

Federal Court



Cour fédérale

Date: 20100513

Docket: IMM-4547-09

Citation: 2010 FC 530

Ottawa, Ontario, May 13, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

**CARLOS CASTILLO MEJIA
MARIA CRISTINA HUERTA TORRES
CARLOS JESUS CASTILLO HUERTA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a judicial review of the decision (the decision) of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated August 13, 2009. The Board determined that the Applicants were neither convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 (IRPA).

[2] For the reasons below the application is allowed.

I. Background

[3] The Applicants are Carlos Castillo Mejia (the principle Applicant), his wife Maria Cristina Huerta Torres, and their 11 year old son. The Applicants are citizens of Mexico who entered Canada in 2007 and made an application for refugee protection on the basis that they feared extortion and violence at the hands of corrupt police officers in Mexico. The wife and son's applications are based primarily on that of the principle Applicant, and a fear of the son being kidnapped.

[4] The principle Applicant was the operator of a tourist transportation business and the wife was the part-owner of a local school. The principle Applicant was abducted and beaten by federal police officers and had to pay money for his release. In addition, the principle Applicant had to pay extortion money at various times. At one point he had a physical conflict with one of the extortionists which was witnessed by his son, who later developed behavioural problems. The Applicants moved to several different locations, but eventually the husband came to Canada. He was joined by his wife and son after the wife received phone threats that the son was going to be kidnapped.

[5] The principle Applicant made a report to the police and followed up on this report several times, but no action was taken by the authorities. The principle Applicant also attempted to make a report in the different locations to which he moved but was told he could not do so for a lack of jurisdiction.

[6] The Board rejected the Applicants' claim on the basis that there was no link between the claim and any Convention ground and that there was adequate state protection.

[7] The Board held that the Applicants were victims of corrupt police officers and not a corrupt state apparatus and, therefore, their fears are not linked to race, nationality, religion, real or imputed political opinion, or membership in a particular social group.

[8] The Board also concluded that, based on the totality of the evidence, Mexico was making serious efforts to contain crime in order to protect its citizens and that the Applicants' had not provided clear and convincing evidence of the state's inability to protect them. At paragraph 24 of the reasons, the Board stated that while the principle Applicant had approached the Public Ministry on a number of occasions with no success, the documentary evidence indicates that there are a number of state authorities or agencies where he could have sought redress to report the corruption. The Board concluded that the Applicant had options that he did not exercise.

II. Issues and Standard of Review

[9] The Applicant raised the following issues:

- (a) Did the Board err by introducing the issue of an Internal Flight Alternative (IFA) in Guadalajara but failing to address this issue in its reasons?

- (b) Did the Board err with respect to the availability of state protection and in finding that the Applicants did not rebut the presumption of state protection?

- (c) Did the Board err by finding a lack of nexus to the definition of Convention refugee?

[10] Issues of IFA, state protection and nexus to a convention group are issues of fact and are reviewable on a standard of reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12; [2009] 1 S.C.R. 339; *Sanchez v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 886; 2008 FC 696; *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171; 282 D.L.R. (4th) 413; *Marquez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1727; [2005] F.C.J. No. 2156).

III. Analysis

[11] For the reasons below it is only necessary to address issue (b).

[12] The Applicants argue that the Board erred by applying the wrong test to overcome the presumption of state protection set out in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; [1993] S.C.J. No. 74.

[13] The Respondent takes the position that the Board's decision is reasonable as the Applicants failed to take sufficient measures to seek state protection in Mexico prior to making a refugee claim and therefore did not rebut the presumption of state protection.

[14] The crux of the issue seems to be whether it was reasonable for the Board to determine that the principle Applicant had not availed himself of the state protection available. The Applicants argue that in cases of developing democracies such as Mexico, where corruption and drug trafficking are prevalent and involve some government officials, the corruption should be sufficient to overturn the presumption of state protection and that efforts by the government should not be equated with providing adequate state protection.

[15] It is well established that individuals claiming refugee status must provide clear and convincing confirmation of their state's inability to protect and that the protection afforded by the state need not be perfect (*Mendez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 584; [2008] F.C.J. No. 771). Applicants are also expected to exhaust all courses of action reasonably available to them and the onus on Applicants to avail themselves of state protection is linked to the level of democracy in the country.

[16] It is noteworthy that the agents of persecution in this matter were rogue police officers. In *Lopez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1341; 68 Imm. L.R. (3d) 81, Justice Danielle Tremblay-Lamer discussed the distinction between different agents of

persecution and how this relates to the effectiveness of state protection. At paragraphs 22 to 23,

Justice Tremblay-Lamer wrote:

[22] The distinction between "state agents", "rogue officers" and "criminals" raises different considerations in evaluating the effectiveness of state protection. Where the alleged persecutors are state agents, the claimant may be faced with an official policy of persecution, such that state protection may not reasonably be forthcoming. On the other hand, where the assailants are "rogue officers" the analysis will focus on whether the state is in a position to effectively police itself, including the effectiveness of oversight and accountability mechanisms. However, where purely criminal elements are the agents of persecution; the above considerations will be irrelevant in evaluating the effectiveness of state protection.

[23] In its analysis of state protection against rogue officers, the Board highlighted the existence of anti-corruption measures in Mexico. While extremely laudable, the efforts of any government to investigate and punish instances of corruption are not in and of themselves determinative of the effectiveness of those efforts at an operational level. The Board highlighted the number of corruption-related investigations carried out by the Attorney General's Office, new training initiatives aimed at combating police and judicial corruption, and the existence of a mechanism for filing complaints against public officials as indicative of the government's ability to protect the applicant, but it did not indicate how those initiatives have affected the level of corruption on the ground, and the lives of the civilian population in general. I note, for example, that the ability to make ex post facto complaints and commence ex post facto investigations of corruption and ill-treatment does not automatically constitute effective protection.

[17] The effectiveness of state protection from the agents of persecution was a central issue in this matter. Where evidence that relates to a central issue is submitted the burden of explanation increases for the Board when it assigns little or no weight to that evidence or when it prefers specific documentary evidence over other documentary evidence. While I recognize that in the present case,

the Board did consider the existence of state protection in Mexico and acknowledged that corruption remains a serious issue, it failed to consider the actual effectiveness of that protection. The Board did not discuss why it preferred some evidence on state protection over documentary evidence supporting the position that state protection was not available for the Applicants.

[18] The decision was not reasonable.

[19] The parties did not raise an issue for certification and none arose.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. this application is allowed. The decision is quashed and the application for protection is remitted back to be reconsidered by a different Board in accordance with these reasons; and
2. there is no order as to costs.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
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APPEARANCES:

Daniel Fine FOR THE APPLICANTS

Kevin Doyle FOR THE RESPONDENT

SOLICITORS OF RECORD:

Daniel Fine FOR THE APPLICANTS
Toronto, Ontario

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General Canada