Date: 20080624

Docket: IMM-5197-07

Citation: 2008 FC 795

Ottawa, Ontario, June 24, 2008

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

FERMIN FELICIANO MONCADA MENDOZA

Applicant

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*, S.C. 2001, c. 27 (Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (Board), dated November 22, 2007 (Decision). The Board found that the Applicant, a citizen of Mexico, had not rebutted the presumption of state protection and was neither a Convention refugee nor a person in need of protection within the meaning of sections 96 and 97 of the Act.

Background

[2] The Applicant was a member of the Public Security Direction, a national police force in Mexico, for seven years. He worked in a number of different policing units over this period including regular patrols, the Motorcycle division, a gang and drug policing section, and a vehicular robberies section.

[3] On March 16, 2002, the Applicant was allegedly involved in a roadblock, checking for intoxicated drivers. A car with three passengers was stopped. One of the passengers was Mrs. Mendoza, the niece of the President of the City of Celaya in Guanajuto, Mexico, the city in which the Applicant was working. Mrs. Mendoza and her husband became abusive and Mrs. Mendoza injured the Applicant with her cell phone. She and her husband were arrested by another police officer and charges were laid.

[4] The charges were later dropped at the behest of the Director of Public Security. However, the Applicant had made a personal declaration against Mrs. Mendoza and refused to withdraw the complaint. The Applicant submits that he was offered a financial settlement in exchange for the withdrawal of this denunciation in July 2002, but that he refused. The Applicant states that he began to receive threatening phone calls a short time later. The Applicant also states that in April 2004, he was assaulted by two individuals for “embarrassing” Mrs. Mendoza. The Applicant was then threatened with dismissal from his job for pursuing the matter. Nonetheless, the Applicant traveled to Mexico City to report to the Public Ministry, but he was advised to withdraw the matter. He made

another attempt to complain in February 2005 by reporting to the Human Rights Commission of the Public Ministry, but was rejected. Upon his return home, he began to receive death threats.

[5] On April 23, 2005, the Applicant resigned from his position with the police force and traveled to a ranch before coming to Canada on May 12, 2005 and claiming refugee status shortly thereafter.

Decision under Review

[6] A large portion of the Board's decision focused on the question, raised by the Minister, of whether the Applicant ought to be excluded from the benefit of refugee status pursuant to Article 1(F)(a) of the *1951 Convention Relating to the Status of Refugees*, 189 U.N.T.S. 2545 (*Refugee Convention*) for complicity in crimes against humanity because of his involvement in the Mexican police force. The Board held that the Minister had failed to meet the burden of proof for the Applicant's complicity in crimes against humanity and, therefore, the Applicant was not excludable under Article 1(F)(a) of the *Refugee Convention*. This is not an issue before the Court.

[7] Once past the question of exclusion, the Board found that the claimant had not rebutted the presumption of state protection in Mexico. The Board reviewed the documentary evidence which suggests that efforts are being made to provide protection in Mexico. The Board noted that the Federal Agency of Investigation and the Federal Attorney General had both made efforts to purge corrupt police officers from service.

[8] The Board noted that the Applicant did not file a denunciation relating to police corruption and that he never witnessed any corruption during his service. As a result, the Board concluded that the Applicant had not exhausted the recourses that were reasonably available to him in Mexico, and that, had the Applicant done so, state protection would have been available.

Issue

[9] The sole issue on this application for judicial review is:

1. *Did the Board err in finding that the Applicant failed to rebut the presumption of state protection?*

Standard of Review

[10] Recently, in *Eler v. Canada (Minister of Citizenship and Immigration)* 2008 FC 334 at para. 6, Justice Dawson held that the standard of review to be applied to the assessment of adequacy of state protection post-*Dunsmuir v. New Brunswick*, 2008 SCC 9, was that of reasonableness. I agree with this assessment. As the Supreme Court stated in *Dunsmuir*, at para. 47, a review based on the reasonableness standard "requires consideration of the existence of justification, transparency, and intelligibility of the decision-making process." When reviewed on this standard, the Board's decision will stand unless the Board's findings relating to the adequacy of state protection fall outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Analysis

1. *Did the Board err in finding that the Applicant failed to rebut the presumption of state protection?*

[11] The Applicant submits that the Board implied that an applicant must exhaust all avenues of state protection before he could be eligible for refugee status in Canada. The Applicant submits that this is an error and that the correct test is that of "reasonable efforts" to seek protection (citing *Nunez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1661 [hereinafter *Nunez*] and *L.G.S. v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 731 [hereinafter *L.G.S.*]).

[12] The Applicant further submits that the Board erred in not providing an analysis of why the efforts made by the Applicant were not sufficient. The Applicant submits that the Board's insinuation that he should have complained about corruption was in error. The Applicant argues that the efforts he made to report the matter, and the fact that the Police warned the Applicant not to pursue the complaint and threatened him with a dismissal from his position as a police officer, sufficiently establish that he sought protection but that protection was not forthcoming.

[13] The Respondent submits that Mexico is presumed capable of protecting its citizens (*Sanchez v. Canada (Minister of Citizenship and Immigration)* 2008 FC 66 at para. 12) and argues that the Board appropriately applied the evidence to the appropriate legal test. Relying on the Federal Court of Appeal's decision in *Minister of Employment and Immigration v. Villafranca* (1991), 99 D.L.R. (4th) 334 (F.C.A.), the Respondent submits that state protection need only be adequate protection,

not perfect protection. The Respondent argues that, in the present case, the non-response of some police officers is not sufficient to rebut the presumption of state protection (*Arenas v. Canada (Minister of Citizenship and Immigration)* 2006 FC 458). Thus, according to the Respondent, the Board did not err in its decision.

[14] The majority of the Board's analysis regarding the adequacy of state protection in the present case is comprised of a review of the different government agencies and policing units established in Mexico and the police reforms and internal control mechanisms that have been introduced to address police misconduct and abuse. The Board noted that within the Office of the Attorney General of the Federal District, the position of Inspector General was established in 1977 to investigate and monitor complaints against the Public Ministry and judicial police agents to combat corruption and impunity. The Board noted that the country documentation showed that the Federal Agency of Investigation "does not hesitate to arrest their own commanders" and that the Federal Attorney General has made efforts "to purge corrupt police officers from its agencies." The Board went on to note that victims of corruption and organized crime can report offences to the nearest Public Ministry then found that, although the Applicant "pursued his denunciation with the Public Ministry [he] did not file any denunciation related to corruption" and that the Applicant's own evidence was that he had not witnessed any corruption during his service in the police force.

[15] The Board continued on by stating that "[w]hen the state in question is a democratic state, the 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" and stressed that the burden of proof on a

claimant will be higher where the state's institutions are more democratic. The Board then concluded that the Applicant had not exhausted recourses that were reasonably available to him and that the Board "was not satisfied that the authorities in Mexico would not be reasonably forthcoming with serious efforts to protect the claimant, if he were to return and approach the state for protection."

[16] I note that the Board did not state that the Applicant was not credible. Counsel for the Applicant, I believe, correctly states that since the credibility of the Applicant was not questioned and that "the Applicant attempted on 12 or 13 occasions" to obtain protection and could not do so, it was for the Board to say why the Applicant's efforts to obtain protection were not sufficient. The jurisprudence clearly states that an applicant need not exhaust all avenues of state protection (see *Nunez* and *L.G.S., supra*).

[17] As I have stated, the Applicant made various attempts for state protection and was unable to obtain same, yet the Board rejected the Applicant's claim and found that the Applicant had not established "that the authorities in Mexico would not be reasonably forthcoming with serious efforts to protect the claimant." On these facts, I find that the Board was required to explain why such efforts were not sufficient and that, despite these numerous past attempts, the authorities in Mexico would be forthcoming with serious efforts to protect the claimant if he were to return to Mexico and seek state protection yet again.

[18] In my view, the Board applied too onerous of a burden of proof upon the Applicant and failed to undertake a thorough and satisfactory analysis of the Applicant's claim, relying instead on the fact that Mexico is a democratic state and that the Applicant was therefore required to "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." It was incumbent upon the Board, in my view, to clearly set out why the Applicant's numerous attempts to seek protection were insufficient to establish that he had taken all reasonable steps in the circumstances to seek state protection. The Board's decision, in my view, lacks justification and transparency and was not reasonable.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is allowed and the matter is returned for a new hearing before a different Board Member. No question for certification was submitted by the parties.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5197-07
STYLE OF CAUSE:	Fermin Feliciano Mancada Mendoza **v.** The Minister of Citizenship and Immigration
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT:	TEITELBAUM D.J.
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APPEARANCES:

Mr. Boniface Ahunwan	FOR THE APPLICANT
Mr. John Locar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Boniface Ahunwan Barrister & Solicitor Toronto, Ontrio	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT