

Date: 20080709

Docket: IMM-5461-07

Citation: 2008 FC 852

Vancouver, British Columbia, July 9, 2008

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

**ARMANDO FALCONI MAZA and
SOFIA ABRIL ALTAMIRANO LARA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants are husband and wife; both are citizen of Mexico. Immediately before leaving Mexico for Canada, the Applicants owned and operated an aquarium supply store in the Mexican state of Chiapas. Prior to that, the male applicant, who is a Mexican lawyer, worked in various government legal departments and in private practice in Chiapas. The Applicants left Mexico in 2006, the husband preceded the wife by a few months, having sold their business, and came to Canada. The husband came first as a tourist, and a few weeks later made a claim for refugee protection on the basis that he feared persecution at the hands of the state in Mexico. By a decision

dated December 5, 2007, the Immigration and Refugee Protection Board rejected that claim.

This application is for a judicial review of that decision.

[2] For the reasons that follow, I find that the application is dismissed without costs. There is no question for certification.

FACTS

[3] The Board member made findings of fact without comment as to the credibility of the Applicants. As such there appears to be no dispute as to the findings of fact or credibility as far as this application is concerned.

[4] The male Applicant worked as a lawyer for a branch of the state government of Chiapas in Mexico. The former assistant Attorney General of that state, Granados, was accused of corruption and fled to Spain. The Applicant was asked to testify against him and refused to do so. His wages were withheld; however, he retained a lawyer, sued and was ultimately awarded reimbursement in the order of 386,400 pesos. He has not actually received the money. The Board member does not consider why the Applicant does not actually have the money in his reasons; a review of the transcript of the Applicant's evidence in this respect is equivocal, at one point he says that an agent can collect it for him, at another time he says that he must be there in person, at another time he says he does not know what must be done.

[5] In the meantime, the Applicant and his wife changed careers opening up an aquarium store selling fish and turtles. At some point two unidentified men entered the shop and claimed to be judicial police officers. They were not in uniform and the Applicant did not ask for identification. While the Board member does not mention it in his reasons the transcript shows that the male Applicant was asked why he did not ask for identification. He answered that he was afraid that they would slap him and rough him up. The male Applicant says that those two persons asked him to testify against the former assistant Attorney General and drop his lawsuit for unpaid wages.

[6] These two unidentified persons made subsequent visits to the Applicant making the same requests. On the last of these occasions one of those persons brandished a gun and threatened the male Applicant that if he were to disappear, they would take reprisals against his wife.

[7] At this point, the Applicants decided to flee Mexico. They made a private unadvertised sale of their aquarium business. The male Applicant came to Vancouver first claiming to be a tourist then, a few weeks later, made a refugee claim. The female Applicant moved in with her parents located in a different state in Mexico and, a few months later, came to Canada to join her husband.

[8] It is clear that neither Applicant ever made a complaint to the police or anyone else in authority as to the visits by the two unidentified persons. It is also clear that the Applicants, shortly before coming to Canada, were able to secure Mexican passports without incident and to leave Mexico without incident.

[9] What is also clear is that family members of the Applicants, including a son, parents and a sister, remain in Chiapas without incident and without being approached by anyone searching for or seeking retribution against the Applicants.

[10] The Board member found that the Applicants did not have a well-founded fear of persecution. He found further that, even if they possessed such a fear, state protection was available in Mexico. The Board member stressed that the male Applicant was a lawyer who worked for two state governments and would know what avenues were available to seek state protection. Nonetheless the Applicants did not approach Mexico for assistance. He found that the Applicants had failed to provide clear and convincing evidence to what the presumption of state protection.

ISSUES

[11] The Applicants raise two issues:

1. Did the Board err in requiring clear and convincing evidence that state protection would not be effective given that the persecutors were Agents of the state; and
2. Did the Board member make unreasonable findings of fact in respect of the adequacy of State Protection in Mexico?

STANDARD OF REVIEW

[12] Since the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, a judicial review is to be conducted on the basis that two standards only, reasonableness and correctness, are to be considered. Correctness is to apply to questions of law and jurisdiction.

Reasonableness to questions of fact and mixed fact and law where the law cannot reasonably be separated out. In considering reasonableness a range of reasonable determinations may be possible with greater or lesser deference given in respect of the particular tribunal and circumstances.

[13] In the present circumstances, while no privative clause exists, the determination of the Board as to adequacy of state protection is a factual matter in respect of which the Board has considerable expertise. Considerable deference to the Board must be given in this respect.

ANALYSIS

Issue #1: Evidence required where alleged perpetrators were agents of the state.

[14] The Supreme Court of Canada in the often referred to case of *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, dealt with the question of state protection. A state is presumed to afford protection to its citizens and international law steps in only when that protection is unavailable. To test whether such protection is unavailable to a claimant a two-fold test is applied: the claimant must subjectively fear persecution; and (2) that fear must be well founded in an objective sense.

[15] The Federal Court of Appeal has very recently considered how the question of sufficiency of state protection is to be approached in *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94. It answered a certified question at paragraph 38 of its unanimous decision this way:

38 I would answer the certified questions as follows:

A refugee who claims that the state protection is inadequate or non-existent bears the evidentiary burden of adducing

evidence to that effect and the legal burden of persuading the trier of fact that his or her claim in this respect is founded. The standard of proof applicable is the balance of probabilities and there is no requirement of a higher degree of probability than what that standard usually requires. As for the quality of the evidence required to rebut the presumption of state protection, the presumption is rebutted by clear and convincing evidence that the state protection is inadequate or non-existent.

[16] It is important to note that in that case the applicant, a Mexican citizen, was alleging that she was being abused not only by her estranged husband but also by his brother a federal judicial police officer.

[17] In a different and unrelated case, even though the applicant has a similar name *Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 944, Justice Snider of this Court held that where an applicant has failed to approach the authorities, alleging that agents of persecution were state agents, the Court must still consider whether it was objectively unreasonable not to have sought such protection. She said at paragraphs 6 to 8:

6 In the case at bar, the Applicant submits that there is no obligation at law for her to demonstrate to the Board that she sought state protection, given that the agents of persecution were state agents. I disagree.

7 In *Ward*, supra at 724, the Supreme Court of Canada held that, when state protection "might reasonably have been forthcoming", the Board is entitled to draw an adverse inference based on a claimant's failure to approach state authorities for assistance:

Like *Hathaway*, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection "might reasonably have been forthcoming", will the

claimant's failure to approach the state protection defeat his claim. Put another way, the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state.

8 In my view, whether it is objectively unreasonable for the claimant not to have sought the protection of home authorities invites the Board to weigh the evidence before it and make a finding of fact. For example, although the agent of persecution might be a stage agent, the facts of the case might suggest that purely local or rogue elements are at work and that the state in question is democratic and offers protection to victims similarly situated to the claimant. It might, therefore, be objectively reasonable to expect a claimant to seek protection. In other instances, the identity of the state agent and documentary evidence of country conditions might mean that state protection would not be reasonably forthcoming and, therefore, the claimant is not expected to have sought protection. Given that the Board's analysis of Costa Rica's political and judicial institutions was not patently unreasonable, meaning it was supported by the evidence before the Board, the imposition of an obligation to seek protection based on this evidence does not constitute a reviewable error, in my opinion.

[18] In the present case the evidence is clear that the Applicants made no effort to approach state authorities in respect of their persecutors. The male Applicant was a lawyer who had worked for the government and would have known how to go about making a complaint. The Applicant says that his persecutors were state judicial police officers but they were not uniformed and the Applicant made no efforts to confirm their identities. Nonetheless the male Applicant had sufficient confidence in the Mexican legal system to sue for recovery of withheld wages.

[19] The Board member was entitled to weigh this evidence in coming to the conclusion that he did, namely that the Applicants had not rebutted the presumption of state protection by clear and convincing evidence. This decision was reasonable and should not be set aside.

Issue #2: Findings of Fact

[20] The Applicants assert that certain findings of fact made by the Board member were sufficiently unreasonable on the evidence before him that his conclusion that the presumption of state protection had not been displaced should be set aside.

[21] The Applicants argue that the Board member relies principally on an Amnesty International report as to conditions in Mexico dated 7 February 2007 entitled “*Mexico Injustice and impunity: Mexico’s flawed criminal justice system*”. Their counsel argue that the member was selective in choosing which parts of the report upon which to rely, overlooking those parts which spoke of corruption and abuses particularly in Chiapas and the difficulties in securing effective relief through the National Human Rights Commission or through the Courts particularly in respect of a remedy called *amparo*.

[22] It is clear from his reasons that the Board member considered the report and made reference to some of the remedial steps suggested in the report. The member did so in the context that the male Applicant was a lawyer who had experience in working with the government but took no steps whatsoever to approach Mexico for assistance notwithstanding the fact that he sought assistance

from the legal system in respect of his withheld wages. To repeat part of what the member said at paragraph 31 of his reasons:

As a Mexican trained law graduate, a lawyer, and as a lawyer who has worked for two State Governments including but not limited to two offices of the state attorney general, the principal claimants should have known all the avenues that Mexico provides for its citizens to obtain state protection in Mexico. In fact, the claimants submitted evidence of the four basic avenues for seeking redress in Mexico. They nonetheless did not approach Mexico for assistance.

[23] The Board member did not deal with the evidence in an unreasonable way nor make unreasonable findings.

CONCLUSION

[24] I find that the Board member did not make any reviewable error in law or in fact and thus this application for judicial review will be rejected.

[25] The Applicants proposed a question for certification as follows:

“When a refugee claimant faces persecution at the hands of agents of the state, does the claimant’s evidentiary burden of proof to show that the state is unwilling or unable to provide state protection lower than in cases where the agents of persecution are not agents of the state?”

[26] The Respondent says that there is no question for certification in this case. I agree.

The circumstances in this case are fact driven. The Federal Court of Appeal in *Carillo, supra*, has recently addressed much the same issues as arise here such that this case presents no new basis for a legal interpretation.

JUDGMENT

For the reasons herein provided:

THIS COURT ADJUDGES that:

1. This application is dismissed;
2. There is no question for certification;
3. No Order as to costs.

“Roger T. Hughes”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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