

Date: 20071211

Docket: IMM-5263-06

Citation: 2007 FC 1295

Ottawa, Ontario, December 11, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MAURICIO ISAAC MARTINEZ AGUILAR

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated September 6, 2006, which found that the applicant was neither a Convention refugee nor a person in need of protection.

[2] The applicant requested the following relief:

- a) An order for a writ of *certiorari* quashing the decision of C. Mutuma dismissing the applicant's claim for refugee protection in Canada;
- b) An order of a writ of *mandamus* directing the respondent to have the applicant's status heard before a differently constituted panel within 90 days of this Honourable Court's Order; and
- c) Costs.

Background

[3] Mauricio Isaac Martinez Aguilar, the applicant, is a citizen of Mexico. The circumstances which led to his claim for refugee status were set out in the narrative portion of his Personal Information Form (PIF).

[4] In 1998, the applicant witnessed a well known Mexican car thief stealing a car. The two locked eyes for a brief moment before the applicant fled the situation. The next day, the car thief appeared at the applicant's home and threatened to murder him if the applicant went to the police. At first the applicant did not report the car theft. However, upon later being threatened on the phone by the car thief, the applicant felt that the right thing to do was to report the incident to the motor vehicles department of the police. Upon doing so, the applicant was warned by the police commander that whistleblowers lived short lives and had bad luck and that it would be better for the applicant not to say anything and to mind his business. The applicant later found out that the car thief had connections with judicial and state police, including the police commander the applicant

had approached. The same day that he approached the police commander, the applicant also approached the Attorney General's office where representatives refused to take his report and referred him to the police.

[5] After the visit to the police station, the applicant received phone calls wherein the car thief threatened the applicant's life. The applicant approached a lawyer, who advised him to write a declaration that he had witnessed a car theft and that he had denounced the crime to police, but the police had not responded and as such, if anything happened to the applicant or his family, the police commander would be responsible.

[6] The death threats subsided in 2000 when the car thief was arrested. Two months after the arrest, the applicant was struck by a car while on his motorbike. As a result of the accident, the applicant underwent surgery for his severely injured leg. He was unable to walk for two and a half years. In late 2003, a friend informed the applicant that the accident was an act of revenge by the car thief, who felt the applicant had reported the theft to the police resulting in his arrest and incarceration.

[7] On October 15, 2005, the applicant was on his bike when he was approached by a motorist who asked him if he remembered the car thief. The applicant crashed his bike as a result of the incident. The applicant did not report the incident to the police.

[8] On October 23, 2005, the applicant left Mexico for Canada. Once in Canada, the applicant filed his application for refugee status.

[9] In a letter dated September 11, 2006, the applicant was informed that in a decision dated September 6, 2006, the Refugee Protection Division had rejected the application on the basis that the applicant was not a Convention refugee and not a person in need of protection. This is the judicial review of that decision.

Board's Reasons for Decision

[10] The Board found that the applicant was neither a Convention refugee nor a person in need of protection. The Board found on a balance of probabilities, that the applicant was never targeted by the car thief as he alleged. The Board found that even if the car thief had been a friend of the local police commander, the applicant would still have gone to other branches of the police to report the attempt on his life, but the applicant did not. The Board also found that there was no credible corroborating evidence proving that the car thief had caused the accident. The Board found it contradictory that the car thief would be sent to prison when he had a friend who was the local police commander to protect him. The Board also found that the applicant's explanation as to the absence of the accident report not reasonable given that, according to the applicant, an ambulance had attended to the incident and the police had ruled out the incident as an accident.

[11] The Board found that the applicant was never discriminated against or denied employment on the basis of his disability. The Board found that even if he was discriminated against, because of his disability, given that the applicant was working and left his job on his own accord in order to come to Canada, the alleged discrimination did not reach the level of persecution.

[12] The Board found that the applicant contradicted himself in that he claimed to have made a declaration to his lawyer in 1999 so that if anything happened to him it would be presented to the police, and yet, after the alleged attempt on his life in 2000, he did not present the declaration to the police. As such, the Board drew an adverse inference as to the applicant's credibility, as a witness, with reference to the motive for the declaration.

[13] Before the Board, the applicant alleged that while the car thief was incarcerated, the threats diminished. The applicant also submitted that he was not responsible for sending the car thief to jail. The Board found it contradictory that the applicant would make these submissions, but then also submit that while in jail, the car thief engineered the accident which was alleged to be an attempt on the applicant's life. The Board drew an adverse inference as to the applicant's credibility, as a witness, with respect to this contradiction.

[14] The Board accepted that the applicant had injuries to his lower leg as stated by the doctor, but given its earlier finding of lack of credibility with respect to the cause of the incident, the Board did not put weight on the allegations that the accident was an attempted murder. The Board put no weight on the counsellor's report, given that it was based on what the applicant had told the

counsellor; allegations which the Board found to be not credible. The Board also found that the applicant's explanation for failing to obtain a counselling report from his aunt was unreasonable as she was a professional psychologist, a member of the family, and the person alleged to have counselled the applicant. Based on the absence of corroborative evidence as to counselling in Mexico, the Board then drew an adverse inference as to the applicant's credibility, as a witness, with respect to his allegations that he received counselling for his fear of the car thief in Mexico.

[15] Before the Board, the applicant stated that the car thief had issued threats both via phone and in person at the applicant's home. The Board noted that during the seven years between the alleged car theft and the applicant's departure from Mexico, no attempt was made by the car thief or his accomplices to attack the applicant personally on the street or at his home. The Board found it implausible that the car thief would only want to harm the applicant by vehicles; despite knowing where the applicant lived. The Board also found it implausible that if the car thief wanted to harm the applicant, he would not attack the applicant on his way to work, at his home, or on the street, but chose to harm the applicant only while riding a bicycle or a motorbike. Furthermore, the Board found the applicant's behaviour of staying in the country for seven years with alleged threats by the car thief on his life not consistent with that of someone fearing for his life.

[16] With regards to state protection, the Board recognized that there is corruption among the police in Mexico, but noted that documentary evidence showed that Mexico was making serious efforts to address these problems. The Board found that state protection was available, but the

applicant had not made sufficient efforts to test it, instead opting to come to Canada. The Board found that the applicant had failed to rebut the presumption of state protection.

Issues

[17] The applicant submitted the following issue for consideration in his written submissions:

1. Whether the panel member unduly disregarded documentary evidence submitted before her?

[18] In addition, the applicant stated the following issues at the oral hearing:

2. Did the Board err in the assessment of the applicant's credibility?
3. Did the Board err with respect to its finding of state protection?
4. Did the Board err in finding there was no serious possibility of persecution?

Applicant's Submissions

[19] The applicant's written submissions were that the Board failed to consider certain pieces of documentary evidence provided by the applicant in his application. The applicant takes issue with three documents in particular: (1) the medical report from Dr. Edgardo Arredondo Gomez, (2) the Mexican lawyer's affidavit sworn May 2006, and (3) a declaration made by the applicant under oath in 1999. Moreover, the applicant submitted that although the Board specifically mentioned the US Department of State Report for Mexico, it failed to consider a particular part of the documents.

More specifically, the Board faulted the applicant for not reporting the accident to police, but yet the US Department of State Report of Mexico states that the corruption is such a pervasive problem in Mexico that “victims often refuse to file complaints.”

[20] During oral submissions, the applicant also submitted that the Board erred in its assessment of the applicant’s credibility. The applicant took issue with the Board’s handling of the applicant’s testimony concerning the police report and the resulting credibility findings. The applicant also took issue with the Board’s finding of state protection and the finding that there was no serious possibility of persecution.

Respondent’s Submissions

[21] The respondent submitted that the appropriate standard of review is patently unreasonable (see *De (Da) Li Chen v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm. L.R. (2d) 161 (F.C.A.) at paragraph 5). The respondent submitted that with regards to credibility, so long as inferences drawn by the tribunal are not so unreasonable as to warrant intervention, its findings are not open to judicial review (see *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.)). The respondent submitted that the Board was justified in drawing a negative inference from contradictions and implausibilities in the applicant’s testimony.

[22] The respondent submitted that a state’s ability to protect is the crucial element in determining the objective reasonableness of the claimant’s unwillingness to seek protection (see

Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689). Absent a situation of complete breakdown of state apparatus, it is generally presumed that a state is able to protect a claimant (see *Ward*, above). The more democratic the state's institutions, the more the applicant must have done to exhaust all the courses of action available to him (see *Canada (Minister of Citizenship and Immigration) v. Smith*, [1999] 1 F.C. 310 (F.C.T.D.)). Where the country in question is a democracy with effective political and judicial systems, the failure of particular members of the police to furnish protection is insufficient to demonstrate a want of state protection (see *Kadenko v. Canada (Minister of Citizenship and Immigration.)* (1996), 143 D.L.R. (4th) 532, 206 N.R. 272 (F.C.A.); leave to appeal dismissed May 8, 1997, S.C.C. file no. 25689). Based on these cases, the respondent submitted that the applicant has failed to rebut the presumption of state protection. Thus, the respondent submitted that the Board was justified in rendering the decision it did.

[23] The respondent submitted that it was reasonable for the Board to give no weight to the information contained in the medical and psychological reports submitted by the applicant because conclusions in the reports were based on the applicant's self-reported allegations about the cause of his accident, which the Board had already found not to be credible.

[24] The respondent submitted that the fact that the written reasons do not summarize all of the evidence introduced does not constitute a reviewable error of law. The fact that some of the documentary evidence is not mentioned in the Board's reasons is not fatal to its decision unless its conclusions of fact from the evidence can be said to be capricious or perverse (see *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 at 318 (F.C.A.)).

Analysis and Decision

Standard of Review

[25] The Board may evaluate the probative value of evidence, including documentary evidence, and the standard of review applicable to such findings is patent unreasonableness (see *Akhter v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1165, 2006 FC 914). The Board's credibility findings are reviewed on a standard of patent unreasonableness and are therefore accorded a high level of deference (see *Juan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 809 at paragraph 2).

[26] I will address the issues as presented at the hearing by the applicant.

[27] **Issue 2**

1. Did the Board err in the assessment of the applicant's credibility?

The Board stated as follows in its decision:

Credibility

The claimant alleges that the accident in which he was involved which fractured his leg was an attempted murder by Solis who accused the claimant of blowing the whistle on him for stealing a car. The claimant was asked if he had a police accident report and he said he did not have one because when he was hit on his motorcycle he became unconscious and did not know what happened until he was taken to the hospital for treatment. The claimant was asked if his parents, including his aunt, whom he alleges is a psychologist, ever went to find out from the police what happened. In his response, the claimant stated that it was ruled out as an accident because the car

that hit him did not stop; it was a hit and run. The claimant was asked why his parents would not try and find out the cause of the accident, given the severity of the injuries, as stated in the medical report as having suffered an exposed fracture of shinbone. The claimant said that the police would not give them the report, and he did not know if the police came; all he knows is that an ambulance was called and took him to the hospital. When asked how he knew that it was an attempted murder, given the absence of a police accident report and that no one was arrested; the claimant said that he was told by friends that it was Solis who caused the accident. He was then given the opportunity to explain why, given that he had people who told him that it was attempted murder, he did not go to report to the police; he said he did not because Solis was connected to the commander of the local police. I find that even if Solis would have been a friend of the commander of the local police, the claimant would have still gone to other branches of the police to report which he did not do. However, according to the claimant, when the alleged accident occurred, Solis was in prison. Given that Solis was in prison and that there is no police report to state the cause of the accident, I find that there is no credible corroborating evidence to show that Solis caused the accident. Furthermore, I find it contradicting that Solis would go to prison when he had a friend who was the commander of the local police, whom the claimant alleges protected Solis. I find the claimant's explanation about the absence of the accident report not reasonable, given that an ambulance, according to him, was called and, according to the claimant's testimony, the police ruled out the incident as an accident.

(Tribunal record pages 7 and 8)

[28] When asked at the hearing about the accident report, the applicant testified as follows:

PRESIDING MEMBER: Now I have a couple of questions to ask you. Now, when you were run over by a car on your motorcycle was there, did you report to the police about the accident itself?

CLAIMANT: The police arrived and made a report, said it was an accident, but that file they lost it because a person went to look for that report and that report does not exist.

PRESIDING MEMBER: When did you ask – well at the time when the police made the report, given this injury here, who spoke to the police.

CLAIMANT: At that time nobody.

PRESIDING MEMBER: And when they made a report, who was there to give statement on your behalf. Was it you?

CLAIMANT: They only made me, asked me some questions simply.

PRESIDING MEMBER: Where were the questions asked, at the scene of the accident or where?

INTERPRETER: Allow me to ask claimant to wait for the end of the interpretations, Mr. Member. Thank you, Mr. Member.

COUNSEL: We're waiting for a reply from the claimant. Do you remember the question?

CLAIMANT: Please once again.

COUNSEL: Okay.

PRESIDING MEMBER: My question was when the accident occurred the police arrived and were you still at the scene of the accident?

INTERPRETER: For the record the gentleman is making a gesture and now he's saying yes.

PRESIDING MEMBER: I would advise you to say yes or no so that it can be recorded.

CLAIMANT: Yes.

INTERPRETER: Yes, said the gentleman in English.

PRESIDING MEMBER: So you can say yes in Spanish.

CLAIMANT: Yes.

PRESIDING MEMBER: Okay. So did the police speak to you at that moment?

CLAIMANT: Yes.

PRESIDING MEMBER: So what did they ask you?

CLAIMANT: That how had the problem be and I in the mid of my desperation explained it to them. But I was bleeding and the ambulance did not allow that anymore.

PRESIDING MEMBER: So who arrived first, the ambulance or the police, do you remember? Now let me just (inaudible).

CLAIMANT: Yes I remember.

PRESIDING MEMBER: Okay. You don't have to bend to the microphone because you might strain your leg. Just sit the way you are. Microphones have got a very high (inaudible) control. So you can just sit in your, sit there, relax and just talk. Okay?

CLAIMANT: Okay.

PRESIDING MEMBER: So I will ask you the question again. So who arrived first, the ambulance or the police?

CLAIMANT: The police, but I'm not sure whether they arrived at the same time. I was more worried about my leg that was to the side.

(Tribunal record pages 161 to 163)

[29] From a review of the Board's decision, it appears that the Board gave considerable weight to the absence of the police report and the applicant's alleged lack of knowledge about the existence of a police report when assessing the applicant's credibility. I do not know what the Board's conclusion on the credibility of the applicant would have been had it considered the actual

testimony of the applicant concerning the police report. I am of the view that the Board made a reviewable error by stating the evidence about the police report in the manner it did.

[30] Because of my finding on this issue, I need not deal with the other issues.

[31] The application for judicial review is therefore allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

[32] The applicant proposed a serious question for my consideration for certification. I am not prepared to certify a question on the facts of this case.

JUDGMENT

[33] **IT IS ORDERED 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

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

<p>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,</p> <p>(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p>(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.</p> <p>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</p> <p>(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of</p>	<p>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:</p> <p>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;</p> <p>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.</p> <p>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:</p> <p>a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au</p>
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Article 1 of the Convention
Against Torture; or

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 themselves of the
protection of that country,

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

(ii) the risk would be faced by
the person in every part of that
country and is not faced
generally by other individuals
in or from that country,

(ii) elle y est exposée en tout
lieu de ce pays alors que
d'autres personnes originaires
de ce pays ou qui s'y trouvent
ne le sont généralement pas,

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

(iii) la menace ou le risque ne
résulte pas de sanctions
légitimes — sauf celles
infligées au mépris des normes
internationales — et inhérents à
celles-ci ou occasionnés par
elles,

(iv) the risk is not caused by the
inability of that country to
provide adequate health or
medical care.

(iv) la menace ou le risque ne
résulte pas de l'incapacité du
pays de fournir des soins
médicaux ou de santé adéquats.

(2) A person in Canada who is a
member of a class of persons
prescribed by the regulations as
being in need of protection is
also a person in need of
protection.

(2) A également qualité de
personne à protéger la personne
qui se trouve au Canada et fait
partie d'une catégorie de
personnes auxquelles est
reconnu par règlement le besoin
de protection.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5263-06

STYLE OF CAUSE: MAURICIO ISAAC MARTINEZ AGUILAR
and
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 24, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: December 11, 2007

APPEARANCES:

Ms. Inna Kogan FOR THE APPLICANT

Mr. Gordon Lee FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ms. Inna Kogan FOR THE APPLICANT
Toronto, Ontario

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada