Federal Court  Cour fédérale

Date: 20101028

Docket: IMM-6618-09

Citation: 2010 FC 1059

Montréal, Quebec, October 28, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

JUAN ARTEMIO AVILES YANEZ
GENOVEVA YOLANDA RODRIGUEZ DE LA ROSA
PAOLA AVILES RODRIGUEZ
JORGE EDUARDO AVILES RODRIGUEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (the Board) dated December 11, 2009. The Board found that the applicants were neither Convention refugees nor persons in need of protection for the purposes of sections 96 and 97 of the *IRPA*.

Background

[2] The applicants are all citizens of Mexico.

[3] In 1990, Mr. Aviles Yanez (the principal applicant) and his wife purchased a lot in what was to be a new neighbourhood called "Las Maravillas", located in the Iztapalapa borough of Mexico City. They moved there in 1995.

[4] They allege the following facts in support of their claim:

[5] In 1996, a dispute arose between the Las Maravillas residents and the Iztapalapa municipal authorities (the Iztapalapa Delegation). The Iztapalapa Delegation claimed that the residents had not received subdivision authorization and that they were, in fact, in violation of a presidential decree which designated the Las Maravillas land as part of an ecological reserve. In February of 1996, after providing 48 hours notice, the Iztapalapa Delegation began pulling down houses. The residents applied to the courts for injunctive relief, which was ultimately granted. However, on July 19, 1996, further demolition was carried out – some 45 houses, out of the 70 to 80 that had been built, were destroyed. The courts intervened again.

[6] The residents' turbulent relationship with the Iztapalapa Delegation continued. In 2004, under the guise of performing maintenance work, the Iztapalapa Delegation disconnected water services to the neighbourhood, interrupted electricity, and even dug a trench to prevent residents

from entering or exiting the community via automobile. It was at this time that the Iztapalapa Delegation began demanding a fee of 50 pesos per house per week in exchange for not demolishing additional homes.

[7] At the end of 2006, the situation deteriorated further. In November, representatives from the Iztapalapa Delegation visited the offices of the Las Maravillas homeowners' association (the Association). They had come to collect their usual pay-off. This time, however, the president of the Association and the principal applicant ─ who was serving as secretary for the Association ─ refused to pay. The representatives threatened the principal applicant by telling him that their boss, the newly elected Senator Rene Arce Islas, was powerful and would be angered by the refusal.

[8] In December of that year, three people from the Frente Popular Francisco Villa (FPFV), a political organization supposedly affiliated with Senator Arce Islas, also attended at the offices of the Association. The group made it known that they had good relations with the Senator. They indicated that the FPFV would be able to put an end to the residents' troubles with the Iztapalapa Delegation and with Senator Arce Islas, if the Association would agree to assign it 50 of the 200 Las Maravillas lots. This "offer" was refused. At that point, the principal applicant was taken aside by one of the individuals and was told that if the land wasn't signed over, he would suffer significant consequences. The applicants submit that Senator Arce Islas was the driving force behind both of these incidents.

[9] The Association went to the National Human Rights Commission of Mexico (NHRC) to file a complaint against the FPFV and against Senator Arce Islas. The NHRC indicated, however, that it didn't have jurisdiction to address the complaint and recommended, instead, that a complaint be filed with the Iztapalapa Delegation. The Iztapalapa Delegation refused to accept the complaint without evidence.

[10] The situation in Las Maravillas continued to get worse. Police officers had taken to harassing members of the community. The principal applicant began receiving death threats on his mobile phone. On December 11, 2006, the Association decided to set up a video camera to record activities in the neighbourhood and collect evidence. Over the course of the subsequent few nights, the video camera captured agents of the Iztapalapa Delegation entering the neighbourhood, stripping parts from stolen cars, painting walls with threats, and breaking windows. The Association decided to take the tapes to the media.

[11] On the evening of December 15, 2006, the night before the principal applicant was going to take the tapes to the media, the Association's office and his home were broken into. The video tapes were taken from the office and a note was left behind telling the Association to stop its investigations and complaints, or suffer the consequences. At the applicants' home, the intruders left a message on one of the walls indicating that the next message would be written using the blood of the principal applicant's two children: Jorge and Paola. On December 20, 2006, the police broke into the principal applicant's sister-in-law's house looking for him; they said they had a warrant. On December 21, 2006, the applicants left Mexico City and moved to Queretaro.

[12] In April of 2007, the principal applicant started to receive threatening phone calls at his new mobile phone number. On May 3, 2007, he went to the State Commission of Human Rights in Queretaro to ask for assistance. They said they had no jurisdiction to help, but gave him a document that he could take to the Agency of the Public Prosecutor requesting that it receive his complaint regarding the threats. The principal applicant did not take the document to the authorities.

[13] On May 19, 2007, while working at his restaurant job in Queretaro, a man confronted the principal applicant and told him that Mexico was a small place and that he couldn't hide. It was at that point that the applicants decided to leave. The principal applicant resigned from his job the next day. On May 24, 2007, after picking up his final pay check from work, he was attacked by a pair of men. They kicked him and told him that they hadn't forgotten about him. The men gave him 24 hours to convince the residents of Las Maravillas to sign over the 50 lots to the FPFV; otherwise he and his family would pay with their lives. He went to the Public Ministry in Queretaro, accompanied by a lawyer, to file a complaint regarding the attacks and the threat. The authorities took down the details of his statement and told him to return the next day. He went back the next day, but the people at the Public Ministry refused to assist him further. They told him that he would have to wait until the employees who took his statement came back to work, which would be in 48 hours.

[14] The principal applicant decided he could not wait that long. On May 26, 2007, the applicants left Queretaro for Mexico City. On May 29, 2007, they left Mexico City and arrived in Canada. They sought refugee protection upon arrival.

[15] The Board found the the principal applicant was not credible on matters central to his claim, that he had not rebutted the presumption of state protection, and that, in any event, Guadalajara was a viable Internal Flight Alternative (IFA). It concluded by rejecting the applicants' claim and finding that the applicants were not Convention refugees nor persons in need of protection for the purposes of sections 96 and 97 of the *IRPA*.

Issues

[16] This application raises the following issues:

a) What is the applicable standard of review?

b) Was the Board's credibility determination unreasonable?

c) Was the Board's assessment as to the availability of state protection unreasonable?

d) Was the Board's IFA analysis unreasonable?

Analysis

a) *What is the applicable standard of review?*

[17] Decisions concerning credibility lie within the "heartland of the discretion of triers of fact" (*Siad v. Canada (Secretary of State)*, [1997] 1 F.C. 608, 36 Imm. L.R. (2d) 1 (F.C.A.) at para. 24).

As such, credibility findings are to be reviewed using the reasonableness standard of review (*Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315, 42 A.C.W.S. (3d) 886 (F.C.A.) at para. 4; *Yin v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 544 at para. 22).

[18] Questions as to the adequacy of state protection are questions of mixed fact and law and, thus, are also reviewable against the reasonableness standard (*Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 63 Imm. L.R. (3d) 13 at para. 38 [*Hinzman*]; *R.G. v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 801 at para. 9).

[19] IFA assessments, similarly, warrant deference because they involve both evaluation of the circumstances of the applicants, as related by them in their testimony, and expert understanding of country conditions (*Sivasamboo v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 741, 52 A.C.W.S. (3d) 136 (F.C.T.D.) at para. 26). The appropriate standard for reviewing an IFA determination made by the RPD is the reasonableness standard (*Rodriguez Diaz v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1243, [2009] 3 F.C.R. 395 at para. 24).

[20] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para. 47 [*Dunsmuir*], the Supreme Court of Canada held that "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 which are defensible in respect of the facts and law."

b) ***Was the Board's credibility determination unreasonable?***

[21] The Board found that there were "numerous omissions and contradictions" in the applicants' testimony. It highlighted the five "most important ones."

[22] First, the Board took issue with the principal applicant's testimony that the Iztapalapa Delegation had asked him to pay 3,500 pesos ($350 USD according to the Board's calculations) per week, in exchange for not demolishing additional homes. It specifically took issue with the amount of money involved. It found that the principal applicant "simply could not afford to pay [this amount] on a weekly basis," and, thus, wondered why the amount had been omitted by the principal applicant in his PIF narrative.

[23] The Board appears to have misconstrued the principal applicant's testimony. The principal applicant indicated that "normally… the people gave… a weekly quote of five dollars per house." When asked who the "people" were, he explained that it was the 70 to 80 residents who were living in Las Maravillas. So, normally at least, it was not a case of asking one person for $350 per week, it was a case of asking everyone in the neighbourhood to each pay $5 per week. The Board appears to have concluded, however, that in the case of the November 2006 incident, the Iztapalapa Delegation expected the principal applicant to pay all of the money (i.e. the full 3500 pesos or $350) out of his own pocket. This is evident from its determination that "3500 pesos… is an amount that he simply could not afford to pay on a weekly basis" (emphasis added). This interpretation is not supported by

the testimony. It is true that at the hearing the Board asked, "Wait a minute, they wanted you to pay for all the houses, yes?" To which the principal applicant responded, "Since we were in the office, [they wanted the Association president] and me to pay for all the houses because we were on the Association's office." However, he went on in his testimony to explain that this was no different from what the Iztapalapa Delegation normally demanded, in that the money was normally collected from all of the residents in the community by the president and then given over to the Iztapalapa Delegation. He said, during the November 2006 incident, the Iztapalapa Delegation was "asking [the president] and me for that money because we were on the board of direct[ors] of the association. And [the president] usually was the person in charge of put[ting] together the money and giv[ing] the money to these people" (emphasis added). The record simply does not support the Board's interpretation that somehow, on this occasion, the principal applicant was being asked to pay 3500 pesos per week out of his own pocket, an amount he "simply could not afford to pay". Thus its credibility determination on this point is not "defensible in respect of the facts and law" (*Dunsmuir*, above at para. 47) and is unreasonable.

[24] Second, the Board found the principal applicant's credibility to be affected because he expanded upon who he feared persecution from as between the time he entered Canada and the time of the hearing. The Board pointed to the notes taken by the immigration officer at the point of entry. In responding to the question "Are you afraid of a group of people or an individual", the principal applicant replied, "Rene Arce is his name, he is a political leader in Mexico who has threatened me and my family". Similarly, in responding to the question, "Whom are you afraid of if you returned to your country," in Schedule I of the Background Information form, he indicated "Rene Arce". The

Board found that these answers were inconsistent with the one given "spontaneously, without hesitation" before the Board at the hearing. There, the principal applicant indicated he feared not only Senator Rene Arce Islas, but also: the FPFV, the Iztapalapa Delegation, the Mexico City police, and members of the Party of the Democratic Revolution (PDR).

[25] The Board's rejection of the principal applicant's explanation, in this case, was unreasonable. The record does not reflect the Board's finding that the principal applicant's answer at the hearing, when he eventually listed 5 potential persecutors, "was given spontaneously, without any hesitation." In fact, when first asked by the Board, "Who is it that you fear would persecute you in Mexico today…?" he responded in the same way he had to the immigration officer's question: "The senator Rene Arce Islas." Moments later, he asked, "I don't know as the question was who, I don't know if I have to include the organization that contacted us, that the organization that he…" At which point, the Board interrupted and said, "Okay. So he would be the primary persecutor as I understand it…" This *was* a spontaneous exchange. However, it reinforces the principal applicant's explanation, given much later on in the hearing, that he understood the question posed to him by the immigration officer to be referring to a single person. In the context of the hearing, he exhibited the exact same confusion as to the nature of the question. In fact, it was only on the second day of the hearing, when the principal applicant's counsel asked him to clarify his answer, that he replied with the complete list of persecutors. The exchange was:

> Q: Sir, you say in the last hearing that Rene Arce Islas was your primary persecution agent. Who do you fear exactly?
>
> A: Well I fear also the Frente Popular Francisco Villa that depends from him, well not from him but from the same party and he controls part of the party the PRD. And also there are

> the people from the Iztapalapa Delegation and the Mexico City government that is also controlled by the PRD, And (inaudible) .

[26] It is clear that the list of persecutors was not given "spontaneously, without any hesitation," at the hearing. It was only after the principal applicant's own counsel asked for clarification that he understood what was being asked and provided the complete list. The record does not support the conclusion that the Board appears to have arrived at: that the additional persecutors were made up to bolster the principal applicant's claim. The various groups that the principal applicant eventually listed explicitly as potential persecutors were implicitly listed by the principal applicant much earlier on: he mentioned them in the complaint filed with the Mexican police as far back as May 24, 2007 (prior to his entry into Canada), they were mentioned in his PIF narrative filed on June 26, 2007, and they were discussed in detail before the Board prior to being asked to specifically list the groups. The Board's negative credibility determination on this point was unreasonable.

[27] The Board's third credibility finding was based on the principal applicant's failure to make any efforts to determine what had happened with his Las Maravillas land since leaving Mexico. The Board rejected the explanations provided by the principal applicant.

[28] The principal applicant had explained at the hearing that he believed someone on the Las Maravillas board of directors was giving information to Senator Rene Arce Islas. This, combined with the fact that he might ultimately be returned to Mexico, meant that he did not want to take the risk of following-up. The Board's only reference to this explanation in its reasons was that the principal applicant had "alleged that he does not feel safe enough in Canada to try to find out what

happened with the lands" (emphasis added). This is, in fact, a misstatement of the principal applicant's explanation. It was not that the principal applicant did not feel safe enough *in Canada* to follow up, it was that he worried that it might make his situation worse in the event that he were *returned to Mexico*. Again, I find this aspect of the Board's credibility assessment was unreasonable.

[29] Regardless of the fact that some of the Board's credibility findings were defensible in respect of the facts and law ─ and, thus, were reasonable ─ I find that the Board's overall determination that the principal applicant was "not credible" was unreasonable. It involved simply too many unreasonable findings on matters central to his claim to be considered justified.

c) *Was the Board's assessment as to the availability of state protection unreasonable?*

[30] The Board determined that even if the principal applicant was credible (i.e. even if it had accepted the principal applicant's account of events), he still had not rebutted the presumption of state protection. It faulted the principal applicant for not following up on the complaint he had filed with the Queretaro police and for leaving only 5 days after filing it, for not following up on the complaint he filed with the Queretaro State Human Rights Commission, and for not providing the authorities with his contact information. Although it referred to no documentary evidence on country conditions in its analysis, the Board did indicate that it adopted the reasoning in RPD decision TA6-07453, which it found to be persuasive with respect to the availability of state protection in Mexico.

[31] Assessing the availability of state protection is central to determining whether a refugee claimant's fear of persecution is objectively well-founded. Except in cases of complete breakdown of the state apparatus, we must start with the presumption that a state is able to protect its citizens. The refugee claimant, thus, has the onus of establishing relevant, reliable and convincing evidence that, on a balance of probabilities, rebuts this presumption (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1 at 724 (*Ward*); *Flores Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 F.C.R. 636 at para. 30). As part of this onus, a claimant coming from a democratic country will generally be required to show that they approached the state and sought protection, without success. The more democratic a state is, the more the individual must have done to exhaust all avenues of protection available (*Kadenko v. Canada (Solicitor General)* (1996), 143 D.L.R. (4th) 532 at 534, 206 N.R. 272 (F.C.A.); *Hinzman*, above at para. 57; *Zepeda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, [2008] F.C.J. No. 625 at para. 13 (*Zepeda*)).

[32] While Mexico is a functioning democracy, it nonetheless faces well-documented governance and corruption problems. As such, the presumption of state protection is somewhat diminished and, thus, decision-makers must engage in a full assessment of the evidence placed before them. This assessment should include the context of the country of origin in general, all the steps that the applicants did in fact take, and their interaction with the authorities (*Zepeda*, above at para. 20; *Villicana v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1205, 86 Imm. L.R. (3d) 191 at para. 67).

[33] Critically lacking in the Board's reasons is any assessment of the country conditions in Mexico. In this regard, the Board simply adopted RPD persuasive decision TA6-07453, from November 26, 2007. This is insufficient. In TA6-07453, the principal agent of persecution was a gang member, who allegedly had connections with members of the police. In this case, the principal agent of persecution is an elected member of the Mexican government. The principal applicant has testified that this elected official is the leader of a major political party and has influence throughout the government and the police. Certainly, this requires a different analysis as to the question of state protection.

[34] The June 27, 2008 National Documentation Package on Mexico was in evidence before the Board. The applicants point to a number of documents within the June 27, 2008 package that go towards rebutting the presumption of state protection in this case. For instance, one of the reasons the principal applicant says he did not put much faith in the state's ability to protect him from Senator Arce Islas was because of the immunity afforded to politicians in Mexico. In this regard, the applicants point to a Response to Information Request prepared by the IRB in October of 2004 which cites the US-based Center for Public Integrity as saying:

> In Mexico, politicians or public servants can steal, bribe, or conspire to commit extensive frauds against the government and not spend a minute in jail… . If indicted, government officials enjoy freedom until they are sentenced, a process that can take years in the Mexican judicial system.

[35] The principal applicant also says that he fears the Mexican police directly because of Senator Arce Islas' influence over them. In this regard, the applicants point to a March 11, 2008 US Department of State Report which indicates that:

> The government generally respected and promoted human rights at the national level by investigating, prosecuting, and sentencing public officials and members of the security forces. However, impunity and corruption remained problems, particularly at the state and local level. The following human rights problems were reported: unlawful killings by security forces; kidnappings, including by police; physical abuse; poor and overcrowded prison conditions; arbitrary arrests and detention; corruption, inefficiency, and lack of transparency in the judicial system; confessions coerced through physical abuse permitted as evidence in trials; criminal intimidation of journalists leading to self-censorship; corruption at all levels of government; domestic violence against women, often perpetrated with impunity; violence, including killings, against women; trafficking in persons, sometimes allegedly with official involvement; social and economic discrimination against indigenous people; and child labor. [emphasis added]

[36] Not only did the Board neglect to refer to relevant country documentation, it also failed to acknowledge the severity of the principal applicant's situation. In response to questions about why he had not attempted alternate methods of recourse (i.e. after filing his complaint with the police on May 24, 2006) the principal applicant testified that, "The steps were available but the problem is the time, the time was running against me because I knew that these people will go back for me." The fact that the principal applicant was only given 24 hours by his attackers was not mentioned by the Board in its analysis of state protection. Nor was the fact that they had threatened to kill him. It faulted him for leaving Mexico too soon, for not following up on his complaint, for not contacting supervisors at the Queretaro police, for not following up with the Human Rights Commission and for not contacting the SACTEL helpline. The 24-hour deadline and the severity of the threat are highly relevant pieces of evidence in relation to all of these concerns. After all, a claimant is not

required to put themself in danger in order to exhaust all possible avenues of protection (*Ward*, above at para. 48; *Zepeda*, above at para. 16).

[37] While the RPD is not required to refer to every piece of evidence before it in its reasons, it should engage with the evidence that is central to a claimant's position and indicate why it can be discounted or why other evidence is to be preferred (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 (F.C.T.D.) at para. 15, (*Cepeda-Gutierrez*); *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1336, [2009] 3 F.C.R. 591 at para. 88; *Villicana,* above; *S.A.M.G. v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 812 at para. 63). The Board failed to do that in this case. As such, its determination as to state protection was unreasonable.

d) *Was the Board's IFA analysis unreasonable?*

[38] The Board found that the applicants had not discharged their burden with respect to demonstrating they lacked an IFA. First, the Board considered whether there existed another part of Mexico where the claimants would not face persecution. It considered Guadalajara. The Board indicated that it did not believe, given the large size and population of Mexico, that Senator Arce Islas would have the "desire, the means, or the ways to be able to locate the principal claimant." As for the "means, or the ways", it rejected the suggestion that the Senator would be able to find the applicants using the electoral list. It indicated that personal data was protected by privacy legislation. If someone were to violate that legislation, it reasoned, that person would be liable to

punishment. In terms of the Senator's "desire" to locate the principal applicant in 2009, the Board listed the concerns of the applicants ─ i.e. that the Senator might believe the principal applicant still had evidence of corruption, and that the Senator was a violent person with a guerrilla past ─ but rejected them without explanation.

[39] Next, the Board considered whether it would be objectively unreasonable or unduly harsh to expect the applicants to move to another part of the country. It found that the principal applicant, given his 16 years of schooling and his 11 years of managerial experience, could find work in Guadalajara. It also found that the principal applicant's wife would be able to find work in Guadalajara, given her experience and schooling. The children, it noted, could continue their studies there. Ultimately, the Board determined that Guadalajara was a realistic IFA.

[40] The determination of the existence of an IFA is integral to the determination of the entire refugee claim (*Rasaratnam v. Canada (Minister of Employment and Immigration)* (1991), [1992] 1 F.C. 706, 140 N.R. 138 (F.C.A.) at para. 8 (*Rasaratnam*)). The applicant bears the burden of proving that an IFA either does not exist or is unreasonable in the circumstances (*Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589, 109 D.L.R. (4th) 682 (F.C.A.) at para. 12). Assessing the IFA issue involves a two-pronged analysis. First, the Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the proposed IFA; and, second, conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of all the circumstances, for the claimant to seek refuge there (*Rasaratnam*, above; *Thirunavukkarasu*, above at paras. 5-6).

[41] I find that the Board's reasons with respect to the first branch of the test reveal a reviewable error. In concluding that Senator Arce Islas would not have the "means, or the ways" to locate the applicants if they moved to Guadalajara, the Board failed to address the principal applicant's evidence that in 2007 he had, in fact, been located after moving from Mexico City to Queretaro. The fact that the principal applicant's attackers had the ability to determine his location in 2007 would suggest that they would, in fact, have the "means, or the ways" necessary to determine his location in Mexico still today. The Board's failure to engage with this aspect of the principal applicant's testimony, which runs directly counter to its conclusion, suggests that the Board made an erroneous finding of fact without regard to the evidence before it (*Cepeda-Gutierrez*, above at para. 17). I find that this undermines the Board's overall analysis and renders its determination with respect to the availability of an IFA unreasonable.

[42] Accordingly, the application for judicial review is allowed. The matter is returned to a newly constituted Board for rehearing and redetermination.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is allowed. The matter is returned to a newly constituted Board for rehearing and redetermination.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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