

Federal Court



Cour fédérale

**Date: 20111107**

**Docket: IMM-261-11**

**Citation: 2011 FC 1267**

**Ottawa, Ontario, November 7, 2011**

**PRESENT: The Honourable Mr. Justice Scott**

**BETWEEN:**

**MARTIN ROCHA CASTOR  
MARIA GUADALUPE PINA CRUZ  
DAYANE PAOLA ROCHA PINA**

**Applicants**

**and**

**MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application by Martin Rocha Castor (Mr. Castor), the principal applicant, Mrs. Maria Guadalupe Pina Cruz (Mrs. Cruz), the associate applicant, and Miss Dayane Paola Rocha Pina (Miss Pina), the minor applicants' daughter (all together the Applicants), made pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 [IRPA], for judicial review of the decision of the Immigration and refugee Board (the Board) rendered on December 14, 2010.

[2] The Board concluded that the Applicants were neither Convention Refugees nor Persons in need of protection under sections 96 and 97 of the *IRPA*.

[3] For the reasons that follow, this application for judicial review is denied.

## **I. Facts**

[4] On March 10, 2005, Mr. Castor was returning home from work at 2:00 am when he saw three men on the roof of the neighbour's house and business. They ran away quickly but Mr. Castor recognized the three robbers. He then woke up his parents and went to the neighbour. The next day, he reported the robbery to the police with his neighbour. He identified the three men as Carlos Cobarrubias, Jesus Sabala Cruz and Pedro Ruiz.

[5] On March 12, 2005, at about 8:00 pm, the three men involved in the attempted robbery two days earlier dropped by Mr. Castor's house. They pointed weapons and shouted death threats at him from outside his house. Mr. Castor went to the police the next day to report the death threats.

[6] The same day, Mr. Castor and his parents visited the homes of the three men in order to negotiate a truce. They were successful with Carlos Cobarrubias and Jesus Cruz. However, no agreement was reached with Pedro Ruiz. The latter had a criminal record and there was an outstanding warrant for his arrest. After the filing of the second police report, Pedro Ruiz was arrested and sentenced to five years in jail. A few months thereafter, Pedro Ruiz sent Mr. Castor threatening messages from jail.

[7] Mr. Castor ran into Pedro's brother Rojelio Ruiz on a few occasions. Each time, Rojelio shouted insults and threats at him.

[8] On April 14, 2005, the threats escalated into a fight. Rojelio knocked Mr. Castor unconscious with a bat. Mr. Castor alleges to have awakened in a hospital where he was admitted for two days. The hospital reported the beating to the police, but when the police came to interview Mr. Castor, he claimed to have been hit by a falling rock. At the hearing, Mr. Castor explained that he did not want to say anything to the police for fear it would worsen his situation.

[9] Thereafter, Mr. Castor moved his family to a new home about a ten minute drive from their former residence.

[10] On March 5, 2006, the Applicants left Mexico for Canada further to an invitation from Mrs. Cruz's brother, a Canadian resident.

[11] In September 2006, Rojelio Ruiz was murdered in Mexico and his brother Alberto Ruiz swore revenge against all the family's enemies, including Mr. Castor.

[12] Mr. Castor was working in Canada as a temporary foreign worker, he applied to extend his work permit, but his application was denied. The Applicants returned to Mexico in February of 2007.

[13] The Applicants spent the next four months in Torreon. Mr. Castor learned that Alberto Ruiz joined the Zetas, a drug trafficking group.

[14] In May 2007, while driving to his parents' home, Mr. Castor's truck was shot at several times by Alberto Ruiz who was standing in the street and pointing a weapon at him. He filed a complaint identifying Alberto Ruiz as responsible. Mr. Castor claims that the police failed to intervene.

[15] In June 2007, Mr. Castor returned to Canada as a tourist and in December 2007, Mrs. Cruz and Miss Pina joined Mr. Castor in Canada. The Applicants tried to obtain legal status in Canada, and in January 2009, Mrs. Cruz and Miss Pina traveled to Mexico for four months, while the Mrs. Cruz waited for her live-in caregiver application to be processed. While there Mrs. Cruz gave birth to their second child.

[16] Mrs. Cruz testified that members of the Zetas entered school to demand money from the students. The incident frightened her and she withdrew her daughter from school fearing she was a target of the Zetas.

[17] On April 25, 2009, Mrs. Cruz and Miss Pina entered Canada. The Applicants made their refugee claims on April 27, 2009.

[18] The Board found that the Applicants were not Convention refugees. It also found that there was no risk to their lives or risk of cruel and unusual treatment or punishment, and no danger of torture, should they return to Mexico.

[19] Furthermore, the Board determined that there was a reasonable Internal Flight Alternative [IFA] to Guadalajara and Monterrey. In its assessment of the evidence, the Board considered the fact that Mr. Castor is a high school graduate and has experience as an industrial electronics technician. The Board also concluded that the Applicants have a generalized fear related to the Zetas, one that is shared with the population at large.

[20] The Board rejected their claims.

## **II. Legislation**

[21] Sections 96 and 97 to the *IRPA*:

Convention refugee

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.

Person in need of protection

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

(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.

Person in need of protection

(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.

### **III. Issues and standard of review**

#### **A. Issues**

- *Did the Board err in failing to consider relevant documents when it determined that state protection was available to the Applicants?*

- *Did the Board err when it determined that the Applicants were not persons in need of protection pursuant to section 97 of the IRPA?*
- *Did the Board err in finding that there existed a viable IFA in Guadalajara and Monterey for the Applicants?*

**B. Standard of review**

[22] Questions related to the adequacy of state protection are questions of mixed fact and law and are reviewable on the standard of reasonableness.

[23] The interpretation of an exclusion in section 97(1)(b) of the *IRPA* is an issue of application of law to the facts of a case. It is subject to review on the standard of reasonableness (see *M.A.C.P v Canada (Minister of Citizenship and Immigration)*, 2011 FC 81, [2011] FCJ No 92 at paras 27 and 28 [*MACP*]).

[24] The Board's determination regarding the viability of a proposed IFA is a question of mixed fact and law to be determined on the standard of reasonableness (see *M.A.C.P.* cited above at para 29).

[25] The jurisprudence of this Court has established that the Board's findings of fact, and more specifically its assessment of the evidence, are also subject to the reasonableness standard. It is not

for the Court to substitute its assessment of the evidence for the Board's or to reweigh the evidence that was adduced before the Board. The Court will intervene only if the Board's findings are made in a perverse or capricious manner or without regard to the evidence (see *Martinez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 798, [2009] FCJ No 933).

#### **IV. Parties' submissions**

##### **A. Applicants' submissions**

[26] The Applicants submit that the Board erred in determining that state protection exists in Mexico.

[27] The Applicants also claim that the Board committed a breach of procedural fairness and natural justice by failing to consider evidence showing the inadequacy of state protection in Mexico. The Applicants argue that the Board ignored relevant evidence presented and considered outdated documentation from the National Documentation Package [NDP] on Mexico.

[28] The Board erred in applying the wrong test to determine if state protection was available to them in Mexico according to the Applicants. They allege that the Board considered what the state of Mexico is endeavouring to correct and not what is actually happening. As a result, they claim that the Board failed to take into consideration the effectiveness of the protection available to the Applicants and arbitrarily disregarded relevant evidence that supported the Applicants' position.



[29] Moreover, the Applicants submit that the Board committed a reviewable error in failing to analyse the risk they were facing and determining that they were not persons in need of protection pursuant to section 97 of the *IRPA*.

[30] According to the Applicants, they are not victims of indiscriminate or random acts. They specifically fear Pedro and Alberto Ruiz, who are associated with the Zetas.

[31] The Applicants allege that the Board erred since it did not conduct an individualised analysis of the present or prospective risk they are facing as acknowledged by the jurisprudence of this Court (see *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, [2009] FCJ No 143 [*Prophète*]).

## **B. Respondent's submissions**

[32] The Respondent submits that the conclusion of the Board regarding state protection was reasonable.

[33] According to the Respondent, in claiming refugee status in Canada, claimants have the obligation of providing “clear and convincing confirmation” of their own country’s inability to provide them with adequate protection (see *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, [1993] SCJ No 74 at para 50 [*Ward*]).

[34] In the case at bar, the Board concluded that the Applicants had not exhausted all the recourses available to them in Mexico. Consequently, their failure to do so seriously undermined the clear and convincing confirmation of Mexico's inability to protect the Applicants.

[35] The Respondent also claims that the Board is not obligated to comment in its decision on all the evidence that was adduced. The Board was entitled to choose the evidence it preferred in arriving at its conclusion as long as it is reasonable and properly supported. The Respondent alleges that all documents cited by the Board were disclosed to the Applicants in due time.

[36] As for section 97 of the *IRPA*, the Respondent underlines in his memorandum that "the rules of procedural fairness demand that the board expressly raise the matter of an IFA [...] It then belongs to the claimant to show that it would be unreasonable for him to seek refuge in his own country" (see para 16 of Respondent's memorandum of argument).

[37] The Respondent argues that the Federal Court of Appeal has set a very high threshold for the unreasonableness test in regards to an IFA (see *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, [1993] FCJ No 1172 at paras 12 and 13 [*Thirunavukkarasu*]). In *Thirunavukkarasu*, the Court of Appeal writes that "given the persecution in the claimant's part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of the country before seeking a haven in Canada or elsewhere". According to the Respondent, the Board's findings in regards to an IFA were reasonable.

[38] The Respondent alleges that this conclusion alone suffices to deny the present application pursuant to section 97 of the *IRPA*.

[39] In its further memorandum, Respondent underlines that Applicants failed to provide actual and concrete evidence of the existence of conditions preventing them from moving elsewhere within their country.

## **V. Analysis**

[40] The Court finds that the Board's decision in determining that state protection was available to the Applicants is reasonable.

[41] At paragraph 50 of *Ward* cited above, the Supreme Court of Canada states that "nations should be presumed capable of protecting their citizens".

[42] This presumption can only be rebutted where the Applicants provide "clear and convincing" evidence of the inability of state to provide them with effective protection (see *Ward* at para 50).

[43] The Board had to consider the general situation in Mexico, the Applicants' efforts to seek protection and their relationship with the authorities (see *Leon v Canada (Minister of Citizenship and Immigration)*, 2011 FC 34, [2011] FCJ No 57 at para 25).

[44] This Court finds the Board's assessment of the evidence to be reasonable. The Board concluded that Mexico is a democratic country that provided "an official apparatus sufficient to provide a measure of protection to its citizens" (see para 27 of the Board's decision).

[45] The Board considered that Mr. Castor went three times to the police to file reports. He also had a fourth opportunity but chose not to inform the police of the reason for his injuries because he feared Rojelio Ruiz (see para 32 of the Board's decision).

[46] The Board underlined that if Mr. Castor was unsatisfied with the police efforts, he could have sought alternatives such as the witness protection program which exists in Mexico.

[47] The Court acknowledges that the Board's decision contains clerical errors with respect to references to documents that were in the NDP country package at time of hearing that is on November 9<sup>th</sup>. But this error does not void the Board's decision (see *Miranda v Canada (Minister of Employment and Immigration)*, 63 FTR 81, [1993] FCJ No 437; *Earl v Canada (Minister of Citizenship and Immigration)*, 2011 FC 312, [2011] FCJ No 392 at paras 26-27). The assessment of the situation in Mexico found in the NDP does not relieve the Applicants from adducing clear and convincing evidence of Mexico's inability to provide them with adequate protection.

[48] As for section 97(1) of the *IRPA* and the issue of a viable IFA, it is recognized that "the Board's conclusions on objective fear and the existence of an IFA are each determinative of the refugee claim. Thus, in order for this Court to quash the decision [and] to reject the claim this Court must find [that] the Board committed a reviewable error in respect of both issues" (see *Butt v*

*Canada (Minister of Citizenship and Immigration)*, 2010 FC 28, [2010] FCJ No 77 at para 9 [*Butt*]); *Guzman Lopez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 990, [2010] FCJ No 1352 at para.14.

[49] The Court finds that the Board failed to conduct an individualized analysis into the nature of the risk facing the Applicants. The jurisprudence of the Court of Appeal is clear on the matter; section 97(1) claims require such an individualized analysis of the nature of the risk confronting the Applicants (see *Prophète* at para 7). As the Court reviews the Board's decision, it is apparent that such an analysis has not been conducted. The Applicants fear reprisals at the hand of the remaining Ruiz brothers, who they claim are now associated with the Zetas, if they are to return to Mexico.

[50] The Board failed to conduct the required analysis (see *Prophète* at para 7 and *Munoz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 238, [2010] FCJ No 268 at paras 29-34). The evidence adduced by the Applicants was to the effect that as a result of Mr. Castor witnessing a robbery and having denounced Pedro Ruiz and subsequently his brother, Alberto Ruiz, for reprisals against him, he faced a personalized risk, one that was not shared with the Mexican population at large. The Board should have addressed this important issue.

[51] Nonetheless, this Court concludes that the Board's decision will stand since its finding in respect of a viable IFA is reasonable.

[52] The Applicants have not established, on a balance of probabilities, that their lives would be at risk or that they would be subject to cruel and unusual punishment in Guadalajara or Monterrey.

The Applicants' fear of living in Guadalajara or Monterrey is speculative. Their fear of the Zetas is a generalized one that is similar to that of the population at large since no evidence was presented to the Board to establish clearly that the Ruiz brothers would pursue them in Guadalajara or Monterrey and that they are associated with the Zetas.

[53] The Board also determined that Mr. Castor is a high school graduate and has experience as an industrial electronics technician. The education and employment history of Mr. Castor would not create a harsh situation for the Applicants if they move to Guadalajara or Monterrey.

[54] The Board did not commit any error in respect of its determination of a viable IFA in Guadalajara or Monterrey.

## **VI. Conclusion**

[55] This application for judicial review is denied.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is denied.
2. There is no question of general interest to certify.

"André F.J. Scott"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-261-11

**STYLE OF CAUSE:** MARTIN ROCHA CASTOR  
MARIA GUADALUPE PINA CRUZ  
DAYANE PAOLA ROCHA PINA  
and  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Montreal, Quebec

**DATE OF HEARING:** October 12, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** SCOTT J.

**DATED:** November 7, 2011

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