

Federal Court



Cour fédérale

Date: 20110517

Docket: IMM-1477-10

Citation: 2011 FC 562

Ottawa, Ontario, May 17, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

FRANCISCO JAVIER MARIN GARCIA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 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 February 11, 2010, 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 set aside and the claim remitted for redetermination by a different member of the Board.

Background

[3] Francisco Javier Marin Garcia (the applicant) was born on January 24, 1969 and is a citizen of Mexico.

[4] On December 21, 2006, in Veracruz, Mexico, the applicant and his family witnessed a man covered by a mask with his hands tied behind his back and a child also covered, taken into a house by four people. The applicant reported the incident to the police and was told that the criminal organization “Los Zetas” operated in the area.

[5] After he returned to Puebla, Mexico, the applicant’s car and home were vandalized with the words “we are going to kill you”. The applicant did not report this vandalism to the police. Rather, he and his family stayed at his mother-in-law’s home and then left for Canada on January 6, 2007. The applicant filed a refugee claim on November 21, 2008.

Board’s Decision

[6] The Board found that the applicant was not a Convention refugee under section 96 of the Act as there was no nexus between a Convention ground and any personal vendetta that members of Los Zetas may have against the applicant.

[7] The determinative issue for the Board was state protection. The Board found that Mexico is a democratic country with a functioning political and judicial system and that the presumption of state protection applies. After reviewing the documentary evidence, the Board noted that Mexico has made recent efforts and achieved results in combating drug-trafficking, corruption and other organized crime. The Board found that the applicant did not seek protection from Mexican authorities and given the significant progress made by the Mexican state, this was objectively unreasonable. The Board assigned greater probative weight to the documentary evidence than to the applicant's opinion that there is inadequate state protection in Mexico, since the documentary evidence was drawn from a variety of reliable and independent sources. The Board concluded that the applicant failed to rebut the presumption of state protection.

Issues

[8] The applicant submitted the following issues for consideration:

1. Did the Board fail to observe a principle of natural justice or procedural fairness?
2. Did the Board ignore relevant evidence before it?
3. Did the Board err in its assessment of the availability of state protection in Mexico?
4. Did the Board base its decision on an erroneous finding of fact?
5. Did the Board make a decision in a perverse or capricious manner or without regard

for the material before it?

[9] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in its assessment of whether state protection is available to the applicant?

Applicant's Written Submissions

[10] The applicant does not challenge the nexus finding of the Board under section 96 of the Act.

[11] The applicant submits that the Board ignored relevant evidence before it. The Board member did not address contradictory evidence on the lack of availability of state protection in Mexico, even when such information was more current than that which the Board relied on. Failure to reference evidence directly relevant to the central issue will give rise to a conclusion that the Board did not take into account all of the evidence before it.

[12] The applicant submits that the Board erred in its state protection analysis. The applicant submits that the organization Los Zetas has strong contacts with corrupt police and members of the judiciary and state protection is not forthcoming for individuals targeted by this organization. The applicant was not required to continue to approach the state for protection in these circumstances. Further, the Board did not properly examine the particular reasons why the applicant did not continue seeking protection from Mexico that he had previously experienced the inefficiency of the police with respect to his brother's death twenty years earlier.

Respondent's Written Submissions

[13] The respondent submits that the Board properly noted that a state is presumed willing and capable of protecting its citizens, absent a complete breakdown of the state apparatus. The Board reasonably found that the applicant had not rebutted the presumption of state protection with clear and convincing evidence.

[14] The Board specifically noted that the documentary evidence indicates that inefficiency, bribery and corruption remain issues at all levels of the Mexican security forces and the public sector. The Board weighed this against evidence that indicated that Mexico has enacted strict laws against corruption and bribery. The Board made multiple references to the success of recent law enforcement measures in Mexico. The Board found that based on the preponderance of the objective evidence, there is adequate state protection available to victims of crime in Mexico.

[15] The onus was on the applicant to exhaust all courses of action reasonably open to him before seeking protection in Canada. The applicant made no attempt to access state protection in Mexico prior to coming to Canada. The Board reasonably found that the applicant's explanation that he did not approach the authorities because there had been an unsatisfactory police response to the death of his brother twenty years earlier was an insufficient basis on which to refuse to seek state protection.

[16] The Board's conclusion that the applicant did not rebut the presumption of state protection fell within the range of possible, acceptable outcomes and should not be disturbed.

Analysis and Decision

[17] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[18] It is established that assessments of the adequacy of state protection which raise questions of mixed fact and law are reviewable against a standard of reasonableness (see *Hinzman Re 2007 FCA* 171 at paragraph 38). As such, this Court should not intervene on judicial review unless the Board has come to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47).

[19] **Issue 2**

Did the Board err in its assessment of whether state protection is available to the applicant?

The onus was on the applicant to rebut the presumption of state protection with clear and convincing evidence of Mexico's unwillingness or inability to protect him (see *Ward v Canada (Minister of Employment and Immigration)*, [1993] 2 SCR 689, [1993] SCJ No 74 (QL) at paragraph 52).

[20] The Board found that the applicant had not approached the Mexican authorities for protection. The applicant submitted that he did in fact approach the authorities in filing a police

report concerning the potential kidnapping that he witnessed. The applicant submits that his contact with the police is what led to the vandalism and threats on his life as the police likely provided his address to the criminal organization Los Zetas. The applicant submits that it was reasonable for him not to go to the police again when he was directly targeted by Los Zetas, because he would be putting his own life at risk.

[21] While it is true that the applicant was not required to seek state protection if doing so would put his own life at risk, it was open to the Board to find that this was not that type of situation (*Ward* above, at paragraph 48).

[22] The Board acknowledged that police corruption and involvement with criminal organizations occurs in Mexico. However, despite this, there was no evidence that the organization Los Zetas located the applicant due to information received from the police. Moreover, the applicant testified at the refugee hearing that while driving away from the scene of the kidnapping, one of the persons involved pointed a firearm at the applicant's vehicle, thus the applicant knew that the organization could have gained his license plate through means other than the police. Furthermore, the Board reasonably concluded that the police followed through and arrested persons involved in the kidnapping reported by the applicant which contradicts his statements that state protection would not have been available for him as a victim of Los Zetas.

[23] In oral submissions, the applicant pointed to several parts of the documentary evidence which contradict the Board's conclusion that the applicant's views that police protection is not effective are largely unsubstantiated.

[24] The Board need not refer in its decision to all the documentary evidence, provided that its decision takes into account any evidence which contradicts its conclusion (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425 (FCTD) (QL), at paragraph 17; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (CA) (QL)).

[25] The Board reviewed the documentary evidence at length and noted that corruption in the security forces is an ongoing problem in Mexico. The Board reviewed several incidents where police and government officials shared information and cooperated with drug cartels and organized crimes groups. The Board engaged in a detailed analysis of the current situation in Mexico and concluded that Mexico is making efforts to fight crime and corruption which have achieved unprecedented results. Reading the decision as a whole, it was not unreasonable for the Board to find that adequate state protection would be reasonably forthcoming to the applicant in Mexico.

[26] The Board's finding that the applicant had failed to rebut the presumption of state protection was reasonable. As a result, the application for judicial review must be dismissed.

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

JUDGMENT

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

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions*Immigration and Refugee Protection Act, SC 2001, c 27*

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

...

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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(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.

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

...

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) 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) 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 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) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

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 themselves of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1477-10

STYLE OF CAUSE: FRANCISCO JAVIER MARIN GARCIA
- and -
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 24, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: May 17, 2011

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