Federal Court  Cour fédérale

Date: 20120229

Docket: IMM-4489-11

Citation: 2012 FC 276

Ottawa, Ontario, February 29, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

RICARDO LUNA RIOS, ROSA ZAMUDIO DEMERUTIS, and MARTHA LUNA ZAMUDIO and FERNANDA LUNA ZAMUDIO by their Litigation Guardian RICARDO LUNA RIOS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated June 1, 2011, wherein the applicants were determined to be neither Convention refugees within the meaning of section 96 of the Act, nor persons in need of protection as defined in subsection 97(1) of the Act. This conclusion

was based on the Board's credibility concerns and alternatively on its finding that adequate state protection was available to the applicants in Mexico.

[2] The applicants request that the Board's decision be quashed and the matter be referred back for redetermination by a differently constituted panel.

Background

[3] The principal applicant is Ricardo Mauricio Alejandro Luna Rios. The other applicants are related to him as follows: Rosa Martha Zamudio Demerutis, his wife; Martha Alejandra Luna Zamudio, his minor daughter; and Fernanda Gabriela Luna Zamudio, his minor daughter. All the applicants are citizens of Mexico.

[4] The applicants visited Canada in 2005 to assist the sister of the principal applicant's wife with a difficult pregnancy. At that time, the principal applicant worked illegally in Canada. However, as the family was unable to enroll their daughters in school, they returned to Mexico in 2006.

[5] In 2007, the principal applicant began working as a manager of a large gas station in Mexico City. Although the station was owned by Corpo Gas, the principal applicant was hired and employed by Proselic. Corpo Gas and Proselic are owned by the same people. Under contract, Proselic provides employees, such as the principal applicant, to work at Corpo Gas' gas stations. Corpo Gas owns several gas stations in Mexico City.

[6] The gas station that the principal applicant managed had 16 pumps, 50 employees and several service bays. Approximately $50,000 Canadian dollars (600,000 Mexican pesos) worth of gas was sold daily, most of which was paid for in cash. The main vault was located on the first floor of the station. There was also a small vault in the principal applicant's office. The gas station had extensive security, including video surveillance. Twice daily, the bank sent armoured vehicles to collect money from the main vault.

[7] During the principal applicant's employment as gas station manager, he fired approximately fifteen employees for various reasons, including stealing. Many of these fired employees were angry when fired and one also threatened him.

[8] In 2009, the principal applicant began experiencing problems. First, in mid-April, two men came to the gas station to apply for work. Unlike other applicants, these men were well-dressed and asked many questions about the operations. Later, on May 15, 2009, an individual who identified himself as the commandant and who spoke in a northern Mexican accent called the principal applicant. The caller told the principal applicant that he had seen his family at the grocery store. Over the following days, the principal applicant received several anonymous calls where the caller hung up without speaking.

[9] On May 22, 2009, the principal applicant received a call on his direct (unlisted) office line. Speaking in a northern Mexican accent, the caller stated that he was calling on behalf of the commandant. The caller demanded 1 million pesos (worth approximately $95,000 Canadian at that time) and warned the principal applicant that if he did not pay, hid, or sought police help, they

would find him and something bad would happen. The caller told the principal applicant to obtain the funds from the daily sales. The following day, the principal applicant spoke with Arturo Sosa, one of the company auditors (later referred to as a supervisor at the hearing), and asked, without providing any specifics, what he should do if threats were made against him in demand for money. The auditor told him that in such an event, he should go to the police.

[10] On May 25, 2009, a neighbour told the principal applicant's wife that a stranger has asked where the family lived. As the stranger had accurately described the family and stated that he was a family friend, the neighbour told him where the applicants lived. The same day, the principal applicant received a phone call from a caller who asked him about his daughters at school. The caller also reminded the principal applicant about the money. In fear, the principal applicant and his wife withdrew their daughters from school.

[11] On May 28, 2009, the principal applicant received another call at work. The caller told him to have the money ready for June 1, 2009. The principal applicant responded that he would be away that day for an inventory check and it would take some time to collect the money. Later that same day, the principal applicant reported all the events that had transpired to the police. After an interview lasting between 30 and 45 minutes, the police informed the principal applicant that they were unable to do anything as there was no evidence. The police also refused the principal applicant's request to trace the phone calls he received.

[12] In fear of the continued threats, the principal applicant's wife and children went to live with the wife's family. The couple also discussed options for leaving Mexico. On request, the wife's

sister who lived in Canada agreed to loan the family money to purchase tickets to Canada. The earliest date available to travel was June 28, 2009 due to the ongoing swine flu crisis that had restricted the number of flights. The applicants reserved their flights on May 30 and paid for them the following day.

[13] On June 6, 2009, the principal applicant resigned from his job. He continued to work until June 15th to allow the company to find and train a replacement and to conduct an audit process to verify the state of the station. The principal applicant also continued working to earn extra money to cover his family's expenses.

[14] On June 11, 2009, a replacement was found for the principal applicant's position. That same night, the principal applicant received another phone call from a person who identified himself as the commandant. The caller asked if the money was available and who the principal applicant's replacement was. The principal applicant said he did not have the money and did not give the caller any information about his replacement.

[15] On June 20, 2009, the principal applicant received another phone call from an individual who identified himself as the commandant. The caller indicated that he knew where the principal applicant's family was living and demanded to know when the money would be available. The principal applicant hung up without responding.

[16] On June 22, 2009, the principal applicant received another call. The caller stated that he knew the principal applicant's family was staying with relatives and threatened that he would find them.

[17] On June 28, 2009, the applicants left Mexico and arrived in Canada.

[18] The applicants filed inland claims on July 2, 2009. These claims were based on their fear of persecution arising from membership in a particular social group, namely, those targeted through their particular employment with access to large amounts of money. They also claimed protection under section 97 of the Act as persons who faced a particular risk to life and whom the Mexican authorities were unable to protect.

[19] The applicants' original Personal Information Forms (PIFs), dated August 3, 2009 were incomplete as they were prepared without counsel or the use of an interpreter. Amended PIFs, prepared with the assistance of counsel, were filed on October 9, 2009. A further minor amendment was also made on May 4, 2011.

[20] The hearing of the applicants' refugee claims was held on May 11, 2011.

Board's Decision

[21] The Board issued its decision on June 1, 2011.

[22] The Board first summarized the applicants' allegations. Next, the Board found that the applicants' identities as Mexican citizens were established based on the evidence before it.

[23] The Board determined that there was no nexus under section 96 of the Act as the basis of the principal applicant's fear was criminality which has no connection to any Convention grounds.

[24] Turning to the section 97 analysis, the Board found that the determinative issue was credibility. The Board highlighted that although the June 1, 2009 extortion payment deadline passed without payment, the applicants were never visited by the extortion gang at work, home or school. In addition, none of the applicants' relatives in Mexico experienced problems from the gang searching for the applicants. As such, the Board disbelieved, on a balance of probabilities, that the principal applicant was targeted for extortion.

[25] The Board highlighted that despite the threats in May 2009 and the passing of the June 1, 2009 deadline, the principal applicant willingly delayed his departure from the company to train his replacement as consideration for the company's resignation policies. The Board found that this delay of half a month indicated a disturbing or even fatal lack of fear. Therefore, on a balance of probabilities, the Board found that the principal applicant was not a target of extortion.

[26] The Board also noted that the principal applicant did not discuss his problem with his company superiors even though extortion and robberies would have been common experiences for gas station managers who were responsible for substantial amounts of money from sale proceeds. In addition, as far as the principal applicant knew, his replacement did not experience extortion

attempts. Further, the ‘gang’ (callers) did not confront the applicants after the passing of the June 1, 2009 deadline. The Board also questioned why the gang did not come directly to the principal applicant’s office and demand the day’s sales or the money that was in his office vault. Finally, the Board questioned why the gang continued to make threatening calls after the principal applicant had left his employment and no longer handled cash from the gas sales.

[27] Based on these observations, the Board did not believe, on a balance of probabilities, that the principal applicant was a target or had been targeted by a gang of extortionists.

[28] The Board found that an alternative determinative issue was state protection. It noted that the principal applicant had not rebutted the presumption of state protection with clear and convincing evidence. Although he had visited the local police station, his complaint was not accepted by the police for lack of evidence to support his claim. Furthermore, the Board found the principal applicant’s explanation for not discussing the extortion with company superiors incredible as the company would have known that extortion was a common problem among station managers since they handled large amounts of cash from daily sales.

[29] Further, with his two year experience as a gas station manager and his six year experience as an auditor and accountant, the Board deemed it reasonable to expect that the principal applicant was aware of the protection mechanisms available to him in Mexico, including the human rights commission in Mexico City and other specialized law enforcement agencies. As such, the Board found that the principal applicant’s fear of criminality was not reflective of the state’s inability or unwillingness to provide adequate state protection to him and his family.

[30] The Board then listed various principles that have emerged in the jurisprudence on refugee protection. The Board noted that Mexico is a working democracy with the state apparatus to provide adequate protection to its citizens. The Board cited documentary evidence in finding that Mexico has a functioning police, security force and judiciary. The evidence also indicated that Mexico has several agencies to assist citizens in accessing state protection against criminality, gangs and various other crimes. In addition, the evidence indicated that the country's presidency has placed importance on the fight against crime and the protection of its people. The Board noted that as in the U.S., the fact that criminal gangs operate in the country did not indicate a lack of state protection.

[31] Furthermore, although deficiencies may exist in the Mexican criminal justice system, the Board noted a continuing progress in the government's efforts to provide adequate protection to its citizens. The Board found no evidence of a pervasive undermining of democratic institutions. As such, the Mexican state was assumed to be capable of providing adequate protection. Thus, the applicants bore a heavy burden to rebut the presumption of state protection.

[32] Recognizing this heavy burden, the Board found that the applicants had not provided "clear and convincing" proof of the lack of state protection available to them in Mexico. Therefore, the Board found that, on a balance of probabilities, the applicants did not face a risk of harm or a risk to life or of cruel and unusual treatment or punishment if returned to Mexico.

[33] Based on this analysis, the Board rejected the applicants' claims under both section 96 and subsection 97(1) of the Act.

Issues

[34] The applicants submit the following points at issue:

1. Did the Board err in law by impugning the principal applicant's credibility by misapprehending evidence and by conjecture and speculative musings?

2. Did the Board err in ignoring or misapprehending evidence of personalized targeting and in finding that there was adequate state protection available in Mexico?

3. Did the Board err in failing to undertake the requisite analysis regarding nexus to a Convention ground and by failing to properly consider the link between extortion and persecution and/or the need for protection?

4. Were the applicants denied natural justice and fairness when the Board denied their claim on the basis that they had delayed their departure from Mexico, after implicitly stating at the outset of the hearing that it was not an issue because it was not noted in the Refugee Protection Division screening form?

[35] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in finding no nexus to a Convention ground under section 96 of the Act?

3. Did the Board err in determining that the principal applicant was not credible?

4. Did the Board deny the applicants procedural fairness by basing its decision on delay in departure?

5. Did the Board err in conducting the section 97 analysis and determining that state protection was available to the applicants in Mexico?

Applicants' Written Submissions

[36] The applicants submit that the questions of fact and of mixed fact and law that are at issue in this case are reviewable on a reasonableness standard. However, this Court must intervene if the Board's conclusions are based on erroneous findings of fact without regard for the material before it. Further, the issue of whether something (i.e. a personal characteristic) constitutes a particularized risk under section 97 of the Act is reviewable on a correctness standard.

[37] The applicants submit that the Board's credibility findings were based on a misunderstanding or misinterpretation of the evidence before it. The Board also erred by basing its credibility findings on conjecture and speculative musings. The applicants submit that there were no apparent contradictions in their testimony. They submit that a Board must give its reasons for casting doubt on the applicants' credibility in clear and unmistakable terms.

[38] The applicants submit that delay in departure was not noted as an issue in either the Refugee Protection Division screening form or at the outset of the hearing. Further, the Board did not ask any questions on this issue. In indicating that a certain issue was resolved or misleading the applicants

into believing that a certain issue was resolved and then reaching an adverse finding on that issue, the Board denied the applicants natural justice.

[39] Nevertheless, the applicants submit that they gave clear explanations for their departure on June 28, 2009 and for the date that the principal applicant left his employment. The Board was obliged to specifically consider this evidence, which provided a reasonable interpretation of the events. The applicants also submit that the Board erred by imposing its own view of what it considered would have been a "sensible approach to the situation".

[40] The applicants submit that it was relevant that the principal applicant's employer was Proselic, not Corpo Gas. The Board erred in assuming that the principal applicant would be able to seek assistance from Corpo Gas after the threats arose. Conversely, Proselic had no policy on extortion demands. Employees were therefore required to take up such matters directly with the police as the principal applicant did.

[41] The applicants also submit that the Board erred in failing to explain its reasoning for its finding that it would have been common for gas station managers to experience extortion or robberies. The Board's explanations had to be based on reasonable inferences, not conjecture or speculation. Further, the Board should have granted the applicants an opportunity to explain why evidence that it deemed implausible was in fact plausible.

[42] The applicants highlight the Board's observation that the principal applicant had spoken with his supervisor and its later finding that the principal applicant did not discuss his problem with

company supervisors. This conclusion is confusing and based on unreasonable conjecture regarding the normal course of action for reporting extortion. As such, the Board's finding was not based on inconsistencies internal to the applicants' evidence, but rather on what it deemed a more likely scenario in the circumstances. Its findings were therefore unreasonable.

[43] Further, the Board misinterpreted or ignored the principal applicant's testimony in concluding that his replacement had not been contacted. The evidence merely provided that the principal applicant did not know whether his replacement had been contacted. The principal applicant also attempted to explain why the gang members continued to contact him after he had left the company. The Board did not consider these explanations even though it was plausible when considered from within the applicants' milieu. The applicants submit that their explanations were not so irrational as to support outright rejection.

[44] Turning to state protection, the applicants also submit that the Board ignored or misinterpreted evidence on this issue. The Board's silence on evidence that contradicted its findings indicated that it ignored that evidence. Specifically, the Board erred by not referring to any documentary evidence showing that the resources devoted to combating crime has not produced tangible results. The applicants also submit that the Board erred by not considering whether the state protection was actually effective.

[45] The applicants submit that the Board erred in not considering that the principal applicant approached the police, and they did not refer him to any other government agencies. In addition, the

Board relied on dated documentary evidence. More recent evidence indicated that protective agencies in Mexico continued to have limited and ineffective impact.

[46] The Board also erred in finding that because the principal applicant had been an auditor, he should have known about protection mechanisms. Rather, the Board should have analyzed the principal applicant's attempts to seek protection and provided reasons on why these were insufficient. The principal applicant's efforts to engage state protection were sufficient in light of the established jurisprudence that applicants must not risk their lives in seeking protection that is not forthcoming.

[47] The applicants submit that the Board also erred in its analysis of nexus to Convention grounds by not considering whether the principal applicant was targeted because of his particular social group, namely, managers of gas stations with access to large amounts of money.

[48] Finally, the applicants submit that the Board failed to undertake an adequate analysis of risk under section 97 of the Act. The Board's negative credibility finding is not necessarily determinative of a section 97 claim. The Board was required to undertake the section 97 analysis, not merely the state protection analysis. The section 97 analysis requires a contextual approach that takes into account the individual circumstances of each applicant. In this case, the principal applicant was specifically and personally targeted on a repeated basis because of his position and circumstances. As such, his fear did not pertain to random acts of violence. The fact that he took his family and fled Mexico, where he had a good career, confirms his personal fear.

Respondent's Written Submissions

[49] The respondent submits the standard of review of the Board's decision is reasonableness. This Court should not intervene unless the Board's decision does not fall within the range of possible acceptable outcomes that are defensible in respect of the facts and law.

[50] The respondent submits that given the level of fear that the principal applicant claimed to have felt from the extortion threat, it was reasonable for the Board to conclude that if this fear was genuine, the principal applicant would have left his job earlier and joined his family in hiding until their planned departure.

[51] The respondent submits that the Board did not ignore the evidence of the availability of plane tickets. Rather, the Board did not believe the principal applicant's rationale for staying at his job until mid-June and not going into hiding until the end of the month.

[52] The respondent highlights that there was no mention in the principal applicant's original or amended PIFs that he approached a supervisor about the extortion threats. Rather, this evidence indicates that the principal applicant discussed the threat with a company auditor who told him to go to the police. The reference to a supervisor, instead of an auditor, was first made in the applicants' submissions in this application, submissions that were not before the Board when it rendered its decision. Further, contrary to the applicants' submissions, the Board did not base its credibility

findings solely on the applicants' delay in leaving Mexico but also relied on other reasons in coming to its conclusion.

[53] The respondent also submits that the Board did not base its findings on conjecture. Rather, the Board's findings on how much money gas station managers handled was based on the principal applicant's own evidence on sale transactions at his gas station. Further, given the applicants' submissions that gas station managers who had access to large amounts of money were extorted by criminal gangs on such a large scale that they formed a particular social group, it was reasonable for the Board to conclude that extortion was a common problem for gas station managers.

[54] The respondent submits that as the principal applicant only went to the police on one occasion and did not contact any other government institutions for assistance, it was also reasonable for the Board to find that his fear of criminality was not reflective of the state's inability or unwillingness to provide adequate state protection. The Board clearly stated that it took into consideration the evidence tendered by the applicants. There was therefore no basis for the applicants' assertion that the Board ignored evidence.

[55] Finally, the respondent submits that the Board's finding that the applicants' claim had no nexus to a Convention ground was reasonable. However, if this finding is deemed unreasonable, the respondent submits that it does not amount to a reviewable error given that it was not a determinative finding. Rather, the Board dismissed the claim on the basis of credibility. The Federal Court of Appeal has firmly established that a negative credibility finding will, in most cases, be determinative of a refugee claim. Therefore, given that the applicants' section 97 claim was based

on the same fact scenario as the section 96 claim, it was reasonable for the Board not to conduct a separate section 97 claim.

Analysis and Decision

[56] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[57] It is established jurisprudence that credibility findings, described as the "heartland of the Board's jurisdiction", are essentially pure findings of fact that are reviewable on a reasonableness standard (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at paragraph 46; *AD v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584, [2011] FCJ No 786 at paragraph 23; and *RKL v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, [2003] FCJ No 162 at paragraph 7).

[58] Findings on state protection raise questions of mixed fact and law that are also reviewable on a reasonableness standard (see *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] FCJ No 584 at paragraph 38; *Gaymes v Canada (Minister of Citizenship and Immigration)*, 2010 FC 801 at paragraph 9; and *SSJ v Canada (Minister of Citizenship and Immigration)*, 2010 FC 546, [2010] FCJ No 650 at paragraph 16).

[59] Finally, the reasonableness standard also applies to determinations of nexus to a Convention ground under section 96 of the Act (see *Chekhovskiy v Canada (Minister of Citizenship and Immigration)*, 2009 FC 970, [2009] FCJ No 1180 at paragraph 18; and *Aburto v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1049, [2011] FCJ No 1305 at paragraph 10).

[60] In reviewing the Board's decision on a standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Khosa* above, at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraphs 59 and 61).

[61] Conversely, issues of procedural fairness and natural justice are reviewable on a correctness standard (see *Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283, [2009] FCJ No 1643 at paragraph 23; and *Khosa* above, at paragraph 43). No deference is owed to the Board on this issue (see *Dunsmuir* above, at paragraph 50).

[62] **Issue 2**

Did the Board err in finding no nexus to a Convention ground under section 96 of the Act?

The first requirement to qualify as a Convention refugee under section 96 of the Act is the establishment of a nexus with one of the five Convention refugee grounds. In this case, the applicants submit that their membership in a particular social group establishes the required nexus with a Convention ground. The applicants define this social group as individuals targeted through

their particular employment, specifically managers of gas stations, as having access to large amounts of money.

[63] The first step in the analysis of whether a refugee claimant could be classified within a particular social group is the determination of whether an issue exists that concerns basic human rights (see *Zefi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636, [2003] FCJ No 812 at paragraph 36). Secondly, membership in that particular social group must be the cause of the well-founded fear of persecution (see *Zefi* above, at paragraph 39).

[64] In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, [1993] SCJ No 74, the Supreme Court recognized that "any association bound by some common thread" is not necessarily included in the scope of "particular social group" (at paragraph 61). Rather, the meaning of this term "should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative" (see *Ward* above, at paragraph 70). The Court noted three possible categories for the meaning of a "particular social group" (see *Ward* above, at paragraph 70):

> (1) groups defined by an innate or unchangeable characteristic;
>
> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

[65] The Court noted that the first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation; the second would encompass

persons such as human rights activists; and the third pertained to historical intentions (see *Ward* above, at paragraph 70).

[66] Subsequent jurisprudence has recognized that criminality, revenge and personal vendetta can generally not be the foundation of a well-founded fear of persecution by reason of a Convention ground (see *Zefi* above, at paragraph 40; and *Begum v Canada (Minister of Citizenship and Immigration)*, 2011 FC 10, [2011] FCJ No 8 at paragraph 11). However, a victim of crime may still be a victim of persecution where such persecution is caused by discrimination associated with a Convention ground (see *Begum* above, at paragraph 31).

[67] In this case, the Board briefly determined that there was no nexus as the basis of the principal applicant's fear was criminality. No evidence was submitted to suggest that the persecution was related to discrimination based on race, religion, nationality or political opinion. Reliance on membership in a social group of individuals targeted through their particular employment as having access to large amounts of money does not relate to any of the three categories of a "particular social group", as described by the Supreme Court of Canada in *Ward* above. Rather, as the Board found, the applicants' fear was based on criminality non-related to discrimination or human rights abuses. I therefore find that it came to a reasonable conclusion that there was no nexus to a Convention ground, thereby reasonably denying the applicants' claim under section 96 of the Act.

[68] **Issue 3**

Did the Board err in determining that the principal applicant was not credible?

It is well established that credibility findings demand a high level of judicial deference and should only be overturned in the clearest of cases (see *Khan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1330, [2011] FCJ No 1633 at paragraph 30). As such, the Court should generally not substitute its opinion unless it finds that the decision was based on erroneous findings of fact made in either a perverse or capricious manner or without regard for the material before it (see *Bobic v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1488, [2004] FCJ No 1869 at paragraph 3). In reviewing a board's decision, isolated sections should not be scrutinized. Rather, the Court must consider whether the decision as a whole supports a negative credibility finding (see *Caicedo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1092, [2010] FCJ No 1365 at paragraph 30).

[69] In this case, the applicants submit that the Board erred by basing its credibility finding both on a misunderstanding or misinterpretation of the evidence before it and on conjecture and speculative musings.

[70] In rendering its negative credibility finding, the Board highlighted the following:

1. The principal applicant did not discuss his problem with his company superiors;
2. The gang did not come directly to the principal applicant's office to demand the day's sales or the money that was in his office vault;
3. Although the extortion payment deadline passed without payment, the applicants were never visited by the gang at work, home or school;
4. The principal applicant willingly delayed his departure from the company for a half a month to train his replacement;

5. As far as the principal applicant knew, his replacement did not experience extortion attempts;

6. The gang continued to make threatening calls to the principal applicant after he left his employment; and

7. None of the applicants' relatives in Mexico experienced problems associated with the gang searching for the applicants.

[71] As noted by the applicants, the first point above contradicts the previous statement in the Board's decision at paragraph 3 that the principal applicant "discussed this with his boss as company policy dictated he report this to the police". The applicants also submit that the Board disregarded the evidence of the high level of security (video surveillance), which explained why the gang members did not come directly to the gas station to demand the money. This was not addressed by the Board.

[72] With regards to the principal applicant's delay in leaving his employment, the principal applicant explained at the hearing that a replacement for his position needed to be found and that "… it was the policy of the company that I had to pass the station after an audit process to verify the state of the station and the management". This suggests that the principal applicant remained with the company not merely to respect its policies, but also to ensure that he was cleared of any mismanagement before leaving.

[73] On questioning about his replacement, the principal applicant testified that he did not inform the commandant that he had resigned and that a replacement had taken over his job. However, his

testimony suggests that the commandant was nevertheless aware of his replacement by the June 11 call. Later, after the principal applicant's last day of work on June 15th, he stopped having contact with the gas station. It was therefore reasonable that he would not have known if extortion demands were made of his replacement. This was further supported by his previous statement at the hearing that these types of incidents were generally handled confidentially. The Board's reliance on this point to find the principal application not credible is therefore questionable.

[74] At the hearing, the principal applicant also testified that he did not know why the caller continued to contact him after he had left his job:

> COUNSEL: Why do you believe sir that he continued to contact you after you no longer have the ability to take money out of sales and pay them?
>
> PRINCIPAL APPLICANT: I do not know, maybe he thought that was not the case and I was going to be relocated, I do not know. […] Or that I could borrow money or …

It would seem to me that unless the caller told him why he was calling, the principal applicant would not know why the caller continued to call him.

[75] As cited by the applicants, "[i]t is well settled that if a panel makes a finding of fact having misconstrued or ignored relevant evidence before it and relies on those findings when making an adverse determination as to credibility, the decision is unreasonable and warrants intervention" (see *Toth v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1133, [2002] FCJ No 1518 at paragraph 25). In *Toth* above, the Board dismissed the applicant's refugee claim solely on the basis that there was no evidence that Reformed Church members were harassed in Romania. However, the documentary evidence clearly indicated the contrary (at paragraph 25). Similarly, in *Lai v*

Canada (Minister of Employment and Immigration), [1992] FCJ No 906, the Federal Court of Appeal overturned the Board's decision because its findings of fact were not supported by any of the evidence before it, including the documentary evidence, applicant's oral testimony and testimony of an expert witness.

[76] As I have noted above, some of the factual underpinnings for the Board finding the principal applicant to be not credible were not correct. Despite the level of deference owed to the Board with respect to its credibility findings, I find that the Board's credibility finding was unreasonable. As noted, some of the factual underpinnings were misstated and some explanations were not addressed. I am unable to say what the Board's credibility finding would have been had it not made these unreasonable steps.

[77] **Issue 4**

Did the Board deny the applicants procedural fairness by basing its decision on delay in departure?

The applicants submit that the Board did not indicate that delay in departure was an issue. By basing its decision on this issue, the applicants submit that the Board denied them natural justice and fairness.

[78] In its decision, the Board did not indicate that delay in departure was a reason for its decision. Rather, it noted that the principal applicant's delay in leaving his company was one of several concerns that collectively led to its negative credibility finding. At the hearing, the Board did question the principal applicant about his delay in leaving the company after the June 1st deadline

passed. I therefore do not find that the Board denied the applicants natural justice by misleading them on this issue. The issue was raised before them and the principal applicant was given an opportunity to respond.

[79] **Issue 5**

Did the Board err in conducting the section 97 analysis and determining that state protection was available to the applicants in Mexico?

Under paragraph 97(1)(b) of the Act, applicants may be found in need of protection if their removal would subject them personally to a risk to their life or of cruel and unusual treatment or punishment, for which they are unable, or unwilling due to the risk, to avail themselves of state protection. Applicants bear the onus of providing clear and convincing evidence of the state's inability to adequately protect them (see *Ward* above, at paragraphs 50 and 51; and *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] FCJ No 399 at paragraph 38).

[80] Section 97 only contains an objective component (see *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] FCJ No 1 at paragraph 33). However, this does not mean that state protection should be analyzed in a vacuum. Rather, a contextual approach is required that first identifies the nature of the applicant's fear and then analyzes the capacity and will of the state to respond to the applicant's circumstances (see *Prasad v Canada (Minister of Citizenship and Immigration)*, 2011 FC 559, [2011] FCJ No 708 at paragraph 13). In *Torres v Canada (Minister of Citizenship and Immigration)*, 2010 FC 234, [2010] FCJ No 264 Mr. Justice Russel Zinn explained

that in undertaking a contextual approach many factors ought to be considered, including (at paragraphs 37 through 42):

> a. The nature of the human rights violation;
>
> b. The profile of the alleged human rights abuser;
>
> c. The efforts that the victim took to seek protection from authorities;
>
> d. The response of the authorities to requests for their assistance; and
>
> e. The available documentary evidence.

[81] In this case, the Board summarized the applicants' allegations, which included the frequency and severity of the threats made. Due to the anonymous nature of the calls, little evidence was available on the alleged abuser, however, the Board did summarize what was available. The Board also mentioned the efforts taken by the principal applicant to seek police protection and the police response to that request.

[82] With regards to the documentary evidence, the Board highlighted documentary evidence that indicated that: various protection mechanisms are available in Mexico; the state is a working democracy able to provide adequate protection to its citizens; and although deficiencies exist, the government's efforts to provide adequate protection to its citizens are continuously progressing. Based on this evidence, the Bound found that the applicants bore a heavy burden in rebutting the presumption of state protection, a burden which it found they failed to discharge.

[83] In reviewing the documentary evidence, the applicants highlight three documents that it submits the Board ignored.

[84] The first evidence, “In Mexico, a legal breakdown invites brutal justice”, was published by the Washington Post on December 9, 2010. The applicants submit that this article indicates a collapse of the legal system in recent years which has led citizens to begin looking for justice outside the government. However, it is important to note that this article pertains primarily to events that have transpired in northern Mexico and to the issue of vengeance carried out by Mexican citizens against kidnapping suspects. As these issues have little direct relevance to the case at bar, I do not find that the Board erred in not referring specifically to this article.

[85] The second evidence, “Mexico’s National Human Rights Commission: A Critical Assessment”, was authored by Human Rights Watch in February 2008. The applicants submit that this document indicates that Mexico’s National Human Rights Commission (NHRC) has routinely failed to press state institutions to remedy abuses, promote reforms to prevent abuses and challenge abusive laws. This document does indicate that the NHRC had shown disappointing performance in being a catalyst for change to improve the country’s human rights record. However, although the Board referred to the NHRC in its decision, it relied more on the evidence of law enforcement agencies that could protect the applicants. I find that this was a reasonable approach since the NHRC’s role, as presented in this evidence, appears more directed at reform of human rights laws than actual protection of individuals.

[86] The third evidence, “Police Reform in Mexico: Advances and Persistent Obstacles”, was authored by Daniel Sabet in May 2010. This document provides a chilling view of the adequacy of the Mexican police. Problems include corruption and collusion with organized crime, abuses of human rights and ineffectiveness which lead to a lack of confidence in the police, further rendering them less effective and perpetuating the corruption and abuse. After analyzing reform efforts by the last three federal administrators, the author notes that although considerable advances have been made, “the fundamental problems of corruption, abuse, and ineffectiveness remain”.

[87] Although the Board references this third document, it relies on numbers of police officers per capita in finding that this number exceeds United Nation averages and recommended levels. No reference is made to Sabet’s main finding that fundamental problems remain. This is exacerbated by the Board’s statement that the country’s presidency has placed great importance on fighting crime. This statement is based on a 2006 publication. No mention is made to Sabet’s contradictory finding that fundamental problems remain even after reform efforts were by the last three federal administrators (including governments in place during the terms of 2000 to 2006 and 2006 to 2012).

[88] The Board only mentioned once that “deficiencies may exist in the Mexican criminal justice system”, without providing any further analysis on the significant evidence that contradicts its finding that “there is continuing progress in regard to the government’s efforts to provide adequate protection for citizens in Mexico”. The sole reference cited for this latter finding is a 2008 case from this Court, not any specific documentary evidence. Based on this, the Board concludes that the applicants have not discharged their heavy burden of providing clear and convincing proof of the lack of state protection for them in Mexico.

[89] There is extensive jurisprudence that boards need not refer to every piece of evidence submitted. However, boards must address significant and important evidence (see *Michel v Canada (Minister of Citizenship and Immigration)*, 2010 FC 159, [2010] FCJ No 184 at paragraph 40). As stated in the often-cited case of *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35 at paragraph 17:

> […] the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence" […]

[90] In this case, the Board cited extensive jurisprudence and relied heavily on evidence that supported its finding of adequate state protection. However, it did so without addressing significant contrary evidence, such as Daniel Sabet's recent report. I therefore find that the Board made an erroneous finding of fact on the question of state protection, without regard to the evidence before it.

[91] As a result of my findings, the application for judicial review must be allowed, the decision of the Board set aside and the matter is referred to a different panel of the Board for redetermination.

[92] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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.
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.

FEDERAL COURT

SOLICITORS OF RECORD

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