

Date: 20080411

Docket: IMM-3659-07

Citation: 2008 FC 466

Ottawa, Ontario, April 11, 2008

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

OSCAR CASTILLO RAMIREZ, HECTOR ANTONIO VICCON PALACIOS

Applicants

and

THE MINSITER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Castillo Ramirez and Mr. Viccon Palacios are Mexican nationals. They seek judicial review of the decision of the Refugee Protection Division (RPD) rejecting their claim for protection under sections 96 and 97 of the *Refugee Protection Act*, S.C. 2001, c.27.

Facts

[2] The applicants are a gay couple and have been together for eight years. Prior to coming to Canada, they resided in the city of Cancun, where Mr. Castillo Ramirez worked as an architect and Mr. Viccon Palacios worked as a music teacher. Both have been the victims of homophobic incidents in the past going beyond hurtful words. For instance, in 2000 Mr. Viccon Palacios was attacked by a group of young men in a city park upon leaving a gay bar. And in 2004, an apartment administered by Mr. Castillo Ramirez was vandalized by the outgoing tenants, who scribbled anti-gay graffiti on the walls¹. Since they have lived a common life, the applicants have been compelled to move several times because they were harassed by homophobic neighbours whenever the latter became aware of their relationship.

[3] Because of such incidents and the prevalence of homophobic sentiments in Mexican society generally, over the years both applicants said that they have felt it necessary to be more or less discrete about their sexual orientations, particularly in their working lives. Nonetheless, until the series of incidents which provoked their actual departure from Mexico, the applicants considered their lives and situation to be tolerable despite the discrimination they faced.

¹ Although he filed a complaint about the incident on June 26, 2004, it was only on January 3 of 2006 that Mr. Castillo-Ramirez specified to the police the anti-gay aspect of the vandalism, on the advice of a Cancun gay activist. See pp. 119-124, 143-145 of the certified record.

[4] This series of incidents began on November 5, 2005, when the applicants were arbitrarily stopped by a group of police officers after leaving a Cancun gay bar. These police officers took down the applicants' names and vehicle information, and were going to bring them in to the police station. When the applicants refused arrest and threatened to report the incident, they were essentially told by the police to watch out for their lives, who warned that "fags who carry on like that, we kill them (...) things will go badly for you." ("Les tapettes qui se conduisent comme cela on les tue (...) cela ira très mal pour vous².") In the end, however, the applicants were not arrested.

[5] Several days later on November 13th, in the middle of the day, the applicants were in their car driving when someone shot a bullet through their windshield. Neither of them was injured but both were frightened. At this time they decided against reporting the incident out of fear that it was the police themselves who were responsible. Also, a cousin of Mr. Castillo-Ramirez who is now a judge advised against reporting the incident, since there were no identifiable suspects and the police would not investigate seriously without a bribe in any case (see p.46 of the certified record). As a result of this incident, the applicants sought therapy with a psychologist and later a psychiatrist, and filed documentary evidence in that respect.

[6] On December 10, 2006, Mr. Castillo Ramirez' mother received a phone call at her home in Mexico City. The caller claimed he had kidnapped her son and demanded ransom money. The caller had detailed information about Mr. Castillo Ramirez, including his full name and address. The

² The RPD's decision is in French, however the applicants requested reasons in English from the Court.

kidnapping was in fact a ruse, but Mr. Castillo Ramirez' mother reported the extortion attempt to the Office of the Attorney General for the Federal District nonetheless. In her complaint, she does not mention anything about possible police involvement or a relation to earlier incidents involving her son in Cancun (see pp. 128-132 of the certified record).

[7] Similar calls followed later in December, while Mr. Castillo Ramirez was with his parents in Mexico City, prompting him to file his own complaint with the Office of the Attorney General for the Federal District on the 29th of December (at pp. 131-135 of the record). The unknown caller said that he and Mr. Viccon Palacios could expect to be attacked upon their return to Cancun.

[8] Thereafter the applicants resolved to report the shooting incident of November 13th to the Cancun police, having concluded on the advice of Mr. Castillo Ramirez' father and a Cancun gay activist named Guzman that it would be prudent to make an official report despite their misgivings about police involvement. This they did on January 16 (see pp. 145-147). The Cancun police took the complaint and evidence submitted by the applicants (which included the bullet retrieved from the cabin of the car), but asked for a bribe to actually investigate.

[9] After this, the applicants went unmolested for some time, until on March 18, 2006, Mr. Castillo Ramirez' mother received another threatening phone call. In her police report of the same day, she stated that the caller had made reference to the shot fired at the applicants' car.

[10] A little over a week later, the applicants were again targeted; this would be the final straw which allegedly prompted them to flee the country. It was around 10PM on March 30th when the applicants realized they were being followed by a vehicle of the type used by the judicial police (as opposed to the traffic police), which at one point even turned on its police flasher. They were followed for about three kms, until they turned into a well-lit supermarket parking lot and waited until they felt secure enough to proceed home. They arranged a hasty departure and left for Canada three days later, claiming protection upon arrival.

[11] In Canada, Mr. Viccon Palacios was diagnosed with HIV, in May of 2006. His medical condition was raised as an additional element of his claim by way of an affidavit dated May 14, 2007, supported by a letter of his physician Dr. Martin Potter (at pp. 107-109 of the certified record). In his affidavit, Mr. Viccon Palacios alleges that he fears that he would not be able to receive adequate medical treatment in Mexico particularly as regards medicines, and that like his ex-partner who died of AIDS in 1999, he would not be able to find employment on account of his HIV status, and he would face discrimination from doctors and nurses in the actual dispensation of medical care. At the hearing, he elaborated on these elements of his claim.

[12] In its decision of August 17, 2007, the RPD rejected the applicants' claims on the following grounds:

i) with regard to Mr. Viccon Palacios' HIV status, the RPD dismissed this portion of the claim on the basis that the documentary evidence speaks of treatment possibilities for the HIV infected in Mexico, and it was not established that the Mexican government would refuse to offer Mr. Viccon Palacios adequate treatment; moreover, the RPD notes that even if Mexico were unable to provide sufficient medical services, this could not found a claim under s. 96 of the Act, and is in fact expressly excluded as a basis for a claim for protection under s. 97;

ii) as for the common elements of the applicants' claim, the RPD concluded that the incident of November 5, 2005 could not be counted as persecution against which there would be no state protection, as the police refrained from arresting the applicants and "thereby" showed an awareness that their actions could be sanctioned in accordance with mechanisms put in place by the state; that nothing in either Mr. Castillo Ramirez' or his mother's complaints to the police indicates that the police were definitely the perpetrators of the mock kidnapping, in a country where the practice is commonplace³; and that the alleged link between the three incidents and the police was purely speculative. The RPD then adds "[l]e tribunal n'ajoute pas foi à cette histoire, il n'y croit tout simplement pas." ("The tribunal

³ It is not clear whether the RPD meant that kidnappings are commonplace, or rather that the police are involved in many kidnappings, as suggested by the documentary evidence (see p.249)

doesn't accept this story, and simply doesn't believe it"). As for the incident of March 30, 2006, the RPD concludes that it could not be counted as persecution.

iii) finally, the RPD comments that in light of the information related in its Mexico National Documentation Package⁴, nothing would have prevented the applicants from filing a complaint after the incident of March 30, 2006, and opines in the final paragraph of its analysis that the applicants failed to avail themselves of every means of obtaining domestic state protection. The RPD also notes, at p.6 of its decision, that the applicants' two-month delay in reporting the shooting incident to the police reflects negatively on the seriousness of their efforts to secure state protection.

[13] The applicants challenge the decision on numerous grounds; the Court will only refer to the main ones. They argue that the RPD erred i) by failing to assess whether discrimination faced by the HIV positive and their families in Mexico amounts to persecution, and whether such discrimination, coupled with anti-gay discrimination generally and the specific series of incidents experienced by the applicants, amounts cumulatively to persecution; and ii) by failing to explain and provide reasons for the finding that the applicants' story was not credible. The applicants also argue that the RPD's analysis of the state protection issue was insufficient and cannot stand given that its analysis

⁴ The specific reference is to documents 9.1 and 9.5. These were not included in the record before the Court, but are described in the index respectively as "List of government-funded institutions that assist those having difficulty obtaining state protection" and "Procedures followed to file a complaint with the Federal Prosecutor's Office."

of the risk faced by the applicants did not include all grounds raised, namely HIV status, generalized discrimination against gays, and the cumulative effects thereof.

Analysis

[14] In light of the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, and the extensive prior case law of this Court applying the pragmatic and functional approach to the RPD's findings on factual questions (including credibility and plausibility) and questions of mixed fact and law (such as state protection), it appears that the RPD's findings in this case are reviewable against a reasonableness standard⁵.

[15] In *Dunsmuir*, it was explained at paragraph 47 that "[a] court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes in respect of the facts and the law."

⁵ The possible impact of section 18.1 (4) of the Federal Courts Act was not raised by the parties. See *The Minister of Public Safety and Emergency Preparedness v. Lennox Philip*, 2007 FC 908.

[16] Turning back to the decision before the Court, in its treatment of the portion of Mr. Viccon Palacios' claim relating to his HIV status, the RPD appears to deal only with the availability of medical services and accessibility thereof to the HIV infected. It does not address the allegation that HIV infected patients are discriminated against by doctors and nurses in the provision of care and services (see the decision of the Federal Court of Appeal in *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365). Nor does the RPD address the allegation that Mr. Viccon Palacios would face discrimination in employment, whereas the applicants clearly alleged that Mexican employers conduct medical testing and will dismiss or refuse to hire HIV positive workers out of a concern to minimize their contributions to the public health care scheme, although this is apparently illegal⁶.

[17] This matter of employment-related discrimination (and its alleged connection to the availability of health care) was discussed at considerable length by Mr. Viccon Palacios and his counsel on the last day of the hearing. As such, it cannot be dismissed as an issue that had not been argued and that did not emerge perceptibly from the evidence presented as a whole, as the respondent urges on the authority of the Federal Court of Appeal's decisions in *Guajardo-Espinoza et al. v Minister of Employment and Immigration*, [1993] F.C.J. No. 797, and *Pierre-Louis v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 420, and the decision of this Court in *Mbokosa v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1806. In

⁶ The issue is addressed in a 2005 newspaper article translated and reproduced at p. 275 of the record; there was also documentary evidence that organized efforts against employer stigmatization of the HIV infected are underway, at pp.279-280.

the circumstances, the Court can only conclude that the RPD effectively disregarded a significant element of the Mr. Viccon Palacios' claim.

[18] Moreover, the Court agrees with the applicants that the RPD failed to consider whether the cumulative effect of all of the grounds raised by the applicants could amount to persecution (notwithstanding its apparent finding that even taken together the events of November 5 and 13, 2005 and March 30, 2006 did not amount to persecution).

[19] Also problematic is the ambiguity of the RPD's statement cited previously, that "it doesn't accept this story and does not believe it." If the RPD is referring to the plausibility of police involvement in the mock kidnapping, then the Court would be reluctant to intervene as this was within the range of possible outcomes reasonably open to the RPD, even if it was poorly reasoned. If the statement refers rather to the veracity of the mock kidnapping (or even the veracity of the story altogether, as it was understood by the applicants), the RPD would clearly have had to review and explain its dismissal of the corroborating evidence adduced by the applicants, such as their numerous complaints to the police and Office of the Attorney General (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425). This ambiguity affects the intelligibility of the RPD's reasons.

[20] There remains the question of whether the RPD's finding on the applicants' failure to seek state protection is sufficient to save the decision, as argued by the respondent. But here again, the Court must conclude that the RPD's reasons fall short. Where the applicants testified to multiple and essentially fruitless attempts to seek the assistance of the authorities in two localities, the RPD should have articulated why this evidence was not sufficient to meet the evidentiary burden recently discussed by the Federal Court of Appeal in *Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, at para. 38, and how one more complaint might have made any difference. Moreover, the Court agrees with the applicants that the analysis of state protection must be personalized and take account of all grounds raised. Here, the RPD approached the issue as if the applicants' claim related solely to their alleged targeting by the police, whereas their situation is somewhat more complex, as may be appreciated from these reasons. Accordingly, the RPD's laconic statements on the applicants' failure to seek state protection cannot be regarded as sufficiently well-explained to meet the reasonableness threshold.

Conclusion

[21] In light of the above, the Court finds that the RPD's decision cannot be qualified as reasonable. Alone, any one of the defects canvassed herein might not have been determinative but their cumulative effect vitiates the decision as a whole. The decision is quashed.

[22] The parties did not propose any question of general importance for certification and the Court is satisfied that this case turns on its own facts.

ORDER

THIS COURT ORDERS that the application is granted. The decision is set aside and the matter will have to be reconsidered (after a new hearing) by a panel differently constituted.

“Johanne Gauthier”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3659-07

STYLE OF CAUSE: OSCAR CASTILLO RAMIREZ,
HECTOR ANTONIO VICCON PALACIOS
v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

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**REASONS FOR JUDGMENT
AND JUDGMENT:** The Honourable Justice Johanne Gauthier

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