Date: 20071221

Docket: IMM-5544-06

Citation: 2007 FC 1341

Ottawa, Ontario, December 21, 2007

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

JOSE OCTAVIO CEJUDO LOPEZ

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*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the “IRB” or the "Board") dated September 25, 2006, wherein the Board determined that the applicant was not a Convention refugee according to Section 96 of the Act, nor a "person in need of protection" according to Section 97 of the Act.

BACKGROUND

[2] The applicant is a 25 year old citizen of Mexico who claimed refugee status pursuant to ss. 96 and 97(1) of the Act.

[3] At his Refugee Determination Hearing, the applicant alleged that he had been harassed and physically abused by police officers seeking to know the whereabouts of his uncle, a former government official accused of gross embezzlement of government funds. His uncle disappeared during the government's investigation of the matter and has been a fugitive from justice since 1998.

[4] The applicant fled to Canada and claimed Refugee status in 1999. His claim was denied and he left for Mexico in September 2000.

[5] In December 2000, the applicant returned to Canada and made a second claim for protection.

[6] At his second hearing, the applicant alleged that when he returned to Mexico in September of 2000, he received telephone calls from unidentified individuals seeking to meet with him to discuss his uncle. These individuals threatened his life and warned that he would be punished by the Mexican authorities if he failed to cooperate.

[7] The applicant relocated but was later found and continued to be harassed. During one instance of harassment, three men driving white cars similar to those of the judicial police threatened to set fire to his grandfather's farm if he did not assist them in locating the applicant.

Furthermore, individuals believed to be police officers forced the applicant out of a car at gunpoint, and questioned him about his uncle's whereabouts. During the altercation he was kicked, his arm was twisted and he sustained bruises that later required medical attention.

[8] The applicant remained in Mexico, concealing his identity for fear of being recognized by the police. In December 2000 he returned to Canada and made a second claim for protection which was denied in 2004.

[9] However, the applicant was successful on his application for judicial review and the claim was returned to for a re-determination by a different panel.

[10] In a decision dated September 25, 2006, the IRB found that the applicant's testimony was "presented in a straightforward manner", but disagreed with the applicant's assertion that he was being persecuted by the state of Mexico, through its judicial police officers. The Board concluded that the applicant's persecutors were either rogue police officers or criminals posing as police officers.

[11] The Board found that the applicant had not rebutted the presumption of state protection. While the Board acknowledged that documentary evidence revealed there was corruption among the police and a measure of inefficiency in the judicial system in Mexico, it noted that the Attorney General's Office (PGR) and the Federal Investigative Agency (AFI) "played a significant role in attempting to combat criminality […] and to provide protection to Mexican citizens."

ANALYSIS

[12] In *Chaves v. Canada (Minister of Citizenship and Immigration*), [2005] FC 193, [2005] F.C.J. No. 232 (QL), at para. 11, I applied the pragmatic and functional approach and concluded that, given the nature of the question, as one of mixed fact and law, and the relative expertise of this Court in determining whether a legal standard has been met, the appropriate standard of review applicable to determinations of state protection is one of reasonableness *simpliciter*. Accordingly, the Board's decision will stand "if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling" (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at para. 55).

[13] The Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 established the general principles relating to the presumption of state protection. At pages 724-725, LaForest J. stated:

> […] 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 […]
>
> […] 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.

He went on to assert that "clear and convincing confirmation" of a state's inability to protect would be required and that absent such proof it is to be presumed that a state can protect its own citizens.

[14] Furthermore, the case law indicates that the burden of proving a lack of state protection increases with the level of democracy exhibited by the state. The more democratic the state in question is, the more the claimant must have done to exhaust all avenues of protection available (*Kadenko v. Canada (Minister of Citizenship and Immigration)*, [1996] 143 D.L.R. (4th) 532, [1996] A.C.F. No. 1376 (C.A.) at page 534; *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] F.C.J. No. 584 (QL), at para. 57).

[15] However, this does not mean that the claimant is required to put him or herself in danger in the pursuit of state protection. It is obvious that in such a situation, protection would not reasonably be forthcoming. As I stated in *Chaves, supra* (at para. 18):

> […] notwithstanding that not every member of the [police] was implicated in the applicant's persecution, seeking help from the [police], - asking, in effect, the [police] to protect the applicant from itself – would have in all likelihood placed the applicant in greater peril.

[16] Of particular importance in determining whether the presumption of state protection has been rebutted, is the effectiveness of the protection offered. As Martineau J. asserted in *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, [2006] F.C.J. No. 439 (QL), at para. 34:

> […] the question is not so much whether remedies exist against corrupt public servants in Mexico, but is to determine whether in practice those remedies are useful in the circumstances

[17] Similarly**,** Campbell J. has held that when examining whether a state is making serious efforts to protect its citizens, it is at the operational level that protection must be evaluated, *Garcia v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 79, [2007] F.C.J. No. 118 (QL), at

para. 15). Indeed, the "[a]bility of the state to protect must be seen to comprehend not only the existence of an effective legislation and procedural framework but the capacity and the will to effectively implement that framework." (*Elcock v. Canada (Minister of Citizenship and Immigration*), [1999] F.C.J. No. 1438 (QL), at para. 15).

[18] In sum, the guiding principle of state protection indicates that a claimant will not be required to seek state protection where it would be objectively unreasonable to do so; however, the claimant bears the burden of proof. This burden of proof increases with the level of democracy exhibited by the state.

[19] Further, country conditions must also be taken into account in the objective analysis. While an analysis of country conditions includes determining the *existence* of mechanisms of state protection, it also involves an analysis of the *effectiveness* of those mechanisms.

[20] While I recognize that in the present case, the Board did consider the existence of state protection in Mexico, it failed to consider the effectiveness of that protection. My finding is bolstered by the fact that the Board ignored contradictory evidence in this regard.

[21] As a preliminary matter, I note that an analysis of state protection does not occur in the abstract (*Montenegro v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1681, [2005] F.C.J. No. 2077 (QL), at para. 17). In the present case, the Board did not come to any determinative conclusions with respect to the identity of the persecuting agents, finding only that they were either

rogue officers or criminals parading as officers. The Board reached that finding despite the applicant's sworn, uncontradicted testimony and Personal Information Form indicating that he recognized his assailants as judicial police officers because of previous dealings with them in 1998. While the Board appears to have proceeded in its analysis as if the persecutors were rogue officers, I find the lack of a definitive statement on the matter troubling. Conducting a state protection analysis in the absence of a determination as to the nature of the persecuting agent risks short circuiting a full assessment of the claim.

[22] The distinction between "state agents", "rogue officers" and "criminals" raises different considerations in evaluating the effectiveness of state protection. Where the alleged persecutors are state agents, the claimant may be faced with an official policy of persecution, such that state protection may not reasonably be forthcoming. On the other hand, where the assailants are "rogue officers" the analysis will focus on whether the state is in a position to effectively police itself, including the effectiveness of oversight and accountability mechanisms. However, where purely criminal elements are the agents of persecution; the above considerations will be irrelevant in evaluating the effectiveness of state protection.

[23] In its analysis of state protection against rogue officers, the Board highlighted the existence of anti-corruption measures in Mexico. While extremely laudable, the efforts of any government to investigate and punish instances of corruption are not in and of themselves determinative of the effectiveness of those efforts at an operational level. The Board highlighted the number of corruption-related investigations carried out by the Attorney General's Office, new

training initiatives aimed at combating police and judicial corruption, and the existence of a mechanism for filing complaints against public officials as indicative of the government's ability to protect the applicant, but it did not indicate how those initiatives have affected the level of corruption on the ground, and the lives of the civilian population in general. I note, for example, that the ability to make *ex post facto* complaints and commence *ex post facto* investigations of corruption and ill-treatment does not *automatically* constitute effective protection.

[24] Moreover, the Board failed to address contradictory evidence that was critical to the reasonableness of the applicant's failure to seek state protection. In *Simpson v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 970, [2006] F.C.J. No. 1224 (QL), at para. 44, Russell J. asserted that:

> 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, [it] must provide reasons why the contradictory evidence was not considered relevant or trustworthy […]

Thus, a Court may infer that an erroneous finding of fact was made from a failure of an administrative board to "mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency." (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL), at para. 15).

[25] As Layden-Stevenson J. indicated in *Castillo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 56, [2004] F.C.J. No. 43 (QL), at para. 9:

> The question of effective state protection was identified as the central issue. Where evidence that relates to a central issue is submitted, the burden of explanation increases for the board when it assigns little or no weight to that

> evidence or when it prefers specific documentary evidence over other documentary evidence.

Thus, in the context of the central issue of state protection, the Board is required to explain its preference for certain documentary evidence over other relevant sources.

[26] Accordingly, it is clear that the IRB, as the primary finder of fact, is mandated to weigh the evidence before it and, in the case of conflicting documentary evidence, come to its own conclusions as to which evidence it finds more persuasive; however, it must address why the contradictory evidence was not relied upon.

[27] In the present case, there are many indications in the documentary evidence that state protection may not be effective. For example, there are documents in the National Documentation Package indicating that corruption remains a problem and that Mexican police continue to employ torture as an investigative technique with impunity (see Amnesty International Report 2005 "Mexico"; Amnesty International Report Mexico: Unfair Trials Unsafe Convictions). Moreover, the documentary evidence indicates that complaints mechanisms are weak, and further that when complaints are filed against police officers, the officers are provided with a copy of the complaint (see Country of Origin Research Document Mexico: Police –May 2004; Country of Origin Research document MEX38204.E: Procedure for charging a police officer with assault in Mexico). It is clear that this fact would make an individual reluctant to complain of ill-treatment at the hands of police officers and it has the potential of provoking reprisals. Again the Board was free to find other documentary evidence more reliable. However, it erred in failing to address the existence of relevant and contradictory evidence.

[28] For all these reasons, the application for judicial review is granted.

JUDGMENT

[29] **THIS COURT ORDERS that** the application for judicial review is granted and the matter is referred back for re-determination by a different panel.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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