the travel agency when he was preparing to leave his country. Moreover, the claimant did not even find out what had happened regarding his initial complaint to the bureau of justice.
>
> [Emphasis added.]

[17] The panel added:

> In light of the documentary evidence and the case law, the claimant's explanations are not, in the panel's opinion, sufficient to justify his failure to seek the assistance and protection of the Mexican authorities in the Office of the Attorney General of the Republic (PGR), even though the police officers offered their assistance. Accordingly, the claimant did not demonstrate to the panel that he acted reasonably in refusing the assistance of the police to go to the office of the PGR.
>
> [Emphasis added.]

[18] The panel is of the opinion that Mexico, while having some problems with corruption, cannot be described as a country where there has been a complete collapse of the State apparatus. According to the panel: "There are places where one may go to make a complaint."

[19] Relying on *Canada (M.E.I.) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.), the panel continued its analysis:

> . . . that it is reasonable to conclude that, when a country like Mexico has control of its territory, has established military and civilian authorities and a police force and makes serious efforts to protect its citizens when they are threatened, the mere fact that it is not always successful is not enough to justify the assertion that the victims of or those threatened with criminal acts cannot claim its protection.
>
> The onus was on the claimant to rebut the presumption that the Mexican authorities were able to protect him. Although the situation in Mexico is not perfect, this panel cannot conclude on this basis that there is clear and convincing evidence that the Mexican government would not try to ensure the claimant's protection if he were to return to his country, and in particular, in his case, the claimant not only did not exhaust all the courses of action open to him to obtain assistance and protection, but did not even make any requests in this regard.
>
> [Emphasis added.]

Analysis

(a) The legislation

[20] Section 96 of the *Immigration and Refugee Protection Act* (IRPA) addresses Convention Refugee status, while section 97 sets out the requirements that a person must satisfy to qualify as a person in need of protection. I set out both of these provisions:

PART 2 REFUGEE PROTECTION DIVISION 1 REFUGEE PROTECTION, CONVENTION REFUGEES AND PERSONS IN NEED OF PROTECTION	PARTIE 2 PROTECTION DES RÉFUGIÉS SECTION 1 NOTIONS D'ASILE, DE RÉFUGIÉ ET DE PERSONNE À PROTÉGER
Convention refugee	Définition de « réfugié »
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.
Person in need of protection	Personne à protéger
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.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

[Emphasis added.]

(b) Standard of Review

[21] I agree with the analysis of my colleague Madam Justice Tremblay-Lamer in *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, with regard to the appropriate standard of review for issues involving State protection. According to my colleague, the application

of a legal standard to a set of facts is a mixed question of fact and law; and the appropriate standard of review is that of reasonableness. Second, if the predominant issue before the Court is whether the panel properly interpreted the law and correctly identified the case law, the merits of this issue must be examined in accordance with the standard of correctness (see *Chaves, supra*, at paragraphs 9, 10 and 11; *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, at paragraph 23, and *John Joseph Goodman* v. *Minister of Citizenship and Immigration*, IMM-1977-98, February 29, 2000).

[22] Mr. Justice Iacobucci explains the standard of reasonableness *simpliciter* in *Law Society of New Brunswick v. Ryan* [2003] 1 S.C.R. 247 as follows:

> [46] Judicial review of administrative action on a standard of reasonableness involves deferential self-discipline. A court will often be forced to accept that a decision is reasonable even if it is unlikely that the court would have reasoned or decided as the tribunal did (see *Southam*, *supra*, at paras. 78-80). . . .
>
> . . .
>
> [48] Where the pragmatic and functional approach leads to the conclusion that the appropriate standard is reasonableness simpliciter, a court must not interfere unless the party seeking review has positively shown that the decision was unreasonable (see *Southam*, *supra*, at para. 61). In *Southam*, at para. 56, the Court described the standard of reasonableness *simpliciter*:
>
> > An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. [Emphasis added.]
>
> [49] This signals that the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and "look to see" whether any of those reasons adequately support the decision. . . . .
>
> . . .
>
> [54] How will a reviewing court know whether a decision is reasonable given that it may not first inquire into its correctness? The answer is that a reviewing court must look to the reasons given by the tribunal.
>
> [55] A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal 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 and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79). [Emphasis added.]

> [56] This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole. [Emphasis added.]

(c) The legal principles of the issue

[23] The case law on the notion of the State's protection in the context of refugee claims is nuanced; the factual framework is always of great importance. Each case must be examined individually.

[24] In this case, the agents of the State are not the persecuting agents. Nor is it a case where protection was refused after a person sought the State's protection because he was being persecuted.

[25] In the case at bar, Mr. Arellano did not himself ask the State for protection and in fact he refused the protection that was offered to him.

[26] The role of State protection in refugee claims was analyzed by Mr. Justice La Forest, on behalf of the Supreme Court of Canada, in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

[27] La Forest J. recognized that the notion of a well-founded fear of persecution is closely related to the State's ability to protect. He explains that the international community was meant to be a forum of second resort for the persecuted, a "surrogate", approachable upon failure of local protection. I refer to the following passage at page 709:

> At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the interpretation of the various terms requiring examination. International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection; see *The Law of Refugee Status* (1991), at p. 135. With this in mind, I shall now turn to the particular elements of the definition of "Convention refugee" that we are called upon to interpret.

[28] He endorses the proposal found under paragraph 100 of the Office of the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR's Handbook (UNHCR'S Handbook) which reads as follows:

> Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.
>
> [Emphasis added.]

[29] At page 723 of *Ward, supra*, La Forest J. addresses whether claimants must first seek the protection of the State when their claim is based on the State's refusal to provide protection in cases where the State is unable to protect them; he refers with some approval to these remarks by Professor Hathaway:

> . . . there cannot be said to be a failure of state protection where a government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming . . .
>
> . . .
>
> . . . however, he must show that he sought their protection when he is convinced, as he is in the case at bar, that the official authorities -- when accessible -- had no involvement -- direct or indirect, official or unofficial -- in the persecution against him.
>
> [Emphasis added.]

[30] La Forest J. distinguishes them as follows:

> This is not true in all cases. Most states would be willing to attempt to protect when an objective assessment established that they are not able to do this effectively. Moreover, it would seem to

> defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.
>
> [Emphasis added.]

[31] He writes:

> 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 for 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.
>
> The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant.

[32] He endorses the decision of the Federal Court of Appeal in *Canada (Minister of Employment and Immigration) v. Satiacum* (1999), 99 N.R. 171. In *Satiacum*, *supra*, the Federal Court of Appeal held:

> In the absence of exceptional circumstances established by the claimant, it seems to me that in a Convention refugee hearing, as in an extradition hearing, Canadian tribunals have to assume a fair and independent judicial process in the foreign country. In the case of a non-democratic State, contrary evidence might be readily forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching, for example, the jury selection process in the relevant part of the country, or the independence or fair-mindedness of the judiciary itself.
>
> [Emphasis added.]

(d) Conclusions

[33] For the following reasons, in my opinion this application for judicial review must be dismissed.

[34] The applicants' counsel properly said that the panel misinterpreted the case law when it held that a claimant "must exhaust all the courses of action open to him", and that to rebut the presumption that a State is able to protect a claimant, there must be clear and convincing evidence that the Mexican State would "not try" to protect the applicants if they were to return to Mexico.

[35] In fact, the case law does not require a claimant to exhaust all recourse in every case and does not provide that an attempt to protect is sufficient. *Ward, supra,* states the contrary *(*see paragraphs 30 and 31 of these reasons).

[36] However, these errors are not determinative and do not justify setting aside the panel's decision (see *Ryan, supra,* at paragraph 56). The heart of the panel's decision is based on its observation that the applicants had been objectively unreasonable in refusing to accompany the police to the PGR's office. The reasons on this issue are based on the fact that Mexico has control of its territory and that it has military and civilian authorities and an established police force, which makes a serious effort to protect its citizens. The panel also adds that the fact the State does not always succeed in protecting these persons does not substantiate a claim that victims cannot avail themselves of the State's protection. This finding is not at all unreasonable in the circumstances,

despite the fact that the alleged persecutor and the person who made the death threats is a major drug dealer eluding the authorities.

[37] In fact, the evidence adduced by the applicants does not establish that the State of Mexico was unable to protect the informers. The Court does not consider in this case that a vague and general allegation made by the applicant during his testimony to the effect that other people acted as informers and were not given effective protection, amounts to clear and convincing evidence of the State's inability. Here are the relevant passages from the transcript:

- At page 220 of the tribunal record:

> [TRANSLATION]
>
> By counsel (addressing the claimant)
>
> Q. How do you know that they cannot . . . that they are unable to protect you?
>
> A. In my country, there are thousands of cases like mine.
>
> Q. There are?
>
> A. Thousands.
>
> - Thousands, okay
>
> A. Like my case. So, I was not going to wait to become another number, one more person and all those who had the courage to inform, they were killed. I have . . . I have a duty to take care of my family and it's the most important thing that I have.

- At page 222 of the tribunal record:

> By the claimant (addressing the member)
>
> - Sir, but I need you, I want to understand, I need you to explain the question to me.
>
> A. You say, Sir, that in your country there are thousands of cases like yours.
>
> - Yes.

> A. Okay, then what . . . what I understand is that there are people who have knowledge of . . . of drug trafficking transactions, and that they reported them to the police or to the public prosecutor and their lives were then placed in danger.
>
> - Yes.
>
> A. Because they could not get protection from their country that is what I understand.
>
> Yes, it's . . . it's like that.

The evidence in the record rather suggests the contrary in that the police were diligent in responding to the call from the owner of the claimant's home and in offering to escort him to the PGR; and in that the authorities were making an effort in looking for Vincente Carrillo.

[38] The principal claimant also claimed before this Court that the issue of State protection must be treated differently under section 97 of the Act. Therefore, he contended that the analysis should be made at a more personal level, i.e. that the Court must determine whether the individual would face a personalized risk of being threatened if he were to return and if the individual was personally unable or unwilling to avail himself of that State's protection.

[39] The notion of State protection in the context of a claim of a person in need of protection is based on sub-paragraph 97(1)(*b*)(i) of the Act, *supra*. The terminology of this provision is essentially the same as paragraph 96(1)(*a*) of the Act. These provisions in fact specify that the claim of a person in need of protection or a Convention refugee will be granted if the claimant is "unable" or "unwilling" to "avail themself of the protection" their country of nationality.

[40] There is a well-known principle of statutory interpretation called the harmonious interpretation principle. This principle allows one to presume on reviewing a statute that an

expression has the same meaning every time that it is used (See Paul-André Côté, *Interprétation des lois*, 3e éd., Montréal, Thémis, 1999, page 419 et seq.). In this context, Mr. Justice Cory of the Supreme Court of Canada held, in *R. v. Thomson*, [1992] 1 S.C.R. 385 at page 400, that "[u]nless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an act."

[41] Sections 96 and 97 are two provisions found in the same division of the same act and using the same terminology. Moreover, neither the case law nor the doctrine make a distinction regarding the test to be applied to determine the State's ability to protect its citizens when the refugee claim is made under section 96 as opposed to section 97. Accordingly, this Court cannot identify any reason that would justify disregarding the harmonious interpretation principle to accommodate the claimant's argument. I would add that this argument does not have any effect on the outcome of the judgment in this case.

[42] Finally, I would like to say a few words about another argument raised by the principal applicant. He argues that the panel erred in confusing the notions of threats and persecution with State protection and, in support of this argument, he refers to the following passage from the decision:

> Consequently, the claimant has not demonstrated that he faces a serious possibility of persecution should he return to his country or that he could be personally subjected to a risk to his life or to a risk of cruel and unusual treatment or punishment.

Even if the reading of this passage out of context appears to suggest that the panel misunderstood, on reviewing the entire document it is clear that this is not the case. As long as the claimant is able to understand the reasoning underlying the decision and that the reasoning is not wrong, there is no

basis for intervening. Lastly, I would like to point out an important principle in judicial review matters: the reasons for judgment are not to be read microscopically (*Boulis v. Canada (Minister of Manpower and Immigration*, [1974] S.C.R. 875 at page 885).

JUDGMENT

1. This application for judicial review is dismissed. If either party wishes to submit one or more questions to the Court for certification, the deadline for doing so is October 31, 2006, and the deadline for opposing the question(s) is November 7, 2006.

"François Lemieux"
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6995-05
STYLE OF CAUSE:	JESUS MANUEL RINCON ARELLANO, CLAUDIA LORENA SANCHEZ RODRIGUEZ, JESUS DANIEL RINCON SANCHEZ v. MINISTER OF CITIZENSHIP AND IMMIGRATION
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