

Federal Court



Cour fédérale

Date: 20130124

Docket: IMM-4469-12

Citation: 2013 FC 64

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, January 24, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

SAMUEL SANCHEZ CASTILLO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Refugee Protection Division (the RPD) of the Immigration and Refugee Board dated April 17, 2012, under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the IRPA). The RPD determined that the applicant was neither a Convention refugee under section 96 nor a person in need of protection under section 97 of the IRPA.

I. Facts

[2] The applicant stated that he feared his boss, Hugo, the owner of the pharmacy Farmapronto, and his allies, federal judicial police officers. He claimed that he was threatened because he refused to distribute drugs in colleges.

[3] The applicant allegedly made two attempts to file complaints with the Mexico City police.

[4] The applicant stated that he did not exhaust all avenues to obtain state protection because he was afraid. In fact, he testified that his mother and he had imagined that the Mexican authorities would protect Hugo and the two former members of the Federal Investigation Agency (AFI) instead of his mother and himself. Counsel for the applicant apparently confirmed this possibility. He did not file a complaint with the federal police.

[5] The applicant decided to leave Mexico on July 23, 2008, and arrived in Vancouver on August 4, 2008. He claimed refugee status on September 7, 2010, in Montréal.

[6] On September 5, 2010, when he was in Canada, he received an e-mail from his sister confirming that his pursuers are members of the AFI.

II. Reviewed decision

[7] The RPD rejected the applicant's refugee claim basing its decision mostly on a problem of credibility because of significant omissions and contradictions in the applicant's testimony, the most important of which are conveyed in the decision.

[8] First, the applicant stated that two AFI police officers allegedly showed up at his home in Mexico on September 5, 2010. However, he stated that he could not provide a copy of his sister's e-mail, which confirms that the agents of persecution are members of the AFI and explained that he did not think of keeping a copy of this e-mail.

[9] Second, the applicant contradicted himself with regard to the number of written complaints filed with the city police. Initially, he claimed that he filed three written complaints with the city police then stated that he had instead attempted to file two complaints. Further, the applicant provided three specific dates on which the complaints were allegedly filed and then retracted them. Therefore, the RPD found that this undermined the applicant's credibility.

[10] Third, the applicant claimed that he used the services of a lawyer in Mexico, Mr. Guzman, who was supposed to have provided evidence to corroborate his testimony, a copy of the complaint filed and thus allegedly conducted an investigation. However, he claimed that he received nothing from him. When asked to explain what the lawyer did for him, the applicant answered in a confused manner, stating first that he did not know what the lawyer did, then stating that he knew that the lawyer had told his mother that he had come to obtain a copy of the complaint. The RPD found that the applicant's confused answers undermined his credibility.

[11] Finally, the RPD considered that the applicant lacked credibility because he had not mentioned in his account that his lawyer, Mr. Guzman, had allegedly confirmed that his fear of not being protected by the authorities had merit given that they support Hugo and the two former members of the AFI. When asked to explain the reasons why he did not mention this fact, the applicant answered that he did not think to do so.

[12] The RPD then considered that even if the applicant was credible with respect to his story, he did not rebut the presumption of state protection.

[13] The applicant did not file a complaint with the federal police despite the fact that he claimed that the persons involved are members of the AFI and, therefore, are employees of the federal government. The applicant provided the simple explanation that he was afraid. However, the documentary evidence shows that in Mexico, when a person is a witness of an act of corruption within the federal administration, he or she may file a complaint with the offices of the public service secretariat and by telephone by using their SACTEL service.

[14] In the circumstances, the applicant did not provide clear and convincing evidence to rebut the presumption of state protection, especially since he did not exhaust all avenues available to him in Mexico. In fact, it is acknowledged that a democratic state is presumed to be able to protect its citizens.

III. Position of the applicant

[15] The applicant submitted that the RPD's findings on his credibility are erroneous.

[16] First, the applicant submitted that the RPD erroneously criticized the applicant for failing to mention the e-mail received on September 5, 2010. In addition, even if the applicant could not provide evidence confirming that he had indeed received this e-mail, the RPD should have considered that the applicant tried to obtain such evidence to no avail in accordance with section 7 of the *Refugee Protection Division Rules*, SOR/2012-256.

[17] Second, the applicant stated that he provided adequate and not confused answers to the questions that he was asked with regard to the complaints. In fact, there is a nuance between presenting himself before the authorities to file a complaint and the acceptance of such complaints. Further, the applicant alleged that the answers he gave with respect to the complaints are clear, because he referred to all the complaints filed, orally or in writing.

[18] Third, with respect to what steps the lawyer Guzman had allegedly taken, the applicant stated that he had communicated with his mother to explain that there had been no progress with respect to the first complaint.

[19] Fourth, according to the applicant, his testimony that the Mexican authorities allegedly would protect Hugo and his accomplices, the AFI officers, is a personal opinion that had not been mentioned in his account.

[20] Fifth, the applicant argued that he was not given the opportunity to provide explanations with respect to the contradictions in his testimony.

[21] Sixth, the applicant considered that the RPD's findings on his credibility are not reasonable given that they deal with elements that are not at the heart of his application and that the RPD is relying on conjecture. Further, the testimony given under oath is presumed to be true.

[22] With respect to state protection, the RPD should have considered the applicant's particular situation, including the profile of the individuals who were persecuting him. In addition, the RPD ignored the documentary evidence showing that corruption of the authorities is still a serious problem in Mexico.

IV. Position of the respondent

[23] With respect to the findings on the applicant's credibility, the respondent is of the view that they are reasonable.

[24] In fact, the applicant failed to mention in his Personal Information Form (PIF) that his lawyer had confirmed that the federal authorities would not help him. Further, it is implausible that he could not provide the e-mail from his sister dated September 5, 2010, and the applicant's testimony is tainted by numerous contradictions.

[25] During his testimony before the RPD, the applicant contradicted himself about the number of complaints and could not provide an explanation in judicial review. Further, the applicant provided contradictory answers regarding his lawyer's investigation.

[26] With respect to the allegation that his lawyer had told him that he should not file a complaint with the federal authorities, it should have been found in the applicant's PIF given that it is an important element of his refugee claim.

[27] As for the e-mail that he allegedly received on September 5, 2010, the RPD had validly found that the fact that the applicant could not produce it and without a valid reason affects his credibility. It is the applicant's burden to prove his allegations and provide the evidence they are based on.

[28] Lastly, the respondent submitted that even if the applicant had been considered credible, he did not provide clear and convincing proof to rebut the presumption of state protection. In fact, the evidence shows that there are specialized authorities in the fight against corruption, particularly within the federal police, and the applicant did not use these processes at the federal level, rather with merely filing a complaint with the city police.

V. Issues

1. Did the RPD err in concluding that the applicant was not credible?
2. Did the RPD commit an error in determining that the applicant had failed to rebut the presumption of state protection?

VI. Standard of review

[29] The reasonableness standard is applicable to the RPD's decision regarding the applicants' credibility (*Aguebor v Canada (Minister of Employment and Immigration)*, 160 NR 315, at para 4,

1993 CarswellNat 303 (FCA)) and the issue of state protection because it is a question of mixed law and fact (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47, [2008] 1 SCR 190).

VII. Analysis

1. *Did the RPD err in concluding that the applicant's story was not credible?*

[30] The RPD's findings with respect to the applicant's lack of credibility are reasonable. He had the burden of establishing the facts on which his application relies, based on the balance of probabilities.

[31] First, contrary to what is alleged by the applicant, the RPD criticized him for not mentioning the fact that his lawyer was of the view that the authorities are siding with Hugo and the two AFI officers and not for failing to mention the event on September 5, 2010. On this matter, the RPD rightly found that the burden was on the applicant to provide the evidence to corroborate his testimony, for example, the e-mail he received from his sister. The RPD validly rejected the explanation provided by the applicant to justify the fact that he did not produce an e-mail. In fact, no intervention is required since the RPD decided to reject an explanation justifying gaps in the applicant's evidence and that such a finding is reasonable (*Ortiz Juarez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 288, at paras 7-9, 146 ACWS (3d) 705).

[32] The RPD reasonably found that the failure of mentioning that the applicant's lawyer confirmed that the federal authorities would not help him negatively affected the applicant's credibility. In fact, it was acknowledged that the omission of an important element in the applicant's

PIF could undermine his credibility (*Basseghi v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ 1867, at para 33, 52 ACWS (3d) 165).

[33] Further, the applicant argued that the federal authorities were on the side of his agent of persecution, but did not bring evidence to demonstrate this fact; he was not able to produce the copy of an e-mail that he received to that effect or the lawyer's statement about this. Therefore, it was reasonable to find that the applicant had not established that he was subject to persecution in Mexico, because he is not credible on this fundamental element of his application.

[34] Contrary to what the applicant alleged, a reading of the hearing transcript reveals that the answers provided on the PIF regarding the complaints were confused. The applicant initially alleged that he made three complaints in writing, then explained that in reality a single complaint was filed and that he made two attempts. The RPD did not consider these explanations to be credible, all the more so because if a complaint was filed, the applicant was not able to prove it.

[35] Finally, regarding the steps taken with the lawyer Guzman, the RPD validly found that the applicant's answers were contradictory, which undermined his credibility. In fact, the applicant claimed initially that he did not know whether his lawyer had tried to obtain a copy of the complaint filed with the public ministry, then finally explained that his mother informed him that this was the case, but that they refused to provide a copy of the complaint. These explanations were considered by the RPD to be confused, which is a reasonable conclusion.

2. *Did the RPD commit an error in determining that the applicant had failed to rebut the presumption of state protection?*

[36] In this case, the RPD assessed whether state protection in the circumstances would be adequate, even if it did not consider the applicant's story to be credible.

[37] The applicant alleged that he complained to the city police without being able to give a specific answer as to the number of complaints actually filed and that he was afraid of filing a complaint with the federal police.

[38] It is recognized that the Mexican authorities are dealing with problems of corruption, which could, in certain circumstances, result in a fear of persecution being justified. In this case, it was not proved on a balance of probabilities that the applicant was persecuted by AFI officers. Further, if that was the case, the applicant could have exhausted some avenues, which he did not do, despite the fact that he alleged that his agent of persecution corrupted AFI officers.

[39] Therefore, the RPD's conclusion that the applicant did not rebut the presumption of state protection is reasonable, because the evidence shows that he did not exhaust all avenues available in Mexico (*Canada (Minister of Employment and Immigration) v Villafranca*, (1992) 18 Imm LR (2d) 130, 150 NR 232 (FCJ)). It is acknowledged that when an applicant alleges that the agent of persecution is part of the federal authorities in Mexico, he or she is obliged to use the processes offered in Mexico for people who are witnesses of corruption among these authorities (*Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCJ 94, at paras 34-35, 69 Imm LR (3d) 309).

[40] The parties were invited to submit a question for certification, but none was proposed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. No question will be certified.

“Simon Noël”

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4469-12

STYLE OF CAUSE: SAMUEL SANCHEZ CASTILLO
v MCI

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REASONS FOR JUDGMENT BY: JUSTICE SIMON NOËL

DATED: January 24, 2013

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