

Federal Court



Cour fédérale

Date: 20141014

Docket: IMM-4572-13

Citation: 2014 FC 970

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 14, 2014

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

**IGNACIO GERARDO RODRIGUEZ NOLASCO
MAURICIO GERARD RODRIGUEZ SALVADOR
JULYSSA XIOMARA CANTO QUINTAL
IRMA FAJARDO PULIDO**

Applicants

and

**CITIZENSHIP AND IMMIGRATION
CANADA**

Respondent

JUDGMENT AND REASONS

I. The nature of the matter

[1] This is an application for judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), dated June 14, 2013, rejecting the

applicants' claim for refugee protection and finding that the applicants are neither "Convention refugees" nor "persons in need of protection" under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

II. The facts

[2] The applications of Irma Fajardo Pulido (the principal applicant's wife), Julyssa Xiomara Canto Quintal (the principal applicant's daughter-in-law) and Mauricio Gerard Rodriguez Salvador (the principal applicant's son), are based on the application of Ignacio Gerardo Rodriguez Nolasco (the principal applicant).

[3] In this case, the overall credibility of the principal applicant and the evidence on file to consider as truthful most of the facts set out in this decision. However, certain aspects of his testimony are being questioned by the RPD, as noted below.

[4] The principal applicant is a citizen of the state of Veracruz, Mexico. Before leaving for Canada, the principal applicant practised in a private clinic as a gynecologist.

[5] In June and October 2010, the principal applicant received extortion and death threats in the form of telephone calls. The principal applicant reported these threats to the Attorney General but states that he was not taken seriously.

[6] In January and March 2011, a nurse working at the principal applicant's clinic was also the victim of threats. The principal applicant did not report any of these threats as he considered that the Veracruz state police are corrupt.

[7] On May 25, 2011, members of the drug cartel "Los Zetas" kidnapped the principal applicant. Although the police went to the principal applicant's clinic, where he was kidnapped, they left at the request of the principal applicant's wife who feared that the presence of the police would endanger the applicant's life. The police did not investigate further. During the kidnapping, the principal applicant's wife did not seek help from police.

[8] When the principal applicant was released, the cartel members informed him that he should work as a doctor for the cartel in future.

[9] Following his release, the principal applicant denounced the kidnapping to the police, without following up on his complaint.

[10] The applicants left Mexico on July 25, 2011.

[11] Following his kidnapping, the principal applicant experienced serious physical and emotional health issues, such as post-traumatic shock.

III. The RPD's decision

[12] The RPD based its decision on the principal applicant's testimony. Although the RPD considered the principal applicant to be, by and large, credible, it concluded that the principal applicant failed to rebut the presumption of state protection.

[13] The RPD submitted that the female applicant and wife of the applicant should have sought state protection when the principal applicant was kidnapped. The RPD did not believe that the principal applicant's life could have been in danger if the female applicant and wife of the applicant had contacted the police during the kidnapping and therefore rejected that argument.

[14] The RPD noted that although the principal applicant mentioned that he had reported the kidnapping to the police before leaving Mexico, he did not follow up on his complaint. The applicant alleges that the police told him that he was making a mistake by contacting them, as the police themselves were infiltrated by criminal organizations. The RPD noted that the principal applicant did not mention that in his principal narrative. The RPD concluded that the failure to do so was highly significant as it goes to the very heart of the claim for refugee protection. Thus, the RPD rejected this submission by the principal applicant. The RPD also found that the principal applicant did not take the necessary steps to obtain state protection as he did not follow up on his complaint before leaving Mexico.

[15] It appears that although the principal applicant was required to rebut the presumption of state protection with clear and convincing evidence, the RPD based its decision only on the principal applicant's behaviour. The RPD stated that the mere assertion that corruption exists in a state is not enough to rebut the presumption of state protection.

[16] The RPD found that it was not necessary to analyze the internal flight alternative within the principal applicant's home state as the principal applicant failed to rebut the presumption of state protection.

IV. The issues

[17] There are two issues:

1. Did the RPD err in its analysis of state protection?
2. Did the RPD err in failing to conduct a separate analysis under section 97 of the IRPA?

Because I am answering "yes" to the first question, it is not necessary to answer the second question.

V. The parties' arguments

A. *Principal applicant's arguments*

[18] The principal applicant submits that the presumption of state protection may be rebutted by clear and convincing evidence that the state protection is inadequate (*Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, at paragraph 38 (*Carrillo*)).

Whereas a refugee claimant from a democracy such as Canada and the United States must show that he or she has exhausted all recourses available to her or him, this requirement does not apply to refugee claimants from all democratic countries, as mentioned by Justice Gauthier in *Capitaine v Canada (Minister of Citizenship and Immigration)*, 2008 CF 98, at paragraph 22 (*Capitaine*):

The Court does not understand *Hinzman* to say that this conclusion applies to all countries wherever they stand on the "democracy spectrum" and to relieve the decision-maker of his or her obligation to assess the evidence offered to establish that, in Mexico for example, the state is unable (although willing) to protect its citizens, or that it was reasonable for the claimant to refuse to seek out this protection.

[19] Accordingly, the presence of a democratic system does not guarantee state protection. The RPD must assess in each case the evidence submitted to determine whether effective protection exists. In *Davila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1475, at paragraph 25, Justice de Montigny rejected the RPD's analysis because he was of the opinion that the RPD did not "proceed with a fulsome and contextualized analysis of each claimant's particular situation, taking into consideration the basis of his or her claim, the precise state or

region where the persecution is alleged to have taken place, and the willingness of the authorities to protect members of the same target group”.

[20] The principal applicant submits that the RPD simply based its conclusions on the principal applicant’s attitude while in Mexico. The RPD erred in failing to consider the evidence describing state protection in Mexico. Further, the RPD did not conduct an analysis of the documentation submitted with respect to the particular circumstances of the principal applicant. Specifically, the principal applicant alleges that the RPD did not assess the evidence on: (1) the corruption within Mexican police forces; (2) the problems of kidnapping in Mexico; (3) the power and dangerousness of the agent of persecution (Los Zetas); and (4) the psychological report pertaining to the principal applicant’s mental health following his kidnapping. Thus, the principal applicant submits that the RPD not only selected the documentation submitted, but also completely ignored it. For these reasons, the principal applicant submits that RPD’s decision is unreasonable and must not be allowed to stand.

B. *Respondent’s arguments*

[21] The respondent submits that the principal applicant provides no clear and convincing evidence in support of his assertion that the police are corrupt. On this point, the respondent cites Justice Létourneau of the Federal Court of Appeal (*Carrillo*, at paragraph 30):

[A] claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate.

[22] The respondent then relies on the decision in *Martinez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1050 (*Martinez*) to illustrate its point. In that case, Justice Phelan held that a victim of spousal abuse who attempted to seek assistance on only two occasions, must have “[done] more than she did given the evidence of the nature of the political, judicial and administrative structure of Costa Rica (*Martinez*, at paragraphs 7, 9). Justice Phelan also mentioned that the applicant provided no “direct, relevant and compelling” evidence of the inadequacy of state protection (*Martinez*, at paragraph 7).

VI. Standard of review

[23] The assessment of the adequacy of a country’s state protection within the meaning of the Act is a question of mixed fact and law to be reviewed on the standard of reasonableness (*G.M. v Canada (Minister of Citizenship and Immigration)*, 2013 FC 710, at paragraph 27; *Balogh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 771; *Teofilio v Canada (Minister of Citizenship and Immigration)*, 2014 FC 783, at paragraph 20). Thus, this Court ought not to interfere where the reviewable decision is one of several acceptable and rational solutions (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, at paragraph 47).

VII. Analysis

[24] The analysis of state protection was specified in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, and *Flores v Canada (Citizenship and Immigration)*, 2008 FC 723, at paragraph 10:

As noted by the Federal Court of Appeal in *Carillo*, the decision of the Supreme Court in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 stressed that refugee protection is a surrogate for the protection of a claimant's own state. When that state is a democratic society, such as Mexico, albeit one facing significant challenges with corruption and other criminality, the quality of the evidence necessary to rebut the presumption will be higher. It is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation: *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.).

[25] As mentioned by the principal applicant, whereas in democracies such as the United-States and Canada, a refugee claimant must show that he or she has exhausted all recourses available to her or him to ensure his or her protection, this conclusion does not apply to all democracies (*Capitaine*, at paragraphs 20-22).

[26] It is settled law that the presumption of state protection can be rebutted where a refugee provides clear and convincing evidence confirming the state's inability to provide protection (*Espinoza v Canada (Minister of Citizenship and Immigration)*, 2005 FC 343, at paragraph 29; *Kaleja v Canada (Minister of Citizenship and Immigration)*, 2011 FC 668, at paragraph 26).

[27] Where an applicant has provided sufficient evidence to rebut this presumption, the RPD must consider and assess its value, provide adequate justification for its decision to accept or

reject it and explain the basis for that determination (*Wright v Canada (Minister of Citizenship and Immigration)*, 2012 FC 320, at paragraph 13). In *Simpson v Canada (Minister of Citizenship and Immigration)*, 2006 FC 970, at paragraph 44, Justice Russell defined those requirements:

While it is true that there is a presumption that the Board considered all the evidence, and there is no need to mention all the documentary evidence that was before it, where there is important material evidence on the record that contradicts the factual finding of the Board, a blanket statement in the Decision that the Board considered all of the evidence will not be sufficient. The Board must provide reasons why the contradictory evidence was not considered relevant or trustworthy: See *Florea v. Canada (Minister of Employment & Immigration)*, [1993] F.C.J. No. 598 (F.C.A.) and *Cepeda-Gutierrez v. Canada (Minister of Citizenship & Immigration)*, [1998] F.C.J. No. 1425 (F.T.D.). In this case, the Board did not do this. It simply relies in its Decision on the statement that Jamaica is a democracy with a police force and so must be presumed capable of providing protection and that no clear and convincing evidence was presented by the Applicant to rebut the presumption of state protection. The contradictory evidence noted above and the specific circumstances of this case, however, were not addressed. The Applicant presented compelling evidence that in Jamaica the state does not provide protection to women like the Applicant who are consistently at risk and without effective protection. This was more than a local failure. The Applicant did provide clear and convincing evidence that the reality was otherwise and, while I do not say that the Board was obliged to accept the Applicant's evidence, it was certainly obliged to deal with it and provide adequate reasons for rejecting what she had to say about her own position and the state's inability to protect women from domestic violence in Jamaica.

[Emphasis added.]

[28] In *Beltram Espinoza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 763 (*Beltram Espinoza*), this Court applied the principles set out above to a case where two applicants, two citizens of Mexico whose family who suffered severe persecution at the hands of the Sinaloa cartel, claimed to be Convention refugees or persons in need of protection. In that

case, Justice Kelen remitted the refugee claim to the RPD for redetermination because, *inter alia*, the RPD erred in failing to consider the particularly relevant *Los Angeles Times* article describing the inability of the state of Sinaloa to provide adequate state protection. The Court stated at paragraphs 29-31:

The applicants in this case failed to approach the police or successive levels of the Mexican state machinery to complain about Abel's kidnapping, the ransom demands, or the rogue police officer. (The Court refers to this incident earlier in these reasons under the heading "background facts".) However, the evidence before the RPD from a *Los Angeles Times* article dated December 22, 2008 cited earlier in these reasons shows that the police in the state of Sinaloa cannot protect their citizens from crimes related to the drug cartels because "the *narcos* have networks meshed into the fabric of business, culture, politics - every corner of life".

...

The reasons given by the RPD are not to be read hypercritically by a court and nor is it required to refer to every piece of evidence that it received that is contrary to its finding, and to explain how it dealt with it: *Cepeda-Gutierrez v. Canada (MCI)* (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 (F.C.T.D.), per Justice Evans (as he the was) at paragraph 16. However, Justice Evans also held at paragraph 15 that the Court may infer that a finding of fact has been made without regard to the evidence if the RPD fails to mention an important piece of evidence which is relevant and directly contradicts the Board's finding:

...

In this case, I am satisfied that the RPD erred in failing to explain why the *Los Angeles Times* article about the breakdown of the state's ability to control the drug killings in Sinaloa was not considered or followed. This is one of the most credible newspapers in the U.S., and this article is important, relevant and contradictory evidence. For this reason, the RPD finding that there was adequate state protection for the applicants in the state of Sinaloa is in error and must be set aside because it did not consider this evidence.

[Emphasis added.]

[29] In this case, the principal applicant submitted important and relevant material pertaining to the state protection for Mexican citizens against cartels, including:

1. A document published by the RPD stating that

ICESI [the Citizens' Institute for Crime Studies, a Mexican think-tank specializing in the production of statistical data on crime in the country] explains that in some cases of alleged extortion, the Public Ministry refuses to initiate investigations for lack of evidence, or minimizes the complaint and refuses to provide assistance to the victim. . . . *The New York Times* also reports that victims of abduction and persons whose vehicle was stolen are ignored by authorities when they go to file police reports.

2. A document published by *La presse* on November 22, 2012, stating that:

[TRANSLATION]

[O]nly 8% of the offences committed in Mexico are reported and 99% of them go unpunished, says the National Human Rights Commission (NHRC). . . . since 2005, the NHRC has recorded 34,385 complaints against federal public safety officials.

3. A document published by Amnesty International on the complicity of police and other officials in murders and kidnappings perpetrated by drug cartels and other criminal organizations.
4. Documents published by the IRB indicating that (i) purges of municipal, state, and federal police have not contained the problem of police corruption (ii) the Mexican President acknowledged that there is a problem with corruption among Mexican judges (iii) the increase in the number of kidnappings in Mexico is due to corruption, impunity and collusion between cartels and police; and (iv) the US

government stated that Los Zetas is the most dangerous and sophisticated cartel operating in Mexico.

[30] In my view, the RPD did not adequately consider the evidence. Indeed, the RPD only considered: (1) the principal applicant's testimony, (2) the principal applicant's Personal Information Form; and (3) the principal applicant's attitude. The analysis of paragraphs 30-35 of the RPD's decision regarding state protection in Mexico indicates that there was no assessment of the documentary evidence, mentioned in the previous paragraph:

[Translation]

The mere assertion that corruption exists is not enough to conclude that the state is incapable of protecting its citizens.

There is a presumption that a state is capable of protecting its citizens.

The onus is on the applicants to provide clear and convincing evidence that the Mexican state and its agents were unwilling or unable to provide protection.

In the circumstances alleged, did the applicants make all efforts necessary to ensure their protection and obtain state protection?

Were they able to demonstrate that the state and its agents were unwilling or unable to provide protection and that the protections of police authorities were non-existent and inadequate?

These questions were answered in the negative by the panel, owing to their attitude.

[Emphasis added.]

[31] Upon a thorough reading of the RPD's decision, I cannot find any assessment of the documentary evidence submitted.

[32] I therefore conclude that the RPD erred in its analysis of state protection.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed.
2. This refugee claim is remitted to a different panel of the RPD for redetermination.
3. There is no serious question of general importance to certify.

“George R. Locke”

Judge

Certified true translation
Daniela Guglietta, Translator

FEDERAL COURT
SOLICITORS OF RECORD

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