

Date: 20080930

Docket: IMM-5503-07

Citation: 2008 FC 1092

Toronto, Ontario, September 30, 2008

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

**Pilar ATRIANO SALDANA
Alejandro ATRIANO RODRIGUEZ
Micaela Ma. Del Pilar RODRIGUEZ RODRIGUEZ
(a.k.a. Micaela M D P Rodriguez Rodriguez)
Jorge ATRIANO RODRIGUEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review is dismissed because the Refugee Protection Division of the Immigration and Refugee Board (RPD or Board) committed no reviewable error when it found Mr. Atriano Saldana's evidence that he had been beaten to be incredible. Further, the Board made no reviewable error in finding that Mexico City was a viable internal flight alternative for three of the applicants, and that the fourth applicant would receive adequate state protection in Mexico City.

[2] Pilar Atriano Saldana, his wife Micaela Ma. Del Pilar Rodriguez Rodriguez, and their adult sons Alejandro Atriano Rodriguez and Jorge Atriano Rodriguez, are indigenous citizens of Mexico who lived in Tlaxcala, Mexico. They testified that they were targeted in Mexico by a criminal gang who believed that the applicants had significant money because each year Mr. Atriano Saldana came to work in Canada as part of the farm worker program. The applicants testified that they received harassing and threatening telephone calls and were followed. The younger son, Alejandro, testified that in May, 2004 he was followed by a man who tried to stab him, and cut his backpack when Alejandro turned to face his assailant. Mr. Atriano Saldana testified that he was attacked and beaten by two men in February, 2005. The older son, Jorge, testified that after his family moved to Canada he moved to Mexico City. There, on January 4, 2007, he was kidnapped by three men who kept him for four days and then released him, telling him that he had five days in which to pay them \$10,000.00. Additionally, each claimant testified that as indigenous citizens they had been discriminated against, and would not receive police protection.

[3] Their claims for refugee protection were dismissed by the RPD because it found that:

- The senior male claimant's account of being beaten was not credible.
- Three of the claimants did not suffer any serious harm or persecution in the past.
- Being a member of an ethnic group, i.e. indigenous Mexican, or Jehovah's Witness, on its own, does not establish a serious possibility of serious harm or persecution in Mexico City.
- The efforts of the oldest son to obtain assistance in Mexico City due to the nature of his information does not rebut that the state will provide adequate protection in the future.
- The documentary evidence supports that for citizens such as the claimants living within the [Federal District] the state is

making serious efforts to provide adequate, but not perfect, protection should they require such protection in the future.

[4] The applicants assert that the RPD made the following errors:

1. The Board erred by finding that Mr. Atriano Saldana's testimony that he was beaten was not credible.
2. The Board ignored evidence.
3. The Board erred by finding that Mexico City is a viable internal flight alternative for all four applicants.
4. The Board erred by finding that state protection would be available to the applicants in Mexico City.

1. Did the Board err by rejecting Mr. Atriano Saldana's claim that he had been beaten?

[5] The applicants argue that the RPD's manner of questioning Mr. Atriano Saldana was confusing, and that the Board erred by drawing a negative inference from Mr. Atriano Saldana's initial failure to testify about the beating. Rather, the applicants submit that the RPD should have accepted Mr. Atriano Saldana's explanation for his initial failure to mention that he had been beaten.

[6] In my view, there is no merit to this contention. The transcript does not support the argument that either the RPD's questions, or the manner in which it asked questions, was confusing. No objection was taken to the Board's manner of questioning, and the order in which the applicants testified was suggested by their counsel.

[7] Moreover, the RPD's negative credibility finding was also supported by its finding that the attack described by Mr. Atriano Saldana was implausible. No challenge is made to that finding.

[8] The RPD is entitled to considerable deference with respect to its credibility findings, and no basis has been established for the Court to interfere with the finding in this case.

2. Did the RPD ignore evidence?

[9] The RPD found that neither Mr. Atriano Saldana, his wife, nor their younger son experienced serious harm before leaving Mexico. This is said to ignore the following evidence:

- The younger son was followed by a knife wielding assailant who cut his back pack when trying to stab him;
- Mr. Atriano Saldana's daughter was attacked;
- The elder son's kidnapping was related to the fears of the other family members because they had all been targeted; and
- The applicants' evidence about their discriminatory treatment.

[10] In my view, the Board did not err as the applicants argue. The Board's reasons are not to be read microscopically. Rather, the question to be answered is whether the Board had a clear grasp of the issues and the evidence before it.

[11] Here, the nature of the attack on the younger son was not so serious that the Board's failure to reference it gives rise to the inference that the Board failed to take the evidence into account. The Board was correct that, fortunately, the attack did not cause any serious harm.

[12] The attack on the daughter, who is not a claimant, was not ignored but was mentioned by the RPD on page 2 of its reasons.

[13] The RPD did consider the attack on the older son to be related to the fears of the entire family because the Board noted that all of the family members believed they had been targeted and followed by kidnappers. As well, the circumstances of the older son's kidnapping were relied upon by the Board to show how implausible the father's evidence was with respect to the beating he claimed to have sustained.

[14] With respect to the applicants' fears arising out of their ethnicity, the applicants state that the Board ignored an amendment to their Personal Information Forms (PIFs) with respect to their ethnicity and that "it is difficult to know what conclusion the RPD would have made if it knew that they raised the issue and were allowed to talk about it."

[15] What the Board wrote was that "[t]here is no mention in any of the PIFs that the claimants experienced discrimination due to their ethnicity. In oral evidence, ethnicity was mentioned as a reason for not going to the police after the February 2005 attack [...]"

[16] The Board could have been clearer in stating that the PIFs were amended at the hearing. However, the Board was correct that discrimination due to ethnicity was not originally raised by any applicant in their PIF, but the applicants did testify about discrimination at the hearing. While the RPD did not question the applicants about the discrimination they said they had faced, and directed the applicants to deal with the specific questions posed to them by the Board member, nothing precluded counsel for the applicants from later adducing this evidence. No attempt was made to do so and no complaint can now be made about that omission. The applicants were at all times obliged to lead all the evidence that they intended to rely upon to support their claims to protection.

3. Did the Board err by finding that Mexico City was a viable internal flight alternative for all four applicants?

[17] Two errors are alleged by the applicants. First, it is said that the RPD erred in finding that Mexico City was an internal flight alternative for the eldest son, Jorge, because Mexico City was where he had been kidnapped. Second, it is said that the RPD erred in finding that it would be reasonable for the other family members to move to Mexico City when there was no evidence that Mr. Atriano Saldana had ever held any employment in Mexico City, and his work history only showed that he was employed as a farm worker in Canada.

[18] Again, I have not been persuaded that the RPD erred as alleged.

[19] With respect to the first alleged error, the RPD at the end of its reasons did make the statement that "Mexico City meets both requirements for a viable [internal flight alternative]." However, I am satisfied that the Board did not find the older son to have an internal flight alternative in the very location in which he was kidnapped. Rather, the RPD found that he would have adequate state protection in Mexico City. I reach this conclusion because during the hearing, the Board member identified the issue to be as follows:

MEMBER: Oh, okay. Okay just let me get this and so basically I'm looking at the District Federale as a viable IFA for the three members of the family than [sic] an area where the oldest son could return with less than a serious possibility of harm and where adequate protection would be provided.

[20] Further, at page 3 of its reasons the Board wrote:

Is the Federal District (D.F.) within Mexico City a viable Internal Flight Alternative (IFA) for the senior male claimant, his wife, and youngest son? I am satisfied this is the case.

[21] Thus, the Board did not find Mexico City to be an internal flight alternative for the older son.

[22] I now turn to the reasonableness of the internal flight alternative for Mr. Atriano Saldana, and his wife and younger son. The law with respect to the existence of an internal flight alternative was recently and succinctly reviewed by my colleague Justice Kelen in *Farias v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1035 at paragraph 34. There, he noted that:

- It is the applicant who bears the burden of proof to demonstrate that an internal flight alternative does not exist or is unreasonable.
- A high threshold must be met in order to establish that an internal flight alternative is unreasonable.
- The fact that a refugee claimant may not be able to find suitable employment in his or her field of expertise may or may not make an internal flight alternative unreasonable.

[23] Here, the following evidence was given by Mr. Atriano Saldana:

Q. If you and your family were to move to Mexico City and have the kinds of problems that you've had in the past, particularly that part of Mexico City that lies within the Federal District, why do you think you wouldn't be able to get help from the authorities in the Federal District?

A. Most of the times the Mexicans that have the right economical positions are helped. I believe that we cannot receive that protection because of our ethnic background.

Q. Is there any other reason you and your family couldn't live in Mexico City?

A. The reason is that if we go back maybe one of us will be kidnapped and killed. I came to this country to work and gave the best of my life. I try my best to improve my work and this twenty years that I have reached in the year 2005 I work as a farmer and this helped me to keep improving my work.

[24] The Board member later repeated his inquiry to Mr. Atriano Saldana as follows:

Q. So is there any other reason you can't live in Mexico City Sir within the Federal District other than your fear that one of your family members would be kidnapped and killed and as I understand it to be your belief that because of your ethnicity

the Federal authorities won't provide you with any meaningful help? Anything else?

- A. Only because of the reasons given for my family. I ask for the Canadian authorities to keep us in mind that we are persons who need your protection.

[25] No other evidence relevant to the reasonableness of the internal flight alternative was adduced by the applicants. I conclude from this that the applicants failed to meet their onus to establish that the proposed internal flight alternative was unreasonable. The RPD's decision on this element of the two-step test was not unreasonable.

4. Did the Board err by finding that state protection would be available to the applicants in Mexico City?

[26] After the older son was released by his kidnappers, he went to the police. He says that, after he was made to wait a long time, the police asked him a number of questions and then completed a report. Questions asked by the police included what had happened to him, whether he knew the identity of his kidnappers, whether he had seen them before and whether he could recognize the vehicle used by the kidnappers. The older son was unable to identify his kidnappers and could provide no information about his kidnappers, the vehicle they used or where he was held.

[27] When making his report, the older son asked for a police car to be put outside his house, but he was told that there were insufficient personnel for this. The older son testified that instead he was told by the police to go home and to be careful.

[28] The RPD found that:

- The older son could not provide any helpful information to the police. "While perhaps the police could have done more than write a report, it would still be unlikely that an arrest could be made based on this evidence."
- The failure of the police to place a patrol car to guard the older son's house did not mean that assistance would not be forthcoming if required in the future.
- Within that part of Mexico City which is in the Federal District, the state was making serious efforts to provide adequate, but not perfect, protection.

[29] The applicants argue that the police inaction is evidence that the police were unwilling to protect Jorge and amounted to an admission that the police were unable to provide protection against kidnappers. The applicants further argue that the Board failed to consider the documentary evidence, and erred by failing to consider whether the laws and procedures in place in Mexico City are effective.

[30] The following principles are well-settled:

- Nations are presumed to be capable of protecting their citizens.
- Clear and convincing evidence of the state's inability to protect must be provided.
- The Court cannot require that the protection provided be perfectly effective. As Justice Hugessen wrote for the Federal Court of Appeal in *Minister of Employment and Immigration v. Villafranca* (1992), 150 N.R. 232 at paragraph 7:

No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been

effective at protecting persons in his particular situation. Terrorism in the name of one warped ideology or another is a scourge afflicting many societies today; its victims, however much they may merit our sympathy, do not become convention refugees simply because their governments have been unable to suppress the evil. Where, however, the state is so weak, and its control over all or part of its territory so tenuous as to make it a government in name only, as this Court found in the case of *Zalzali v. Canada (Minister of Employment and Immigration)*, a refugee may justly claim to be unable to avail himself of its protection. Situations of civil war, invasion or the total collapse of internal order will normally be required to support a claim of inability. On the other hand, where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection. [emphasis added, footnote omitted]

[31] Justice Hugessen's comments are equally applicable to victims of crime.

[32] As a matter of law, the question for the Board was whether, on all of the evidence, it could still be presumed that in that part of Mexico City which is within the Federal District, the state is able to protect the applicants. Isolated cases of persons having been victimized or kidnapped may not rebut the presumption of state protection.

[33] In evidence before the RPD was Response to Information Request (RIR) MEX100642.E "Mexico: Kidnapping for ransom, including complicity of police officers, types of kidnapping, effectiveness of law enforcement officials and protection available to victims (2004 - 2005)." This RIR reported that:

Numerous reports from various sources published in 2004 and 2005 have noted that kidnapping for extortion was prevalent across the country, especially in major urban areas such as Mexico City (Canada 14 Oct. 2005; US 26 July 2005; *IHT* 22 July 2005; EFE 10 June 2004). However, while some sources have reported that kidnapping has increased significantly in recent years (*ibid.*; *The Economist* 17 June 2004), the government of Mexico counters this data, stating that this type of crime has stabilized and even declined slightly (*ibid.*; *El Universal* 22 Jan. 2004).

[...]

Even though kidnappings fall under state jurisdiction, in June 2004 President Fox stated that federal authorities would work with state and municipal governments “to coordinate anti-kidnapping efforts” (Mexidata 14 June 2004; EFE 10 June 2004). Consequently, much of the law enforcement effort to combat kidnapping has involved primarily federal police agencies such as the AFI (Reuters 22 Sept. 2005; *El Universal* 22 Jan. 2004; *Latin American Weekly Report* 22 June 2004; *Business Mexico* Sept. 2004). In September 2004, Mexico City-based news magazine *Business Mexico* reported that the AFI’s reputation in handling crime situations such as kidnapping was improving among those associated with the business community in Mexico. Between the time it was created in December 2001, and June 2004, the AFI reportedly disbanded 48 kidnap gangs, arrested 305 suspected kidnapers and solved 419 cases of kidnapping (*Latin American Weekly Report* 22 June 2004). In addition, the AFI assisted state authorities with 91 kidnapping cases (*ibid.*). Moreover, by August 2005, federal authorities announced that for the year-to-date they had taken into custody 72 suspected kidnapers and had “fully dismantled” 11 kidnapping gangs (*El Universal* 4 Aug. 2005).

[34] In my view, this evidence supported the conclusions of the RPD that the applicants had not rebutted the presumption that assistance would be forthcoming in the future in Mexico City in the Federal District if required, and that the state was providing adequate, but not perfect protection to its citizens.

[35] It is my further view that this evidence is more relevant to the Board's finding than the country conditions documentation relied upon by the applicants. In that regard:

- The Human Rights Watch and Amnesty International reports relied upon by the applicants deal generally with human rights problems in the criminal justice and public security systems.
- The United States Department of State report relied upon by the applicants deals generally with human rights protection.

[36] For these reasons, the application for judicial review is dismissed. Counsel posed no question for certification, and I agree that no question arises on this record.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

“Eleanor R. Dawson”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-5503-07

STYLE OF CAUSE: PILAR ATRIANO SALDANA et al., Applicants

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION, Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 4, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** DAWSON, J.

DATED: SEPTEMBER 30, 2008

APPEARANCES:

GERALDINE MACDONALD FOR THE APPLICANTS

TESSA ANNE KROEKER FOR THE RESPONDENT

SOLICITORS OF RECORD:

GERALDINE MACDONALD FOR THE APPLICANTS
BARRISTER & SOLICITOR
TORONTO, ONTARIO

JOHN H. SIMS, Q.C. FOR THE RESPONDENT
DEPUTY ATTORNEY GENERAL OF CANADA