Federal Court		Cour fédérale

Date: 20100408

Docket: IMM-883-09

Citation: 2010 FC 375

Ottawa, Ontario, April 8, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

HUGO JIMENEZ GOMEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) 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 January 22, 2009, wherein the applicant was determined not to be a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

[2] The applicant requests that the decision of the Board be quashed and the matter be returned to the Board for redetermination.

Introduction

[3] The applicant is a gay man who fled Mexico and came to Canada in 2007 seeking protection from his ex-partner, Ignacio. The Board rejected his claim based on the existence of adequate state protection in Mexico for the applicant. The Board found that the applicant was a difficult witness who provided inconsistent, confusing, implausible and evasive evidence regarding the central aspects of his claim. Nonetheless, the Board was willing to accept most of his story for the purposes of analyzing the issue of state protection.

Background

[4] The applicant met Ignacio at a party in Cuernavaca, Mexico, in December of 2005 and they began a romantic relationship. The applicant alleges that Ignacio worked for the Mexican government. The applicant also alleges that they moved in together in February of 2006, but that Ignacio subsequently became very abusive and jealous, biting him violently on one occasion.

[5] In July of 2006, the applicant tried to report Ignacio to the Mexican authorities but they did not believe him. The applicant alleges that he had witnessed Ignacio selling and using false identity documents.

[6] In August of 2006, the applicant was robbed, kidnapped and held for three days, during which he was beaten. He strongly believes Ignacio had organized the abduction. The applicant alleges that he reported the incident to the police but they did nothing. The applicant also alleges that he later discovered that $50,000 US had been advanced on his stolen credit card.

[7] The applicant alleges that in November of 2006, he moved to Tulum, some 1,050 kilometres away. On August 23, 2007, he came home from work to see Ignacio waiting for him. Ignacio was very angry and threatened to kill him with a knife. In the struggle that ensued, the applicant alleges that his arm was cut and he was raped. The applicant reported this incident to the police first thing the next morning. The police came to his apartment to take pictures and they told the applicant that he should leave the area. Several weeks later, the applicant fled to Canada.

Board's Decision

[8] The Board rejected the applicant's claim on the basis that the applicant had not rebutted the presumption that state protection was available in Mexico.

[9] After setting out the relevant law, the Board summarized some general information from the documentary evidence regarding Mexico's security forces, the level of democracy and resources used in the country to combat corruption. The Board then dealt with the three instances in which the applicant alleged that he attempted to seek help or protection from the state.

[10] The Board found that it was not unreasonable that the police did not conduct an investigation when the applicant reported to them Ignacio's dealings with false identification. The police told him that they would need more evidence in order to proceed. There was no evidence led at the hearing that the applicant attempted to provide such additional documentation to the police.

[11] In regards to the kidnapping incident, the Board found that the police did not refuse to help the applicant. Although they said they would investigate, the applicant had not given them enough information. The applicant could not identify any of the kidnappers. He told police that his only enemy was Ignacio. His narrative explained that he had hired a lawyer to follow up on the report he made to the police, but that the police had done nothing. When questioned, he said that he made only one phone call to follow up despite his evidence that his credit card company later informed him that $50,000 US had been advanced by the kidnappers and did not think it worthwhile to pursue the matter with the Human Rights Commission. With respect to the $50,000 US, the only evidence before the Board was his testimony that he had assumed the debt and had borrowed from friends to pay it off. He did not report it to the police. The Board did not find this explanation reasonable.

[12] With respect to the August 2007 attack in Tulum, the Board found that the police did provide adequate service and are still investigating. The applicant's story regarding what he told the police is unclear. It was not clear whether he told them Ignacio's name. The applicant did not have a copy of the denunciation he made to the police so the Board carefully considered a letter from the applicant's friend who had attempted to get it from the police station. The applicant's friend was told that the information was confidential, given that the matter was under investigation.

[13] The Board concluded that there was no evidence to suggest that the police are not making genuine and earnest efforts to investigate and that the applicant's choice to leave Mexico might have delayed or stymied the investigation.

Issue

[14] The issues are as follows:

1. What is the standard of review?

2. Was the Board's finding that the applicant failed to rebut the presumption of state protection reasonable?

Applicant's Written Submissions

[15] The applicant submits that since the Board did not make any adverse credibility findings, the applicant's evidence and testimony must be accepted as credible and trustworthy. Any credibility issues perceived by the Board are explained by the psychologist's report which indicated that the applicant may have difficulty testifying and by the lack of an interpreter.

[16] The applicant submits that the Board's finding on the first incident was unreasonable. The Board did not state what further documentation the applicant could have brought. The applicant did give the authorities Ignacio's name and indicated the crime to which he had been an eye witness. An investigation could have been started upon this evidence.

[17] Similarly, the applicant submits that the Board's finding on the second incident is unreasonable. The applicant testified that he made three phone calls to the police to follow up. Furthermore, contrary to the Board's finding, the applicant did provide sufficient details in his written denunciation to the police which identified Ignacio.

[18] Regarding the third incident, the applicant submits that the Board erred by inferring that because an investigation was underway, state protection was forthcoming. The police advising him to "leave the area" clearly constitutes an admission of inability to protect. When considering state protection, the Board must consider whether the state is willing to act.

[19] The applicant also submits that procedural fairness was breached when the Board did not provide an interpreter for the applicant when they saw he was having difficulty. Finally, the applicant was not informed of the case to meet, since the issue of state protection was not identified prior to the hearing.

Respondent's Written Submissions

[20] While the applicant contends his account must be deemed credible, the Board simply found the applicant's evidence on the adequacy of state protection unconvincing.

[21] The respondent submits that the Board's finding on the first incident was not unreasonable and reiterates the Board's reasons. With regard to the second incident, the evidence shows that the

applicant gave incomplete information to the police. According to his testimony, he spoke with police for only five minutes and his denunciation omitted the credit card theft and Ignacio's whereabouts. Despite this, Mexico considers kidnapping to be a very serious crime and there was evidence that an investigation is still underway.

[22] With regard to the third incident (the August 2007 attack) the respondent supports the Board's reasoning as reasonable. Further, it was open for the Board to find that the applicant had failed to rebut the presumption as he left Mexico before the police had an opportunity to respond and investigate.

[23] The respondent submits that procedural fairness issues have been raised too late in this proceeding. With regard to the interpretation issue, there was an interpreter present throughout the hearing. The Board clarified at the beginning that the applicant wanted to proceed in English. The presiding member also told the applicant that the interpreter would be available to explain anything to him he did not understand. Moreover, the applicant was represented by counsel who never made any objection on the record regarding interpretation or the order of questioning. With regard to the applicant's claim that he was not informed of the case to be met, the screening form provided notice that the applicant should file evidence and be prepared to testify to "all elements of the claim".

Analysis and Decision

[24] **Issue 1**

What is the standard of review?

Questions as to the adequacy of state protection are questions of mixed fact and law and are reviewable against a standard of reasonableness (see *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 282 D.L.R. (4th) 413, at paragraph 38).

[25] In this case, however, the applicant challenges precise factual findings by the Board. The applicant takes no issue with the Board's statement or understanding of the relevant law regarding the adequacy of state protection. Nor does the applicant argue that the law was improperly applied to the facts found by the Board. Rather, the applicant challenges the Board's factual findings themselves. Those findings of fact fall to be reviewed on the statutorily imposed standard found in paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 which states:

18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
. . .	. . .
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

[26] The Supreme Court in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12 (QL), recently referred to the impact of these legislative instructions.

> 46 More generally, it is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*.

It is with this high standard of deference in mind that I now turn to review the Board's findings of fact.

[27] **Issue 2**

Was the Board's finding that the applicant failed to rebut the presumption of state protection reasonable?

The Board set out the law regarding state protection which I reproduce below:

> A claimant is required to approach the state for protection if protection might reasonably be forthcoming or, alternatively, if it is objectively reasonable for the claimant to have sought protection. *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 724.
>
> The claimant's (evidentiary) burden of proof is directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all courses of action open to them.
> *M.C.I. v. Kadenko, Ninal* (F.C.A., no. A-388-95), Hugessen, Décary, Chevalier, October 15, 1996.
> Reported: *Canada (Minister of Citizenship and Immigration) v. Kadenko* (1996), 143 D.L.R. (4th) 532 at 536 (F.C.A.).
>
> A claimant from a democratic country will have a heavy burden when attempting to show that they should not have been required to exhaust all of the resources available to them domestically before claiming refugee status.

> *Hinzman, Jeremy v. M.C.I.* and *Hughey, Brandon David v. M.C.I.* (F.C.A., nos. A-182-06; A-185-06), Décary, Sexton, Evans, April 30, 2007; 2007 FCA 171, para. 46.
>
> No state can guarantee perfect protection. 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, the mere fact that the state's efforts are not always successful will not rebut the presumption of state protection.
>
> *Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 605 at 615 (C.A.).
> *M.E.I. v. Villafranca, Ignacio* (F.C.A., no. A-69-90), Hugessen, Marceau, Décary, December 18, 1992.
> Reported: *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 at 134 (F.C.A.).

[28] The applicant did not take issue with this statement of the law, but sought to clarify that a state's efforts to protect its citizens are to be evaluated by examining the effectiveness of those efforts at the operational level (see *Garcia v. Canada (Minister of Citizenship and Immigration)*, [2007] 4 F.C.R. 385, [2007] F.C.J. No. 118).

[29] The respondent similarly seeks to clarify that, as affirmed by the recent judgment of the Federal Court of Appeal in *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 F.C.R. 636, the burden is on the applicant to adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate (see *Carillo* above, at paragraph 30).

[30] The applicant further clarifies that a claimant need only provide some clear and convincing evidence to rebut the presumption (see *Garcia* above, at paragraph 19).

[31] While I find these to be helpful clarifications, I do not believe the Board misunderstood or misapplied the law.

[32] In finding that the presumption of state protection had not been rebutted, the Board did not find that protection had been provided to the applicant regarding the first two complaints. Rather, the Board found that the applicant did not make reasonable efforts to obtain protection.

[33] The applicant also asserts that because the Board did not directly challenge the applicant's credibility, his evidence and testimony must be accepted as credible and trustworthy. I disagree. The Board stated that it would accept his testimony for the purposes of analyzing the issue of state protection. Such a statement does not bind the Board to accept as true everything the applicant said. The Board did not state that it was accepting the applicant's entire story or the version of the story most favourable to the applicant's case. The applicant cannot now in this application seek to refine and clarify what the central aspects of his story were.

[34] Despite accepting the central aspects of his story, the Board was still permitted to weigh the evidence and consider the reliability of the applicant's testimony. For example, when faced with inconsistencies in his testimony, the Board was permitted to determine which version it saw as more likely.

[35] Rebutting the presumption of state protection requires highly probative evidence. The Board was entitled to determine that the applicant's evidence, even if reliable, was not clear enough or convincing enough to rebut the presumption of state protection.

[36] The Court must keep in mind "…it is not sufficient that the evidence adduced be reliable. It must have probative value. For example, irrelevant evidence may be reliable, but it would be without probative value." (see *Carillo* above, at paragraph 30). Therefore, the issue of credibility may not be determinative if the evidence submitted, whether credible or not, would simply not have sufficient probative value. In the words of Mr. Justice Zinn, it is possible for a PRRA officer to "neither believes nor disbelieves" an allegation made by an applicant, but rather to be "unconvinced" (see *Ferguson v. Canada (Minister of Citizenship and Immigration*), 2008 FC 1067, [2008] F.C.J. No. 1308 (QL) at paragraph 34).

[37] In my view, the Board did not commit a reviewable error in concluding that the presumption of state protection had not been rebutted.

[38] With regard to the applicant's first encounter with the authorities, the false identity report, the Board did not find it unreasonable that the police did not start an investigation because the applicant had not given them any documentation to support his accusations. It cannot be said that this factual determination of the Board was clearly wrong. It was reasonable for them to conclude that a police request for some corroborating evidence before launching an investigation did not amount to inadequate protection.

[39] The Board was not required to speculate as to what evidence the applicant should have brought in.

[40] With regard to the incident where the applicant claimed he was kidnapped and robbed, the Board determined that his denunciation to the police regarding the incident was incomplete. In my view, it was open for the Board to conclude that the applicant's testimony was not clear or convincing. The applicant could not identify any of his kidnappers, although he told police he thought Ignacio had ordered the kidnapping, he did not indicate where the police could find Ignacio. The applicant also did not report to the police that $50,000 US had been advanced on his stolen credit card. State police forces can hardly be expected to effectively investigate when significant components of the crimes alleged are withheld.

[41] Similarly, with regard to the last incident, it was not unreasonable for the Board to conclude that this did not amount to clear and convincing evidence of a lack of adequate protection. The police began to investigate after the attack by Ignacio, but the applicant left Mexico six days later. It was reasonable for the Board to determine that his leaving may have stymied the investigation.

[42] The applicant finally submits that if any aspects of his testimony were unclear, this was due to the fact that he was testifying in English without the aid of an interpreter. However, as stated earlier, the applicant has the burden of establishing all aspects of his case and was at all times represented by competent counsel. In any event, the applicant has not pointed to any fact or aspect

of testimony that was omitted or misunderstood, the acceptance of which would have made a material difference in the Board's conclusions or this judicial review.

[43] In written argument in reply, the applicant put forward an argument with respect to a breach of the duty of procedural fairness relating to interpretation and notice that state protection would be raised. The applicant, in his further memorandum of argument, stated there was only one issue in the application, namely, the Board's finding that the applicant failed to rebut the presumption of state protection was unreasonable. In addition, the issue of procedural fairness was not raised in the notice of application for judicial review nor was it raised at the hearing of this matter. Consequently, I will not deal with the issue. I might add that had I dealt with the issue, I am not of the opinion that there was any breach of the duty of procedural fairness based on the facts of this case.

[44] As a result of my conclusions, the application for judicial review must be dismissed.

[45] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[46] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97.(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au

Article 1 of the Convention Against Torture; or	sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-883-09
STYLE OF CAUSE:	HUGO JIMENEZ GOMES - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 22, 2009
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	April 8, 2010

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