Date: 20060511

Docket: IMM-4601-05

Citation: 2006 FC 571

BETWEEN:

Marcos Hugo ARAYA ATENCIO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated June 28, 2005, wherein the Board found that the applicant is not a "Convention refugee" or a "person in need of protection" as defined in sections 96 and 97 respectively of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[2] Marcos Hugo Araya Atencio (the applicant) is a citizen from Costa Rica whose claim is based on a fear of persecution and threats of being killed, or injured at the hands of Juan Rafael Casasola Mora, a well-known criminal in Costa Rica.

[3] The Board found that Costa Rica is a long-standing, stable, constitutional democracy with an independent judiciary providing effective means to deal with individual criminal cases. With this in mind, the Board found that the applicant had not taken reasonable steps to seek protection in Costa Rica, and therefore did not rebut the presumption of state protection.

[4] In its reasons, the Board stated “I accept that the perpetrator initially targeted the claimant and that the claimant bought a gun to protect himself. I also accept that the perpetrator is a convicted drug dealer and is spending considerable time incarcerated and has threatened to kill the claimant when he gets out of jail.”

[5] The applicant submits that since the Board did not have any concerns with his credibility, the Board erred in disbelieving his assertion that the state is not willing to provide him with adequate protection.

[6] The applicant submits that in *Moya v. Minister of Citizenship and Immigration,* 2002 FCT 1147, the Federal Court stated the following:

> [27] Here again, I agree with the Applicant's memorandum of argument, paragraph 34: "Given that the Tribunal stated that the Applicant's testimonial evidence was without major contradictions and inconsistencies and that credibility was not a live issue, it is patently unreasonable for the Tribunal to find that the Applicant's

> aforementioned assertion that he could not obtain effective state protection in Mexico non-credible."

[7] Similarly, according to the applicant, in the case at bar, there were no serious credibility issues, and therefore it was patently unreasonable of the Board to find his assertion that he could not obtain effective state protection to be non-credible.

[8] However, in *Hernandez v. Minister of Employment and Immigration* (1994), 79 F.T.R. 198, at paragraph 6, the Federal Court pointed out that the presumption of truth does not extend to the inferences that the claimant draws from the facts he or she testifies to:

> . . . the presumption of truth that applies to the facts recounted by the applicant does not apply to the deductions made from those facts . . .

[9] Similarly, the following was stated in *Derbas v. Canada (Solicitor General)*, [1993] F.C.J. No. 829 (T.D.) (QL):

> . . . By accepting the applicant's version of the events as fact, the Board was certainly not bound to accept the interpretation he puts on those events. The Board still had to look at whether the events, viewed objectively, provided sufficient basis for a well-founded fear of persecution. . . .

[10] The weight of authority establishes that it is the Board who weighs evidence and determines whether or not the state is willing and able to provide adequate protection, not the applicant. This argument of the applicant's that the Board, finding him credible, was bound to accept his assertion that the state was unable to provide him with adequate protection, is therefore untenable.

[11] With respect to state protection, the Supreme Court of Canada has held that the focus of a refugee claim inquiry is whether there is a "well-founded fear of persecution" and that "[b]oth the existence of the subjective fear and the fact that the fear is objectively well-founded must be established on a balance of probabilities" (*Chan v. Canada (M.E.I.)*, [1995] 3 S.C.R. 593. See also *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 and *Rajudeen v. Canada (M.E.I.)* (1984), 55 N.R. 129 (F.C.A.)).

[12] The key component in determining whether a claimant's fear is well-founded is the state's inability to protect. Moreover, the state's inability to protect is the crucial element in determining the objective reasonableness of the claimant's unwillingness to seek its protection (*Ward*, above).

[13] Except in situations where the state is in a situation of complete breakdown, states must be presumed capable of protecting their citizens. This presumption can be rebutted by "clear and convincing" evidence of the state's inability to protect (*Kadenko v. Canada (Solicitor General)* (1996), 143 D.L.R. (4th) 532 (F.C.A.)).

[14] In *Canada (M.E.I.) v. Villafranca*, [1992] F.C.J. No. 1189 (QL), the Federal Court of Appeal suggested that protection need not be perfect:

> No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times. Thus, 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. . . .

[15] The responsibility to provide international protection only becomes engaged when national or state protection is unavailable to the claimant (*Ward*, cited above).

[16] According to case-law, state protection can be available from state run or funded agencies and not only from the police (*Pal v. Minister of Citizenship and Immigration*, 2003 FCT 698; *Nagy v. Minister of Citizenship and Immigration*, 2002 FCT 281; *Zsuzsanna v. Minister of Citizenship and Immigration*, 2002 FCT 1206).

[17] In the case at bar, the Board stated the following:

> . . . I disagree with counsel's position that the claimant exhausted all reasonable avenues of protection and determine that TA2-14980 applies in the case at bar. The availability of state protection in Costa Rica has been comprehensively analyzed in that case, and the reasoning with respect to state protection applies to the facts of this claim. As a result, I adopt the reasoning in TA2-14980.

[18] The Board determined that the applicant had not rebutted the presumption of state protection as the applicant had only approached one police officer regarding the information he had received that the perpetrator was planning on killing him once he was released from prison, and the evidence before the Board demonstrated that the state is able to protect its citizens from criminals in similar situations.

[19] In my view, the essential components of the applicant's claim are the same as in case TA2-14980, *i.e.* fear of revenge from criminals should he return to Costa Rica, dissatisfaction with the handling of his complaint by local police and failure to seek redress from the Ombudsman's

Office. The issue in TA2-14980 that forms the basis of the Immigration and Refugee Board's Jurisprudential Guide is the determination of the availability of state protection.

[20] In my opinion, the Board was well advised to consider and apply the jurisprudential guidelines in this case. This is not a situation where the Board failed to demonstrate its independence, but rather, an instance where the Board considered the guidelines and thereby ensured consistency in the decisions rendered by the Board for similarly situated asylum claimants (*Khon v. Minister of Citizenship and Immigration*, 2004 FC 143).

[21] In the case at bar, the Board assessed whether the applicant reasonably ought to have accessed the avenues of redress that had not been accessed. The Board reasoned that the applicant's efforts at seeking protection from local police were not sufficient because according to the documentary evidence on country conditions in Costa Rica, there are other police, political and judicial institutions, such as the Investigative Judicial Police (OIJ) and the Ombudsman's Office to which he could have turned for help, and he failed to do so.

[22] In my opinion, these conclusions were reasonably open to the Board, based on the evidence. The documentary evidence shows that the Government of Costa Rica is concentrating on dealing with crime and has established institutions and mechanisms beyond the local police for protecting individuals such as the applicant. The Board's finding that if the applicant had complained to the Ombudsman's Office or the OIJ, such complaint would not have gone unheeded, was reasonably open to the Board.

[23] It is my opinion that, in light of the foregoing, the applicant's allegations do not warrant the intervention of this Court.

[24] Finally, to the extent that the Board's appreciation of the facts is concerned, including the documentary evidence, the applicant has failed to convince me that the Board based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it (paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7).

[25] For all the above reasons, the application for judicial review is dismissed.

"Yvon Pinard"
Judge

Ottawa, Ontario
May 11, 2006

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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