

Federal Court



Cour fédérale

Date: 20121224

Docket: IMM-4004-12

Citation: 2012 FC 1543

Ottawa, Ontario, December 24, 2012

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

HECTOR VERGARA PINEDA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board] dated April 3, 2012 wherein the Board determined that the applicant is not a Convention refugee or person in need of protection.

BACKGROUND FACTS

[2] The applicant is a 41 year-old citizen of Mexico. He arrived in Canada on September 27, 2008 and claimed refugee protection that same day. He was a member of the municipal police in Coayucan de Catalan, in the state of Guerrero, since January 2005. He alleges a fear of persecution from members of the federal police in Guerrero who are involved in organized crime and who work for the governor of Guerrero and the mayor of Acapulco. The applicant claims that both he and his partner were pressured to participate in illegal activities. He alleges that in June 2008 he and his partner confronted some of their superiors about what they knew and that subsequently they began to get harassed at work.

[3] The applicant claims that on August 8, 2008 he and his partner were threatened and beaten by some men, including a couple of officers who threatened them and told them that if they did not become part of their team, they would be considered enemies and have to face the consequences. The applicant alleges he and his partner required medical treatment for the beating and sent their resignations to the police force while at a medical clinic.

[4] On August 12, 2008 the applicant and his partner allegedly decided to report what they had experienced to the state-level Public Ministry. The applicant claims that when the Public Ministry official showed them their declarations, they were missing names and facts they had reported. The official and a higher ranking officer allegedly told the applicant and his partner that they were doing them a favour by writing that and that they should leave as soon as possible or some very important people would make them disappear.

[5] The applicant and his partner decided to go to Acapulco for safety and file a report with an agent his partner knew from the Federal Agency of Investigations [AFI]. A few days later, they allegedly went to hide in Toluca and then in Cuahutla, and then decided to come to Canada.

[6] The applicant arrived in Canada on September 27, 2008 and claimed refugee protection that same day. He alleges that his partner Jamie was returned to Mexico by the Canadian immigration authorities and he has not heard from him since. The applicant testified that a friend in the police force in Mexico told him Jamie was arrested when he arrived in Mexico.

THE DECISION UNDER REVIEW

[7] The Board proceeded to find that although the harm the applicant feared did not fall within one of the five grounds enumerated in section 96 of the Act, the applicant did fall within the definition of a person in need of protection under subparagraph 97(1)(b)(ii) of the Act. The Board held that the applicant faced a personalized risk because he was a police officer who refused to participate in illegal activities, which is not a risk faced generally by other individuals in Mexico.

[8] The determinative issue for the Board was the issue of state protection. The Board noted there are many problems faced by citizens and public servants (including police officers) in Mexico, but preferred to rely on the Board's country condition documents which conclude that Mexico offers adequate state protection for police officers.

[9] The Board also found that the applicant did not provide clear and convincing evidence that state protection would not be forthcoming in Mexico. The Board held that the expectation upon the

applicant is that he could have taken the matter to higher levels of authorities in Mexico if he needed to and that he could have sought protection from sources other than the police, such as state-run agencies. The Board found that the effectiveness of the protection should not be set too high, and that the country condition documents reveal that Mexico has taken serious and genuine steps to address its problems and increase protection for its citizens, particularly for police officers.

[10] The Board considered the applicant's testimony that the agents of persecution would be able to find him anywhere in Mexico, but relied on the documentary evidence in finding that public access to national registries in Mexico is prohibited by law, and that even police officers can only gain access to the database of the Federal Electoral Institute with a court order and the written permission of the public prosecutor's office.

[11] The Board concluded the applicant had not rebutted the presumption that Mexico is capable of providing state protection. Therefore, the Board rejected the applicant's claim for refugee protection.

[12] The only issue in the present application for judicial review is whether the state protection determination is reasonable.

ANALYSIS

[13] The applicant claims the Board was overly selective in the evidence it chose to prefer to support its finding on state protection. The applicant submits that the more important the evidence that is not mentioned specifically and analyzed in the reasons, the more willing a court may be to

infer an erroneous finding of fact made without regard to the evidence (*Bains v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 497).

[14] I agree with the applicant that the Board's state protection determination is not reasonable.

[15] First, the Board erred in law with respect to the nature of state protection to be considered. The Board stated that "as long as the government is taking serious steps to provide or increase protection for individuals, then the individual must seek state protection". However, the Board failed to consider the adequacy of that protection.

[16] When examining whether a state is making serious efforts to protect its citizens, it is at the operational level that protection must be evaluated (see *Garcia v Canada (Minister of Citizenship and Immigration)*, 2007 FC 79 at para 15; *Jaroslav v Canada (Minister of Citizenship and Immigration)*, 2011 FC 634 at para 75; *EYMV v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at para 16 [*EYMV*]; *AAB v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1181 at paras 26-27). Although state protection must not be perfect, it must be adequate (*EYMV* at para 13). The evidentiary burden is on the claimant to adduce clear and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate (*Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 38).

[17] In the present case, the applicant declared that both he and his partner attempted to seek protection from the state-level police of the Public Ministry but that the police told him and his partner to leave as soon as possible or some very important people would make them disappear. The

applicant stated that his partner also filed a report with the AFI. In the decision, the Board notes that the applicant's copy of the police report to the Public Ministry is missing information and that the applicant had not provided a copy of the AFI report, but the Board did not make any statement doubting the credibility of the applicant's efforts to seek state protection while in Mexico. In the Court's view, it was therefore not reasonable for the Board to find that the respondent had not provided "clear and convincing" evidence that state protection would not be forthcoming.

[18] Moreover, given the applicant's efforts to obtain protection from the state-level police and their advice that the applicant and his partner leave as soon as possible, it was entirely unreasonable for the Board to find that the applicant could have gone to higher levels of authorities in Mexico to seek protection, such as state-run agencies. The Court's jurisprudence on this issue is mixed, but as I held in *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 at paragraph 25 on the subject of state-run or state-funded institutions:

25 I am of the view that these alternate institutions do not constitute avenues of protection *per se*; unless there is evidence to the contrary, the police force is the only institution mandated with the protection of a nation's citizens and in possession of enforcement powers commensurate with this mandate. For example, the documentary evidence explicitly states that the National Human Rights Commission has no legal power of enforcement ("Mexico: Situation of Witness to Crime and Corruption, Women Victims of Violence and Victims of Discrimination Based on Sexual Orientation").

[19] The Board's remaining justification for its conclusion on state protection was its interpretation of the documentary evidence, but I am not convinced that this evidence alone outweighs the applicant's assertion that he was told to leave as soon as possible when he attempted to seek protection from the state-level police. The Board devoted six pages of the decision to

extensive excerpts from six documents in the Board's national documentation package on Mexico. The documents refer to avenues for individuals wishing to report police corruption and also to the traceability of individuals in Mexico, but nothing in the documents cited by the Board relates directly to whether there is effective state protection in Mexico for a person in the applicant's situation.

[20] Moreover, the Board did not address documentary evidence that was before it in the national documentation package related to the adequacy of state protection for the particular fear of the applicant which contradicted the Board's finding on the issue.

[21] Human Rights Watch states in its 2011 country report on Mexico that "[t]he criminal justice system routinely fails to provide justice to victims of violent crime and human rights violations. The causes of this failure are varied and include corruption, inadequate training and resources, and abusive policing practices without accountability".

[22] The 2011 Amnesty International Report on Mexico states that "[r]eports of arbitrary detention, torture, excessive use of force and enforced disappearance by municipal, state and federal police forces continued" and that "[a]ttempts to reform the police were undermined by the failure to establish credible oversight controls or conduct effective criminal investigations into human rights abuses".

[23] The 2010 U.S. State Department Report on Mexico, which was specifically cited by the Board, indicates that "President Calderon remarked in speeches in March and October that

corruption was a serious problem in the police forces and a primary reason for the use of the military in the domestic counternarcotics fight. CNDH [the National Human Rights Commission] reported that police, especially at the state and local level, were involved in kidnapping, extortion, and in providing protection for, or acting directly on behalf of, organized crime and drug traffickers”.

[24] The Board in the present case cited evidence from the year 2006 on the existence of witness protection programs in Mexico, but it ignored the document entitled “Mexico: Recourse available to victims of the demand for bribes and other government corruption federally, in the Federal District, and in the states of Guanajuato, Jalisco, Mexico, Michoacan, Puebla, Queretaro, Veracruz and Yucatan; legislation designed to address corruption; agencies to which such corruption can be reported and protection available” (Research Directorate, Immigration and Refugee Board of Canada). This document, dated August 11, 2011, reports the following on the adequacy of anti-corruption legislation and state protection in Mexico:

In correspondence with the Research Directorate, a coordinator from the Miguel Agustín Pro Juárez Human Rights Centre (Centro de Derechos Humanos Agustín Pro Juárez, CentroProdh), a non-governmental organization that promotes human rights in Mexico, stated that [translation]

the anti-corruption legislation is not effective in the country since corruption is common to many, if not all, levels of government and ... has an enormous impact on the lives of the population, from the collusion and tolerance of authorities with organized crime, the daily demand for bribes by officials at every level from across the country, influence peddling for business, and so on. (CentroProdh 29 June 2011)

...

Lilia Mónica López Benítez, a judge of the Ninth Collegiate Penal Tribunal of the First Circuit (Magistrada del Noveno Tribunal Colegiado en Materia Penal del Primer Circuito), affirms in an article published in 2009 in a Federal Judicial Power journal, that even though Article 34 of the Federal Law against Organized Crime (Ley Federal contra la Delincuencia Organizada) opens the way for the protection of witnesses, the wording is [translation] "very vague" and does not regulate anything (López Benítez 2009, 59). She further states the following [translation]:

Given that there is not a real program for the protection of witnesses, this creates a legal vacuum that impedes us from knowing, with certainty, who are subjects of protection, what is the assistance provided according to each particular case, the reach of institutional support, the rights and obligations of the protected, the limits of protection and the budget assigned for this purpose. (ibid., 58)

According to the researcher at Amnesty International-Mexico, complaints can trigger threats against complainants, but these threats are very difficult to trace back to the authorities (7 July 2011). If the complaints involve organized crime, the researcher contends that it is difficult to find safety "anywhere across the country" (Researcher 7 July 2011). If the complaint involves low levels of corruption, there are still no guarantees that the complainant will be safe from reprisals since links between corrupt officials and organized crime are difficult to demonstrate, especially when criminal organizations have national networks where the "subcontracting of crime, including targeted killings, etc. is also quite common" (ibid.).

La Jornada reports that, between 2002 and 2009, the Attorney General has quadrupled the number of witnesses in protection, from 99 to 411 (*La Jornada* 7 Dec. 2009). The same article reports that information about two witnesses has been leaked to criminal organizations, resulting in their assassination (ibid.). The Middle Tennessee State University professor, speaking to the Research Directorate in a follow-up telephone interview, said that in Mexico, it is difficult to ensure the safety of a witness (6 July 2011). [Emphasis added.]

[25] Given this evidence, it was unreasonable for the Board to not include in its state protection analysis an assessment of the operational adequacy of the government's efforts in Mexico to protect police officers who refuse to participate in illegal activities.

[26] On the whole, I find that the Board's state protection determination lacks the justification, transparency and intelligibility required and is therefore unreasonable.

[27] For these reasons, the application is allowed. The decision is set aside and the matter is remitted to a differently constituted panel of the Board.

JUDGMENT

THIS COURT'S JUDGMENT is that:

The application for judicial review is allowed. The decision is hereby set aside and the matter is remitted to a differently constituted panel of the Board.

“Danièle Tremblay-Lamer”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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