Date: 20060317

Docket: IMM-3662-05

Citation: 2006 FC 343

Ottawa, Ontario, March 17, 2006

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

LUIS AMADO CONTRERAS MARTINEZ
CLAUDIA MORAN SANCHEZ
LUIS FRANCISCO CONTRERAS MORAN
MARINIEVES CONTRERAS MORAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA") with respect to a decision of B. Wong of the Refugee Protection Division (RPD) denying the claim for refugee protection of Luis Amado Contreras Martinez (Applicant), Claudia Moran Sanchez (Ms. Sanchez), Luis Francisco Contreras Moran and Marinieves Contreras Moran (Applicants). In its decision dated May 26, 2005, the RPD determined that the Applicants are neither Convention refugees nor persons in need of protection as per section 96 and 97 of the IRPA. The RPD found that the Applicants did not have a well-founded fear of persecution in Mexico as state protection is available in this country.

I. Issues

[2] The present matter raises the following issues:

- Did the RPD err in finding that state protection is available for the Applicants in Mexico?
- Did the RPD err in failing to address Ms. Sanchez's psychological assessments in the decision?
- Did the RPD err in refusing to allow the Applicants to stay in Canada for "compelling reasons" (sub. 108(4) IRPA)?

II. Facts

[3] In December 2001, the Applicants partnered with Comunicon to bid for a government contract with respect to a data system. Alejandro Segura Walls (Segura) and Anselmo Pardo Lorencez were the co-owners of Comunicon. Comunicon was awarded the contract, but later allegedly conspired with the Government agency to terminate the Applicant's contract. The Applicants, as per a sub-contracting agreement with Comunicon, was expecting to get 80% of the proceeds.

[4] The Applicants tried to enforce his contractual rights, but he and his family became targets of threats and assaults. Upon his Counsel's advice, the Applicants moved to different locations in Mexico and changed his cell phone number, but the persecutors kept finding and threatening him. The Applicant's lawyer finally abandoned the civil actions that he undertook in the Applicant's name, as he was also threatened.

[5] The Applicants left Mexico on October 11, 2003 and claimed refugee protection in November 2003.

III. Analysis

A. *State Protection*

[6] The Applicants' counsel submitted that when the agents of persecution are agents of the state, state protection should be considered unavailable in most instances. In the Respondent's view, it was neither alleged in the Applicant's affidavit nor in his Personal Information Form (PIF) that the persecutors were state agents.

[7] The RPD determined that the Applicants did not disprove the presumption of state protection. The standard of review applicable to the question of whether the presumption of state protection has been rebutted is reasonableness *simpliciter* (*Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, [2005] F.C.J. No. 232, at para. 11).

[8] In *Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2004 CF 944, [2004] A.C.F. No. 1152, at para. 6 to 8, Justice Snider explained the applicable test where the alleged persecutor is one or several state agents:

> In Ward, supra at 724, the Supreme Court of Canada held that, when state protection "might reasonably have been forthcoming", the Board is entitled to draw an adverse inference based on a claimant's failure to approach state authorities for assistance:
>
> 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 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.
>
> In my view, whether it is objectively unreasonable for the claimant not to have sought the protection of home authorities invites the Board to weigh the evidence before it and make a finding of fact. For example, although the agent of persecution might be a stage agent, the facts of the case might suggest that purely local or rogue elements are at work and that the state in question is democratic and offers protection to victims similarly situated to the claimant. It might, therefore, be objectively reasonable to expect a claimant to seek protection. In other instances, the identity of the state agent and documentary evidence of country conditions might mean that state

> protection would not be reasonably forthcoming and, therefore, the claimant is not expected to have sought protection.

In short, in Justice Snider's opinion, the availability of state protection is to be assessed on a case-by-case basis.

[9] This contrasts, in the Applicant's view, with the following passage from *Zhuravlvev v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 3, at para. 19:

> Where the state is shown to be the agent of persecution, one need not inquire into the extent or effectiveness of state protection; it is, by definition, absent [my emphasis].

[10] In my view, there are no inconsistencies between the two above passages. The issue to address in every instance where state protection is at stake is whether state protection might reasonably have been forthcoming if the refugee claimant had sought such protection. The evidence must then be weighted to decide if the presumption of state protection is rebutted on a case-by case basis. If, as mentioned in *Zhuravlvev*, the state is shown to be the agent of persecution, then the effectiveness of state protection is pointless. However, a conclusion that the state, as a whole, is the agent of persecution in a given case should not be reached in an expedite manner. Where the persecutors are purely local or rogue elements of the state apparatus, an assessment of the availability of state protection should be conducted, as highlighted by Justice Snider. The question remains whether it is objectively reasonable for the claimant to seek protection, taking all relevant circumstances into consideration.

[11] In the present matter, the RPD noted that the Applicants was allegedly threatened and harassed by Mr. Segura's henchmen, but also mentioned that Segura is, according to the Applicants, very well connected to the police (RPD decision, p. 5). In the Applicant's narrative (p. 29, tribunal's file), the Applicant mentioned that "certain government official were co-operating with Comunicon to get rid of [him]". There is no evidence to support these allegations. Further, I understand from the Applicant's narrative that the threats were more likely to be originating from private parties, namely Comunico and Mr. Segura, who had a personal pecuniary interest in excluding the Applicant from the deal with the Mexican government. Having read the evidence, it is hard for me to believe that the Mexican police and government as a whole collaborated to threaten and harass the Applicants. In addition, the RPD cited the documentary evidence on the reliability of the system in place in Mexico and the failure of the Applicant to take any reasonable steps to seek protection. It appears from the evidence that the only remedies sought were of civil nature, not criminal. The lawyer's letter mentions that "related complaints" were made in September 2003, but no details are provided as to the nature of these complains (p. 284 to 291). There is no evidence that any action was taken or any complaint made to the Mexican authorities to prevent violent reprisal against the Applicants.

[12] Given all the above, the conclusion of the RPD as to the availability of state protection is not unreasonable. The RPD found that the state protection presumption has not been rebutted, and the mere fact that the Mexican judicial system has some insufficiencies is not enough to exempt the Applicants from the requirement of seeking protection.

B. *Psychological Assessments*

[13] The Applicants claim that the RPD ignored the psychological report (tribunal's file, p. 277 to 281) and the letter (p. 330 to 332) submitted regarding Ms. Sanchez.

[14] In *J.C.C. v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 534, [2005] F.C.J. No. 660, this Court had to deal with a RPD decision where a refugee claim was rejected solely because state protection was found to be available. In that case, as in the present matter, the RPD failed to explicitly address the content of a psychological report. Justice Layden-Stevenson made a distinction between the objective issue of state protection and the subjective fear of persecution that the psychological report emphasized. At para. 18, she wrote:

> I also find no error regarding the board's treatment of the psychological report. The report concluded that the applicants would be "at a high risk for retraumatization" should they be forced to return to Costa Rica. However, I agree with the respondent that the report does not deal with the applicants' ability to access state protection in Costa Rica. In my view, the report speaks to the applicants' subjective fear, but it does not assist in relation to the objective issue of state protection.

[15] The same distinction was made in *Guerrero v. Canada (Minister of citizenship and Immigration)*, 2004 FC 104, [2004] F.C.J. No. 120, at para. 22. In *Varga v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 617, [2005] F.C.J. No. 765, at para. 27 to 30, Justice Mactavish found a psychological report irrelevant to the issue of state protection and noted that it is the RPD's jurisdiction to weight the evidence:

> Ms. Varga also submits that the Board erred in failing to give adequate reasons for placing little weight of a psychological report prepared by Dr. J. Pilowsky. Dr. Pilowsky concluded that Ms. Varga suffers from Post-traumatic Stress Disorder as a consequence of her experiences. According to the doctor, Ms. Varga would suffer a "complete psychological breakdown and retraumatization" if she were forced to return to Hungary.
>
> In its reasons, the Board noted that it had reviewed Dr. Pilowsky's report, but stated that it preferred to place greater weight on the documentary evidence, observing that it came from a variety of sources with no interest in the outcome.
>
> The question of how much weight should be ascribed to individual pieces of evidence is one for the Board. Moreover, in this case, the issue before the Board was whether adequate state protection would be available to Ms. Varga if she were to return to Hungary. It is difficult to see how evidence of a psychologist practising in the City of Toronto could shed any light on this question, and indeed, Dr. Pilowsky does not purport to do so.
>
> While Ms. Varga's psychological condition could potentially justify favourable consideration under other provisions of the Immigration and Refugee Protection Act, the central question for the Board was whether Ms. Varga's fear of persecution in Hungary was objectively well-founded. Dr. Pilowsky's report was simply not relevant to this inquiry. As a consequence, there is no merit to Ms. Varga's submissions in this regard.

[16] In sum, state protection is an objective issue that has to be assessed regardless of the subjective fear of persecution that refugee claimants might experience. The weighting of the material before the RPD is within its purview, and psychologists' opinion have no relevance with respect to the issue of state protection. The RPD rejected the Applicant's refugee claim because they failed to rebut the presumption of state protection, and this conclusion is not affected by the psychological assessments submitted. Finally, I give no credit to the Applicants argument that the RPD ignored the psychological report, as the RPD explicitly stated that it was taken into consideration (decision, p. 9).

C. *Compelling Reasons*

[17] Finally, the Applicants contends that the RPD failed to provide adequate reasons for rejecting the alternative "compelling reasons" application made by their counsel under sub. 108(4) of the IRPA.

[18] The relevant parts of s. 108 reads:

Cessation of Refugee Protection	**Perte de l'asile**
108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	108. (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :
[...]	[...]
(e) the reasons for which the person sought refugee protection have ceased to exist.	e) les raisons qui lui ont fait demander l'asile n'existent plus.

[...]	[...]
(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

[19] In my view, sub. 108(4) of the IRPA is not applicable in the present matter. The RPD should not undertake a sub. 108(4) evaluation in every case. It is only when para. 108(1)(e) is invoked by the RPD that a "compelling reasons" assessment should me made, i.e. when the refugee claimant was found to be a refugee but nevertheless had been be denied refugee status given the change of circumstances in the country of origin. In *Kalumba c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 CF 680, [2005] A.C.F. No. 879, at para. 18 and 19, Justice Shore provided a succinct summary of the applicable principles:

> [MY TRANSLATION] As per the wording of the section, before considering the application of subsection 108(4) of the Act, the Commission must conclude that the person would have been granted refugee status notwithstanding the change of circumstances which occurred in the country. In the matter at hand, the Commission determined that M. Kalumba had an internal flight alternative in his country of origin and therefore concluded that Mr. Kalumba was neither a refugee nor a person in need of protection as per sections 96 and 97 of the Act.
>
> Secondly, the Commission never mentions in its reasons such a change of circumstances in the RC that would have an effect of depriving the grounds for his fear of persecution. As such, the Commission did not have to conduct a "compelling reasons" analysis pursuant to subsection 108(4) of the Act.

[20] Justice Shore went on and referred to the authoritative Federal Court of Appeal case, *Hassan v. Canada (Minister of Citizenship and Immigration)*, [1992] F.C.J. No. 946. In this case, the Federal Court of Appeal dealt with subsections 2(2) and 2(3) of the former *Immigration Act*, R.S.C. 1985, c. I-2:

> It is clear, as the appellant suggests, that subsections 2(2) and 2(3) of the Immigration Act speak to the loss of status as a Convention refugee because of, inter alia, a change in material circumstance in a refugee's home nation. But those provisions in no way alter the test used to initially determine a claimant's status. It is trite law that to establish status as a Convention refugee within the meaning of the Immigration Act, one has to meet both a subjective and objective threshold. One must have a "well-founded fear of persecution". One cannot get to the point of possibly losing one's status as a Convention refugee, i.e. subsections 2(2) and 2(3) cannot be applicable, unless one first falls within the statutory definition contained in subsection 2(1) [my emphasis].

[21] It is clear from the wording of sub. 108(4) that it is not aimed at creating a broad obligation for the RPD to assess the existence of "compelling reasons" in every refugee claim. If a refugee claimant is neither a refugee nor a person in need of protection because the conditions of the general definition of section 96 and 97 of the IRPA are not met, then no "compelling reasons" assessment need be performed by the RPD. It is only necessary where the rejection of the claim is based on 108(1)(e).

[22] In the present matter, the claim of the Applicants was rejected because the RPD found that State protection was available. Their claim was rejected as they did not meet the necessary conditions in order to be considered refugees or persons in need of protection. The exception enacted at para.108(1)(e) was not applicable. Therefore, the RPD was under no obligation to perform any assessment of "compelling reasons".

[23] For these reasons, the application for judicial review is dismissed.

[24] Both counsels were invited to submit a question for certification but no question was submitted.

JUDGMENT

THE COURT HEREBY ORDERS THAT:

- The application for judicial review is dismissed and no questions are certified.

"Simon Noël"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-3662-05
STYLE OF CAUSE:	**LUIS AMADO CONTRERAS MARTINEZ, CLAUDIA MORAN SANCHEZ, LUIS FRANCISCO CONTRERAS MORAN, MARINIEVES CONTRERAS MORAN** **Applicants** **and** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION** **Respondent**
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	March 15, 2006
REASONS FOR ORDER:	NOËL J.
DATED:	March 17, 2006

APPEARANCES:

Daniel M. Fine	For the Applicants
Marianne Zoric	For the Respondent

SOLICITORS OF RECORD:

Daniel M. Fine Barrister & Solicitor Toronto, ON	For the Applicants
John H. Sims, Q.C. Deputy Attorney General of Canada	For the Respondent