Date: 20100204

Docket: IMM-2331-09

Citation: 2010 FC 119

Ottawa, Ontario, February 4, 2010

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

OSCAR LEONARDO PEREZ MENDOZA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] The central issue raised by the Applicant, a citizen of Mexico, seeking to quash the April 15, 2009 decision of a member of the Refugee Protection Division (the tribunal), determining he was not a Convention Refugee or in need of protection, is whether the tribunal erred in law in failing to provide adequate or any reasons in support of its finding the Applicant had failed to take all or even reasonable steps in the circumstances to seek state protection in Mexico and thus had not rebutted the presumption, with clear and convincing evidence, of the state's inability to protect him. In short, the Applicant argues the tribunal did not provide any analysis in terms of explaining why it had

come to the conclusion, if he would have approached the police a third time, state protection would have reasonably been forthcoming to him.

Background

[2] Credibility is not a factor in this case. The determining factor is state protection. The Applicant named as his persecutors two different sets of persons: (1) Mario Guagnelli, the owner, and his son Roberto Guagnelli, of a company known as TINEP who first employed him in November 2005 but fired him on June 21, 2007; and, (2) PEMEX's Assistant Coordinator of Contracts, Edmundo Vega and two of his managers in the Contracts Department of that very large firm which is the major state-owned company in the production and refinement of oil in Mexico.

[3] In May 2006, TINEP, which specialized in water treatment, won a tender bid from PEMEX for the construction of a sewer treatment plant servicing PEMEX's refinery in Madero, in the State of Tamaulipas.

[4] TINEP was entitled to instalment payments from PEMEX upon certification of each construction phase or delivery of equipment. Vega had the authority to sign off for PEMEX and the Applicant, who by 2006 had been promoted to being a coordinator of contracts, certified for TINEP.

[5] What follows is extracted from the tribunal's decision. The Applicant's troubles began in May of 2007 when it came to light that TINEP had been paid for work not completed or equipment not delivered. An internal investigation was launched by PEMEX which the Applicant participated in but later was told by his supervisor he [the supervisor] would be dealing with the issue. On June

21, 2007, the Applicant was assaulted for the first time by two unknown men who told him "to go easy" on the investigation; he was hospitalized.

[6] After this incident, he contacted Roberto Guagnelli, who was also his friend, informing him what had happened. When he returned to work the following week, he was denied access to the premises and was told he had been fired for his part of in the internal investigation; he had tarnished TINEP's reputation with accusations of questionable business practices. TINEP's lawyer would not assist him, saying he had adversely affected the company. Roberto Guagnelli said to him: "You really messed up this time, we are taking millions of pesos and you know that engineer Vega does not want you to tarnish his political career."

[7] The Applicant made an employment complaint to the Department of Employment and Social Welfare (DOESW) for unlawful dismissal. On June 25, 2007, this Department issued a summons to TINEP to explain the Applicant's dismissal and the non-payment of his severance. In early July 2007, two unidentified men approached the Applicant; they shoved him and told him to "relax" and to stop thinking he was a "big shot."

[8] By this time, the Applicant suspected TINEP, Vega in PEMEX and political candidates who supported them of being engaged in a corruption scheme whereby moneys were siphoned off from the TINEP/PEMEX contract to support the candidates of the Institutional Revolutionary Party (IRP) and the candidates for municipal office. He told a local TV station about the scheme; the station covered the story; the accusation had to be defended by an IRP candidate during a TV interview.

[9] Shortly after, he began receiving threatening phone calls from unidentified persons about his accusations. He fled to Morelia, in the state of Michoacan securing work with a construction company.

[10] On August 6, 2007, he was kidnapped by two masked men; he was assaulted; they told him it was because he had tarnished the reputation of TINEP's owner and that of his son. He was released on August 8, 2007.

[11] On August 14, 2007, he denounced the kidnapping and assault to the Public Ministry of the State accusing Mario and Roberto Guagnelli of orchestrating the incident. A couple of weeks later, he relocated to the city of Queretaro in the State with the same name.

[12] While there, he received a message from his brother that "the same people" were asking for him at his parents' home. He received a call on his cellular phone from Roberto Guagnelli declaring his innocence and asking about the accusations made in Morelia. [My emphasis.]

[13] On October 16, 2007, while in his car he was shot at; witnesses contacted the police who escorted him to the Public Ministry where he denounced Vega and his two contract managers at PEMEX. That same night he relocated to Tampico in his home state of Tamaulipas where he had lived, attended school and worked. He was advised to leave Mexico by his lawyer friend whom he had consulted in connection with his dismissal at TINEP. After a brief delay because of his mother's illness, he fled Mexico for Canada on November 5, 2007 to claim for refugee protection.

The Tribunal's Decision

[14] Before beginning its analysis, the tribunal noted of the Applicant: "He has been in contact with persons in Mexico who told him that TINEP and PEMEX continue to operate and there have been no investigations, but some management has changed and Vega is intending to run for political office as a PRI candidate." The tribunal added: "The claimant fears that he will continue to be of interest to the agents of persecution because he alleges to have incriminating evidence against them and the corrupt state authorities will not protect him." [My emphasis.]

[15] At the start of its analysis the tribunal wrote: "The threats alleged by the claimant are acts of criminality and as criminality does not provide a nexus to a Convention ground, the claimant is not a Convention Refugee." It then embarked on its section 97 analysis.

[16] The tribunal next summarized the main elements of the Applicant's PIF and testimony. It noted the Applicant's filing on June 25, 2007, for wrongful dismissal, compensation and severance with the DOESW writing: "This contact …. was the claimant's first contact with a state authority to request their assistance with his problems in Mexico and he relocated to Morelia, Michoacan before the end of July."

[17] The tribunal found he had been kidnapped and assaulted in Morelia, was released on August 8, 2007 filing a denunciation on August 14, 2007 "against Mr. Guagnelli and his son." It then commented: "After a very brief period, at the end of August, the claimant relocated to Queretaro where on October 16, 2007, he was shot at, escorted by the police to the Public Ministry where he

filed a denunciation this time against three PEMEX contract officials noting: "That same night the claimant relocated to Tampico."

[18] It held:

> "In examining the efforts of the claimant to redress his problems in Mexico prior to seeking asylum abroad, I find that in each instance [the filing with DOESW, with the police in Morelia and in Queretaro] the claimant relocated abruptly after initiating contact with these representatives of the state." [My underlining.]

[19] The tribunal wrote: "[…] that in each of these instances the claimant may have been too quick to assume that protection or a resolution was not forthcoming." [My emphasis.]

[20] It further observed: "[…] the claimant named different perpetrators in each denunciation and the police contact in Queretero was initiated by witnesses, leaving the claimant with a single denunciation initiated by him."

[21] The tribunal found: "There clearly was an onus on the claimant to approach the police in Mexico before he sought the protection of Canada" [and said] "I am not satisfied with the claimant's sincere efforts to seek state protection for the reasons stated above." The tribunal referred to *Sandor Szucs v. the Minister of Citizenship and Immigration* (Docket: IMM-6248-99, October 3, 2000) and *Gloria Del Carmen Peralta v. the Minister of Citizenship and Immigration*, 2002 FCT 989 (Docket: IMM-5451-01) for the propositions a claimant had to show he/she had taken reasonable steps in the circumstances in assessing the availability of state protection, but on the

other hand, not being required to establish he/she had exhausted all avenues of protection if he took reasonable steps to obtain it. [My emphasis.]

[22] The tribunal next examined country conditions in Mexico, citing the U.S. DOS report for 2007 issued in June 2008 finding from that document: "Documentary evidence acknowledges crime and corruption in Mexico but also states that the government is taking steps to address the issue." It referred to Mexico as "a developing and functioning democracy" concluding "thus the presumption of state protection applies." It stated: "The government normally respects and promotes human rights at the national level by investigating, prosecuting and sentencing public officials and members of the security forces." It cited the Federal Court of Appeal's decision in *Canada (Minister of Employment and Immigration) v. Villafranca*, (1992) 18 Imm. L.R. (2d) 130 for the principle that merely showing that a government has not always been effective in protecting persons in his particular situation it is not enough to justify a claim of the unavailability of state protection for a claimant especially where the government is in effective control of its institutions such as the military, the police and civil authority and makes serious efforts to protect its citizens. It referred to jurisprudence holding: "[…] the documentary evidence indicated that even though there were problems with corruption in Mexico, substantial efforts were being made to prevent corruption."

[23] The tribunal concluded:

> Based on documentary evidence and the particular facts of this case, I find that the claimant did not take all steps or even reasonable steps to seek protection in Mexico … [and] has not rebutted the presumption of state protection with clear and convincing evidence of the state's inability to protect him.

Analysis

[24] Before dealing with substantive issues in the analysis, I note the Applicant did not challenge the tribunal's finding that section 96 of the *Immigration and Refugee Protection Act* (IRPA) was not applicable. Section 96 of IRPA deals with the circumstances in which Convention refugee status may be obtained. This case, therefore, turns on whether the Applicant is a person in need of protection under section 97 of IRPA. That disposition reads in both official languages:

Immigration and Refugee Protection Act, S.C. 2001, c. 27	*Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, c. 27
Person in need of protection	Personne à protéger
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 themself of the protection of that country,	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) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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,	(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(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) the risk is not caused by the inability	(iv) la menace ou le risque ne résulte pas

of that country to provide adequate health or medical care.	de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	Personne à protéger
(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.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
[My emphasis.]	[Je souligne.]

(a) The Standard of Review

[25] In her challenge to the tribunal decision, counsel for the Applicant raises two issues: (1) whether the tribunal erred by ignoring, without explanation, evidence which contradicted its conclusions on the availability of state protection; and, (2) whether the tribunal failed to properly analyze the law surrounding the Applicant's obligation to take reasonable steps to secure state protection in the circumstances and, in particular, having found the Applicant did not take reasonable steps because he did not give the state authorities a chance to provide him that protection, the tribunal failed to make a critical finding that had he not "relocated abruptly" after filing complaints with state authorities, i.e. had given the state authorities more time to deal with the complaints, state protection would have reasonably been forthcoming to him.

[26] The issues raised by the Applicant are similar to those raised in *Capitaine v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 98 (*Capitaine*). I adopt the conclusions on the standard of review reached by my colleague Justice Gauthier:

> **10** There is no dispute as to the standard of review applicable to all such issues. If indeed there was an error of law (the respondent objects to this characterization of the alleged error) the standard is

> correctness. However, the finding of the RPD on the availability of state protection, including whether it was unreasonable for the applicants not to have sought such protection, is a mixed question of fact and law subject to review against the standard of reasonableness *simpliciter* (*Hinzman v. Canada (Minister of Citizenship and Immigration*) [2007] F.C.J. No. 584, 2007 FCA 171, para. 38). If the inadequacy of the reasons amounts to a breach of procedural fairness, the Court will intervene without the need to proceed to a pragmatic and functional analysis (*Sketchley v. Canada*, [2005] F.C.J. no 2056, paras. 53-55).

[27] The Supreme Court of Canada's reform on the standards of review and its analysis in *Dunsmuir v. New Brunswick*, 2008 SCC 9 does not impact on Justice Gauthier's findings which themselves are anchored, in part, on the Federal Court of Appeal's decision in *Hinzman v. Canada (Minister of Citizenship and Immigration)*; *Hughey v. Canada (Minister of Citizenship and Immigration),* 2007 FCA 171, at paragraph 38 (*Hinzman*).

(b) Some principles

[28] There is a wealth of jurisprudence on the required elements of state protection which is essentially based on the Supreme Court of Canada's decision in the *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (*Ward*). In *Ward*, the Court found there was an obligation by a persecuted person to first approach his/her home state for protection within limits because as Justice La Forest, writing for the Court, wrote at page 724: "Most states would be willing to attempt to protect when an objective assessment established that they are not able to do this effectively. Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness."

[29] He formulated the test as follows:

> **49** Like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection "might reasonably have been forthcoming", will the claimant's failure to approach the state for protection defeat his claim. Put another way, the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state. [My emphasis.]

[30] He then discussed how a claimant brought proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this refusal. In the case before him the state authorities conceded their inability to protect Mr. Ward. Justice La Forest then wrote:

> **50** […] Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state [page725] protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant.

[31] Before and after *Ward*, the Federal Court of Appeal has issued several judgments defining the parameters of state protection and most recently in *Hinzman*, cited above, and *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 (*Carillo*) which dealt with state protection in Mexico.

[32] In this Court, there are hundreds of cases dealing with state protection in Mexico; I find two of most relevance on the critical point raised by counsel for the Applicant: Justice Martineau's decision in *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359 (*Avila*) and Justice Phelan's decision in *Hurtado-Martinez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 630 (*Hurtado-Martinez*).

[33] From these cases, I derive and summarize some relevant legal principles:

1) The state is presumed to be willing and capable of protecting its citizens (*Ward*).

2) Evidence of the state's willingness to protect cannot be imputed as evidence of adequate state protection (*Ward*).

3) Each case is *sui generis* so while state protection may have been found to be available in Mexico, maybe even in a particular state, this does not preclude a court from finding the same state to offer inadequate protection on the basis of different facts (*Avila*).

4) The claimant is expected to have taken all reasonable steps in the circumstances to seek state protection from his persecutors (*Ward*, *Avila*). A claimant who does not do so and alleges that the state offers ineffective or inadequate protection bears an evidentiary and legal onus to convince the tribunal (*Carillo*).

5) This exception to the general expectation that claimants approach the state supports the principle that the claimant is not required to put himself in danger in order to demonstrate ineffectiveness (*Ward, Avila*).

6) Where a tribunal determines the applicant has failed to take steps to seek protection this finding is only fatal to the claim if the tribunal also finds that protection would have been reasonably forthcoming. A determination of reasonably forthcoming requires that the tribunal examine the unique characteristics of power and influence of the alleged persecutor on the capability and willingness of the state to protect (*Ward, Avila, Heurtado-Martinez*).

7) Similarly, where a non-state actor is alleged to have persecuted the claimant, the tribunal must examine the motivation of the persecuting agent and his ability to go after the applicant locally or throughout the country, which may raise the question of the existence of internal refuge and its reasonableness (*Avila*).

8) The kind of evidence that may be adduced to show that the state protection would not have been reasonably forthcoming includes: testimony of similarly situated persons, individual experience with state protection and documentary evidence (*Ward*).

9) The standard of proof is balance of probabilities (*Carillo*).

10) The quality of such evidence will be raised in proportion with the degree of democracy of a state (*Avila*).

11) The degree of democracy may be lowered if the state tolerates corruption in its institutions (*Avila*).

12) Evidence of remedies for corruption is not evidence of their practical effect (*Avila*). In order to neutralize impact of corruption on the evidentiary analysis, the Board must determine that these remedies have a positive practical effect.

13) The evidence must be relevant, reliable, and convincing to satisfy the trier of fact on a balance of probabilities that the state protection was inadequate (*Carillo*).

[34] As further background, *Avila* was a case dealing with a refugee claimant from Mexico who named as his persecutor a non-state actor for whom he worked in the local office of the Institutional Revolutionary Party (IRP). The claimant discovered his persecutor was directly involved in the illegal financing of the democratic organization of technical students and suspected of committing acts of sabotage and vandalism for the IRP. The claimant made it known to his superior he was aware of the illegal payments and wished to take his distance from him. Before ceasing to work for his persecutor, he made copies of certain documents which apparently incriminated his superior. Mr. Avila was found to be credible.

[35] *Hurtado-Martinez* was not a corruption case; it was one where the Applicant, a citizen of Mexico, claimed her neighbor, a Commander in Mexico's Federal Investigations Agency attempted to rape her but was repelled by her common law partner who had just returned home from work. A complaint at the police department was apparently refused. Her partner was later attacked by the Commander and some of his men.

[36] The refugee claimant fled the city after receiving a threatening phone call from the Commander. Her partner fled to a different city. The Commander was able to call her on her cell phone; she changed the number but he was still able to trace her. She contacted the Desarrollo Integral de la Familia who advised her to take her complaint to a different department of the Public Ministry which she declined because of his past treatment and of her fear of reprisals. It seems in *Hurtado-Martinez* case, the tribunal did not deal with the claimant's credibility.

[37] In both *Avila* and *Hurtado-Martinez,* the tribunal denied protection in Canada on the grounds that the Applicant should have exhausted all existing remedies before claiming in this country. In both these cases, this Court intervened to quash the tribunal's determination. In both cases, the tribunal's finding was set aside because of the tribunal's failure to engage in an appropriate state protection analysis and, in particular, the failure to examine the totality of the evidence before it to determine whether it was reasonable in the circumstances to do what the claimant did.

[38] I should add that Justice Gauthier in *Capitaine* reached a similar result in similar circumstances.

Conclusions

[39] For the reasons that follow this judicial review application must succeed. The nub of this case is encapsulated in the following passage found in *Ward*, at 723:

> **48** Does the plaintiff first have to seek the protection of the state, when he is claiming under the "unwilling" branch in cases of state inability to protect? The Immigration Appeal Board has found that, where there is no proof of state complicity, the mere appearance of state ineffectiveness will not suffice to ground a claim. As Professor Hathaway, supra, puts it, at p. 130:
>
> Obviously, there cannot be said to be a failure of state protection where a government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming: […] [My emphasis.]

[40] The tribunal faulted the Applicant because, in its view, he did not give the authorities an appropriate opportunity to respond to the complaints he made. I find two errors in the tribunal analysis: First, it ignored the testimony of the Applicant as to the circumstances which made him leave the jurisdiction where the complaints were made and it did not analyze in the particular circumstances whether state protection would have been reasonably forthcoming.

[41] On the first point, I make the following findings:

(1) The tribunal erred in finding that his claim for employment compensation at DOESW was a request for protection within the meaning of that concept in refugee law. Clearly it was not.

(2) The tribunal did not refer to the reaction of Roberto Guagnelli when the Applicant contacted him to tell him about his being fired. The tribunal failed to consider the fact, in early July 2007, two unidentified men approached him, roughed him up and warned him about speaking of the affair. There is no mention the Applicant received a number of threatening phone calls after he leaked the story of corruption to the local news causing him to flee to Morelia.

(3) After his assault and kidnapping in Morelia, he made a complaint on August 14, 2007 naming Mario Guagnelli and his son as his persecutors. Two weeks later he fled to Queretaro. The tribunal does not mention, shortly after moving there, Roberto Guagnelli phoned him and questioned him about the complaint he made in Morelia.

(4) He made a complaint following the incident in which he was shot at. The tribunal did not mention the police demanded a bribe in order to take action. He fled that same night.

[42] Second, there is simply no analysis by the tribunal whether, in the circumstances, protection would have reasonably been forthcoming. The tribunal was required to conduct such an analysis weighing a number of relevant factors such as: (1) who were his persecutors? (2) what influence did they have? and (3) the underlying nature of the case – this was a corruption case and the documentary evidence shows that corruption is a problem in Mexico.

[43] For these reasons, the judicial review application is granted.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is allowed, the tribunal's decision is quashed and the matter is remitted to the Immigration and Refugee Board for re-determination by a differently constituted tribunal. No certified question was proposed.

"François Lemieux"

_____

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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