Federal Court  Cour fédérale

Date: 20120221

Docket: IMM-2713-11

Citation: 2012 FC 231

Ottawa, Ontario, February 21, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

ISMAEL COLIN GONZALEZ
JUANA SANCHEZ ROSAS
LEONARDO COLIN SANCHEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application by Mr. Ismael Colin Gonzalez (Mr. Gonzalez), Ms. Juana Sanchez Rosas (Ms. Rosas) and their minor son, Leonardo Colin Sanchez (L. Sanchez) (all together the Applicants), made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the decision of the Immigration and refugee Board (the Board) rendered on March 30, 2011, in which the Board concluded that the Applicants are neither

Convention refugees under section 96 nor persons in need of protection under section 97 of the *IRPA*.

[2] For the reasons that follow, this application for judicial review is dismissed.

II. Facts

[3] The Applicants are citizens of Mexico.

[4] Ms. Rosas and her husband, Mr. Gonzalez, claim they are persecuted by the police because of their political opinions and their active participation in the *Partido Revolucionario Democratico* [PRD].

[5] Ms. Rosas and her husband became members of the PRD in 2005-2006. The two of them actively worked to promote their party locally and their candidate for the presidency of Mexico, Mr. Andres Manual Lopez Obrador.

[6] On February 15, 2006, Ms. Rosas and Mr. Gonzalez, along with 8 other fellow supporters, were verbally and physically assaulted by police officers in the municipality of Ecatepec while putting up posters for the upcoming federal election. The police officers also confiscated their posters. Mr. Gonzalez was physically assaulted and warned by the officers not to post anymore publicity for the PRD.

[7] Mr. Gonzalez tried unsuccessfully to lodge a complaint with the Public Ministry. It was denied on grounds of insufficient evidence. The Ministry took the position that Mr. Gonzalez provoked the situation and damaged public property.

[8] On April 20, 2006, Ms. Rosas allegedly received a telephone call from Commander Urbano Lopez Hernandez, warning her to stop supporting candidate Obrador.

[9] Both Ms. Rosas and Mr. Gonzalez actively worked in the political campaign, even though their life was at risk.

[10] Although candidate Obrador lost his election, Ms. Rosas and Mr. Gonzalez were involved in the movement protesting the results of the election.

[11] A march took place on November 20, 2006, in support of the nomination of Mr. Obrador as President of Mexico. 80 to 100 people marched from Ecatepec towards the Federal district. The march was interrupted by police officers who assaulted the demonstrators and dispersed them with tear gas. Mr. Gonzalez was again forced in a police car where he was physically assaulted. 15 to 20 demonstrators were arrested. Ms. Rosas allegedly recognized Commander Hernandez as the head of the operation.

[12] Ms. Rosas and Mr. Gonzalez subsequently communicated with a director at the National Democratic convention who suggested they file their own complaint with the police. However, Ms. Rosas did not file a complaint since she did not have the support of the other demonstrators.

[13] Six months later, Ms. Rosas and Mr. Gonzalez were involved in the organization of a national protest against the electoral results of July 2, 2006. The protest took place in Mexico City on July 1st, 2007. Mr. Gonzalez was hired to do the publicity.

[14] On May 24, 2007, five armed men entered Mr. Gonzalez' business in his absence. They assaulted the workers and confiscated some material. The men told Mr. Gonzalez' brother Commander Hernandez was sending a message. Both Mr. Gonzalez and Ms. Rosas believe that Commander Hernandez was acting further to instructions from the state prosecutor, Mr. Abel Villicana Estrada, who is actively involved in the *Partido Revolucionario Institucional* [PRI].

[15] The next morning, Ms. Rosas saw a police car parked in front of her son's school. She quickly left the scene, believing they were looking for her. The Applicants then decided to leave Mexico for their own safety. Ms. Rosas resigned from her employment at Ford where she had worked as a credit analyst over 5 years. The Applicants obtained passports and moved to Ciudad Hidalgo in the state of Michoacan where they resided with Mr. Gonzalez' uncle. They remained in that city for approximately 4 months.

[16] On August 27, 2007, Ms. Rosas saw Commander Hernandez in Ciudad Hidalgo. She became very frightened and Applicants decided to leave Mexico. They arrived in Toronto on September 9, 2007, and claimed refugee protection in Montreal on September 17, 2007.

[17] The Board denied the Applicants' claim, finding they lacked credibility and failed to provide clear and convincing evidence to rebut the presumption of adequate state protection in Mexico. The Board also noted that there was a viable internal flight alternative [IFA] in Veracruz, Acapulco and Cancun.

III. Legislation

[18] Sections 96 and 97 of the *IRPA* provide as follows:

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

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

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of

Personne à protéger

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au

accepted international standards, and	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.

IV. Issues and standard of review

A. Issues

[19] The Court must answer the following questions:

1. ***Did the Board err in determining that the Applicants were not credible?***

2. ***Did the Board err in determining that the Applicants failed to rebut the presumption that Mexico could provide adequate state protection?***

3. Did the Board err in determining that there existed a viable IFA in Veracruz, Acapulco or Cancun?

4. Did the Board's conduct raise a reasonable apprehension of bias?

B. Standard of review

[20] The first issue is a question of fact that is reviewable on a standard of reasonableness. Both a credibility assessment and treatment of the evidence are within the Board's expertise and therefore, deserving of deference (see *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA); and *Mailvakanam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1422 at para 15).

[21] The second issue is related to the adequacy of state protection and is a question of mixed fact and law reviewable on a standard of reasonableness (see *Lebedeva v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1165, [2011] FCJ No 1439 at para 32).

[22] The third issue related to the Board's determination regarding the viability of a proposed IFA is a question of mixed fact and law also determinable on a standard of reasonableness (see *M.A.C.P. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 81, [2011] FCJ No 92 at para 29).

[23] As for the fourth question, apprehension of bias raises an issue of procedural fairness. The appropriate standard of review is correctness (see *Jaroslav v Canada (Minister of Citizenship and Immigration)*, 2011 FC 634 at para 31).

V. Parties' submissions

A. Applicants' submissions

[24] The Applicants' contend that their refugee application turns on the degree of depth to which the Board carried out its assessment on state protection, given the breadth of materials available concerning this particular issue.

[25] The Applicants acknowledge that the Board correctly referred to Justice Lemieux's decision in *Mendoza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 119 [*Mendoza*] when assessing the issue of state protection in Mexico. Nevertheless, they allege the Board omitted to take in consideration the context in which the assessment of state protection should have been made. In their view, the Board unreasonably concluded that they failed to exhaust all avenues provided by the state apparatus.

[26] According to the Applicants, the Board erred in law and in fact by failing to address the highly probative evidence found in the National Binder on Mexico as well as the evidence they adduced in support of their claim.

[27] They submit that the binder contains a plethora of evidence showing the inadequacy of state protection in Mexico. This evidence, according to Applicants demonstrates that state protection is not a safe and reasonable solution in the context of their application.

[28] Furthermore, the Applicants produced a letter from Mr. Martin Zepeda Hernandez, Federal Deputy of the PRD (see Applicant's record at pages 56 and 57), acknowledging their participation in political activities. The letter states that "…the corruption networks and the lack of guarantees for our basic rights bring as consequences the situation that our country faces nowadays and to take decision as the one took by my colleagues and many other Mexicans in order to protect their lives and that of their families".

[29] This letter, according to the Applicants, goes to the heart of their claim and raises the issue of state corruption and security. The Board inadequately assessed the evidence adduced and turned its mind from Justice Lemieux's decision in *Mendoza* where he specifies, in paragraph 33, that "10) the quality of such evidence will be raised in proportion with the degree of democracy of state [and that] 11) the degree of democracy may be lowered if the state tolerates corruption in its institutions" (see also *Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359 [*Avila*]).

[30] Additionally, the Applicants claim the Board should have assessed the role played by the Mexican security forces in reinforcing democracy. The National Binder raises deficiencies in policing and draws a link between these deficiencies and the quality of democracy in Mexico. The Board's failure to consider this evidence renders its decision unreasonable and should trigger the intervention of this Court according to the Applicants.

[31] The Applicants submit the Board failed to explain why or how the Federal Electoral Institute would offer a viable solution to the problem of intimidation and physical abuse at the hands of the police.

[32] It is the Applicants' position that the Board's finding, with respect to the adequacy of state protection in Mexico, is therefore unreasonable and should be reviewed.

[33] With respect to their credibility, the Board wrote: "the Tribunal finds that it is implausible that on three separate and distinct occasions, there is no indication of complaints being lodged in circumstances where persons had been physically abused and terrorized while legally participating in a Federal Election Campaign" (see paragraph 15 of the Board's decision). It is submitted that the Board had no specialized knowledge about how complaints are or were lodged or vetted by the PRD.

[34] The Applicants also contend that the Board created a double standard when it wrote that "if in fact the claimants actually sustained such abuse and threats to their lives, so as to be terrified as they declared, it is not credible and that they would continue to participate openly and actively in support of the PRD and its presidential candidate Mr. Obrador from April 15th 2006 until they allegedly fled the state of Mexico at the end of May 2007" (see para 15 of the Board's decision). The Applicants underline that, even though they participated actively in dangerous political activities, their actions were consistent with their right to express their political opinions.

[35] The Board erred in its finding of a viable IFA. The Applicants submit that the Board is imposing that they renounce their political beliefs which is tantamount to asking an applicant who invokes religious beliefs to stop worshipping. The Applicants also contend that the National Binder is quite informative about the drug trafficking organizations in the region of Acapulco, Veracruz and Cancun.

[36] Finally, the Applicants argue that the Board raised a reasonable apprehension of bias which is yet another element to support the intervention of this Court.

B. Respondent's submissions

[37] Despite the attacks and the threats received by the Applicants, the PRD refused to lodge a complaint with the Public Ministry of the state of Mexico, insisting the militants themselves should have lodged the complaint. The Board found this complete inaction of the PRD to be implausible.

[38] At the hearing, Ms. Rosas acknowledged that, given the refusal of the Public Ministry to register a complaint, she could have lodged one herself at the Federal level, with the public prosecutor or the Attorney General of the republic. She decided not to. The Board found it contradictory that the Applicants were terrified to file a complaint with the Federal authorities all the while actively pursuing their political activities.

[39] The Respondent denies the Board asked the Applicants to cease their political activities. Rather, it simply noted that the Applicants' explanation for not having filed a complaint is inconsistent with their decision to carry on their political activities despite the alleged threats.

[40] The Respondent alleges that despite physical and verbal abuses, the Applicants failed to file complaints at the Federal level. According to Respondent, the Board reasonably concluded that the Applicants' behaviour was not compatible with the presence of a subjective fear of persecution at the hands of the police.

[41] The Respondent submits that it was reasonable for the Board to find that state protection would have been reasonably forthcoming if the Applicants had brought their complaints at the Federal level, notably the public Prosecutor's Office and the Attorney general of the Republic of Mexico (see *Cordero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 603 at para 18).

[42] The Respondent claims that Applicants failed to adduce evidence to demonstrate that a complaint to the federal authorities would have endangered them.

[43] The Respondent adds that Mr. Hernandez' letter does not provide any evidence to establish that state protection is unavailable in Mexico. The Applicants also refer to the National Binder which notes the problems of corruption and inefficiency within the Mexican police. There is no doubt that such problems exist however, as noted in the case law, this does not mean that refugee claimants should be exempted from seeking aid from other authorities. In the case at hand, the

Respondent alleges that only one attempt was made to file a complaint and only to a local authority. That authority refused to intervene. This is insufficient to demonstrate that the Mexican police is unable or unwilling to offer its protection or to trigger the substitutive international protection referred to in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*].

[44] As to the existence of an IFA, the Board must be satisfied that there is no serious possibility of persecution or risk of torture in the identified area and that it would not be unreasonable for an applicant to seek refuge there. There is no indication from the Applicants that they had any fear of persecution or risk of torture in Acapulco, Veracruz or Cancun.

[45] The Respondent alleges that the drug trafficking problems in Mexico are not relevant to this case and cannot counter the existence of an IFA.

[46] The Respondent submits that the presence of an IFA is sufficient to dismiss an asylum claim (see *Calderon v Canada (Minister of Citizenship and Immigration)*, 2010 FC 263 at para 10).

[47] As to the apprehension of bias, the Respondent notes that the use of a given name in reasons is not unheard of. Indeed, the Federal Court has used given names of Applicants in at least one case (see *Bajwa v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 474).

[48] The Respondent finally alleges that notwithstanding the use of given names, the reasons do not indicate the Board member disrespected the Applicants.

VI. Analysis

1. Did the Board err in determining that the Applicants were not credible?

[49] The Board found that the Applicants did not have a well-founded fear of persecution based on the lack of credibility of the principal aspects of their narrative.

[50] The Court finds the Board's assessment on credibility to be reasonable. The Board considered that if the Applicants were truly terrified, they would have ceased their political activities in support of the PRD, knowing they were endangered.

[51] The Court also finds that it was open to the Board to note the implausibility that the directors of the national executive of the PRD refused to lodge a complaint with the Public Ministry of Mexico and insisted that the complaint be lodged under Mr. Gonzalez' name. It was also reasonable for the Board to underline the Applicant's failure to file a complaint with the Public Prosecutor's office within the office of the Attorney General. The jurisprudence of this Court is clear. Applicants have a duty to avail themselves of all the recourses available to them in their own country before seeking protection from another country (see *Hinzman v Canada (Minister of Citizenship and Immigration)*, [2007] FCJ No 584 at para -46). The Board reasonably rejected the Applicants' explanations as being inconsistent with their actions, thereby leading to the inevitable conclusion and that the Applicants did not have a subjective fear of persecution at the hands of the police.

2. Did the Board err in determining that the Applicants failed to rebut the presumption that Mexico could provide adequate state protection?

[52] The Board did not err in determining that the Applicants failed to rebut the presumption that Mexico could provide them with adequate protection.

[53] In *Mendoza*, Justice Lemieux held, in paragraph 33, that "each case is sui generis so while state protection may have been found to be available in Mexico, maybe even in a particular state, this does not preclude a court from finding the same state to offer inadequate protection on the basis of different facts" (see also *Avila* cited above). The Applicant is expected to take all reasonable steps in the circumstances to seek state protection from his persecutors (see *Ward* and *Avila*). It is important to note that an Applicant who fails to do so bears the onus of convincing the Board of the inadequacy of state protection (see *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94).

[54] Furthermore, it is important to underline that when a Board finds that an Applicant failed to take the necessary measures to seek state protection, this finding is fatal to the claim if the Board concludes the protection would have been forthcoming. The Board must assess the influence of the alleged persecutor on the capability and willingness of the state to protect (see *Ward* and *Avila*).

[55] In *Ward*, the Supreme Court of Canada held that the testimony of similarly situated persons, individual experiences with state protection and documentary evidence can all be adduced to demonstrate that state protection would not have been forthcoming.

[56] The quality of the evidence necessary to rebut the presumption of state protection will rise in proportion to the degree of democracy of the state involved (see *Avila and Ward*).

[57] The evidence must also be relevant, reliable and convincing to satisfy the trier of fact on a balance of probabilities that state protection is inadequate (see *Carillo*).

[58] The Board acknowledged the Applicant's attempt to file a complaint on April 16, 2006. At the hearing, Ms. Rosas admitted she could have filed a complaint at the Federal level with the Public Prosecutor's office within the office of the Attorney General, but failed to do so because they were terrified. The Board found that "this behaviour does not constitute having taken all reasonable steps in the circumstances to seek state protection. Moreover, there is no evidence to support the contention that the claimants would have put themselves in danger had they attempted to demonstrate the ineffectiveness of state protection in Mexico" (see the Board's decision at para 17).

[59] While the Court cannot ascertain how the Federal Electoral Institute would have assisted the Applicant nor what the outcome would have been if the Applicants had filed a complaint at the Federal level, it must nonetheless take note that the Board correctly weighed the impact of Applicants' failure. The Board correctly noted the Applicants' failure to adduce any evidence to establish that it was dangerous to lodge a complaint with the Office of the Attorney General. This finding is reasonable and was open for the Board to make.

[60] The Court notes the probative value of the National Binder. The adequacy of state protection must nonetheless be considered in the context of the facts of each case. While the binder contains information with respect to deficiencies in certain Mexican institutions, the Applicant still had the burden to present relevant evidence to convince the Board that in this particular instance these deficiencies justified their failure to lodge complaints with the appropriate authorities.

[61] The Board reasonably found that the Applicants had failed to rebut the presumption that Mexico is capable of protecting them.

3. Did the Board err in determining that there existed a viable IFA in Veracruz, Acapulco or Cancun?

[62] The Board did not err in determining that there existed a viable IFA in Veracruz, Acapulco or Cancun.

[63] The Board must consider the viability of an IFA using the two prong test set out in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, [1993] FCJ No 1172 (FCA) and *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 1256; [1992] 1 FC 706 (FCA). It must firstly be satisfied, on a balance of probabilities, that there is no serious possibility that the Applicant will be persecuted in the proposed IFA. Secondly, the conditions of the proposed IFA must be such that it is not unreasonable for the claimants to seek refuge there.

[64] On the first part of the test, the Board was satisfied that the Applicants would not be at risk in one of the three destinations identified. It determined that Ms. Rosas "offered no explanation as to why their lives would continue to be at risk once they were no longer active with the PRD in the state of Mexico" (see the Board's decision at para 18). This conclusion could have been unreasonable in this instance since their political activism is allegedly at the heart of their fear of persecution. An IFA should be realistically attainable. However, the Board concluded that the Applicants suffered from a lack of credibility that ultimately affected their claim since they had no subjective fear of persecution at the hands of the police. "In the context of a state protection analysis, it is an error of law for the Board to conclude that state protection is available if it fails to make any findings about the applicant's personal circumstances" (see *Velasquez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1201 at para 18 [*Velasquez*]; and *Moreno v Canada (Minister of Citizenship and Immigration)*, 2010 FC 993). This principle does not apply in the present case because the Board properly considered the Applicants' account of events and, it concluded that both Mr. Gonzalez and Ms. Rosas were not credible since they both remained actively involved in politics and failed to take concrete measures to seek state protection. This conclusion is reasonable since "there may … be an overlap between the Board's consideration on an IFA and its analysis of state protection" (see *Velasquez* cited above at para 16).

[65] With respect to the second prong of the test, Ms. Rosas testified at the hearing that it would have been possible for her to obtain a transfer to another Ford Company location in Mexico but that it would take some time to be transferred to one of the three destinations identified as possible IFAs The Board noted that she and her family spent more than three months in the state of Michoacán starting in June before departing to Canada. The Board determined that a transfer could have

reasonably been achieved in that timeframe. Such a conclusion “falls within the range of possible outcomes which are defensible in respect of the facts and the law” (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para. 47).

[66] The IFA is a viable solution and reasonable in this instance.

4. Did the Board raise a reasonable apprehension of bias?

[67] The Board did not raise a reasonable apprehension of bias. Even though the Board’s use of first names is discouraged and not commendable, it does not breach its duty of procedural fairness. This argument is not substantive and must be rejected.

VII. Conclusion

[68] The Board properly concluded that the Applicants are neither Convention refugees nor persons in need of protection. This application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed; and

2. There is no question of general interest to certify.

"André F.J. Scott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2713-11
STYLE OF CAUSE:	ISMAEL COLIN GONZALEZ JUANA SANCHEZ ROSAS LEONARDO COLIN SANCHEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Québec
DATE OF HEARING:	January 11, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	The Honourable Mr. Justice Scott
DATED:	February 21, 2012

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