

Date: 20080128

Docket: IMM-7530-05

Citation: 2008 FC 108

Toronto, Ontario, January 28, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**PAUL ENRIQUE HERNANDEZ MARTINEZ
(a.k.a. Paul Enrique Ma Hernandez)
JENNY CLANCIVETTE PINEDA DE HERNANDEZ
(a.k.a. Jenny Clancivet Pineda De Hernandez)
GABRIELA ESTHEFANIA HERNANDEZ PINEDA
(a.k.a. Gabriela Esthef Hernandez Pineda)**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application brought by the Applicant pursuant to s. 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the “Act”) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”) dated November 21, 2005. In its decision the Board determined that the Applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97, respectively, of the Act.

[2] Mr. Paul Enrique Hernandez (the “Principal Applicant”), his wife Jenny Clancivette Pineda de Hernandez and their daughter Gabriela Esthefania Hernandez Pineda (collectively the “Applicants”) are citizens of El Salvador. The Principal Applicant fears persecution on the basis of his political opinion, while the wife and daughter fear persecution as members of a particular social group, that is, family.

[3] The Principal Applicant testified that he became a sympathizer of the Farabundo Marti Front for the National Liberation (the “FMLN”) party in 1992, while he was a university student. He became an active member of the FMLN in 2001. In April 2004, he received two insulting and intimidating phone calls telling him that he should stop his party activities or else he would suffer the consequences. Subsequently, while driving to work, a car tried to force him to stop but the Applicant was able evade his pursuers. He reported this incident to the police who told him they would investigate, but also indicated that it would be difficult because they did not have the license plate number of the vehicle.

[4] The Principal Applicant travelled to Italy after the incident and tried to secure a work permit which proved unsuccessful where he did not apply for refugee status in Italy. He returned to El Salvador for one month and then traveled to the United States. While in El Salvador, he stayed with his family at his mother-in-law’s house, never returning home.

[5] The Applicants did not make an asylum claim in the U.S. as the Principle Applicant heard that he would have a better chance of claiming asylum in Canada. The Applicants came to Canada and sought refugee protection in August 2004.

[6] In a decision dated 21 November 2005, the Board found that there was adequate state protection for the principal claimant and his family in their circumstances.

[7] The Board accepted that the Principal Applicant had received two threatening phone calls and was also involved in an incident where an attempt was made to run him off the road. However, the Principal Applicant was unable to conclusively tell the panel who the persecutors were. The Board found that although the timing of the road incident seemed to link it to the threatening calls, the Principal Applicant was unable to say for sure that it was related.

[8] The Board stated that although the direct linkage may not be established, the police seem to have taken the incidents seriously. They looked for the car that pursued the Applicant, instructed him make a denunciation at the police station, and indicated that priority would be given to his case in light of the telephone calls and the driving incident.

[9] El Salvador was recognized as a democratic state and in light of that fact, the Applicants were found not to have discharged their burden to seek state protection. The Principal Applicant never followed up with police. In fact, he left his residence with his family within a few days of the incident and cut off his phone service. The Applicants had no information indicating that the police

were not investigating the threats and it appeared unlikely that the police would be able to contact the Applicants.

[10] In *Chaves v. Canada (Minister of Citizenship and Immigration)*, (2005), 45 Imm.L.R. (3d) 58 (F.C.), at para. 11, the Court decided that the determination of state protection is subject to review on the standard of reasonableness *simpliciter*. Accordingly, the decision will withstand scrutiny “if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling” (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 55).

[11] The determinative issue in the present case is the Board’s finding that there is adequate state protection in El Salvador. According to the evidence of the Principal Applicant, the police indicated that they would investigate the incident where a car tried to run the Applicant off the road. Since the Applicants did not have a license plate number, this was difficult. The police however indicated that they would make it a priority. The Applicants submit that one failed attempt to obtain police protection is sufficient to prove that the state does not offer state protection.

[12] The burden of proving a lack of state protection increases with the level of democracy exhibited by the state. The more democratic the state in question is, the more a claimant must have done to exhaust all avenues of protection available; see *Kadenko v. Canada (Minister of Citizenship and Immigration)*, [1996] 143 D.L.R. (4th) 532 (C.A.) at page 534. Furthermore, the Federal Court

of Appeal indicated in *Kadenko* that "a claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful."

[13] While it is true that perfect protection is not required; see *Canada (Minister of Employment and Immigration) v. Villafranca*, 150 N.R. 232 (Fed. C.A.). However a state must engage in serious efforts to protect at the operational level; see *Garcia v. Canada (Minister of Citizenship and Immigration)*, [2007] FC 79, [2007] F.C.J. No. 118 (QL), at para. 15.

[14] The Applicants challenge the Board's findings on state protection on the grounds that they were faulted for acting in a manner consistent with a subjective fear, that is, for not staying home longer and not being accessible to the police (cutting off his cell phone, service). The Applicants submit that there is no obligation for an applicant to stay in place just to show whether or not state protection was available.

[15] I agree with the Applicants that there is no obligation for them to stay in one place to show the availability of state protection. However, based on the lack of evidence regarding the police investigation in El Salvador, it was open to the Board to conclude that there was adequate protection for the Applicants in these circumstances.

[16] In the result I find the Board made no reviewable error in its state protection analysis and the application for judicial review of the Board's decision is dismissed. There is no question for certification arising.

ORDER

The application for judicial review of the Board's decision is dismissed. There is no question for certification arising.

"E. Heneghan"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-7530-05

STYLE OF CAUSE: Paul Enrique Hernandez Martinez et al. and The
Minister of Citizenship and Immigration

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 22, 2008

**REASONS FOR ORDER
AND ORDER:** HENEGHAN J.

DATED: January 28, 2008

APPEARANCES:

Ms. Geraldine Macdonald FOR THE APPLICANT

Ms. Angela Marinos FOR THE RESPONDENT

SOLICITORS OF RECORD:

Geraldine MacDonald FOR THE APPLICANT
Toronto, Ontario

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