Date: 20061221

Docket: IMM-2028-06

Citation: 2006 FC 1537

Ottawa, Ontario, the 21st day of December 2006

Present: The Honourable Mr. Justice Blanchard

BETWEEN:

Gerson Alejandr PEREZ BURGOS
Claudia Yaneth CHAIDEZ CALDERON
Yaneth Alejandr PEREZ CHAIDEZ
Gerson Alejandr PEREZ CHAIDEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

1. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (hereafter the IRPA), of a decision of the Immigration and Refugee Board, Refugee Protection Division (hereafter the Board) dated April 4, 2006. The applicants' claim for refugee protection was rejected.

[2] The applicants are requesting that this Court set aside the Board's decision and refer the matter back to a differently constituted panel.

2. Facts

[3] On October 19, 2005, a claim for refugee protection was submitted to the Board by Claudia Yaneth Chaidez Calderon, the principal applicant; by her husband, Gerson Alejandro Perez Burgos; and by their two children, Yaneth Alejandra Perez Chaidez and Gerson Alejandro Perez Chaidez. They are all citizens of Mexico.

[4] The facts giving rise to the claim for refugee protection took place when the principal applicant was operating an appliance repair shop in the town of Obregòn, which she opened in June 2003. In July 2005, a police commander named Franciso Chico allegedly offered her his protection in exchange for money or sexual favours, which she refused. When his wife advised him of this situation, Mr. Perez Burgos allegedly confronted the policeman in question, and even more serious threats were made.

[5] On August 10, 2005, Perez Burgos filed a complaint with the public prosecutor's office in Obregón against Francisco Chico for extortion.

[6] On August 21, 2005, the automobile belonging to Mr. Perez Burgos was stolen. He reported this theft to the police, mentioning that he suspected Francisco Chico. Later on that day, the applicant was assaulted in a narrow, dimly lit street by two men who allegedly tore up the complaint he had filed.

[7] On August 31, 2005, the applicants took refuge in the city of Cucliacan in the state of Sinaloa, a distance of approximately seven hours from Obregón.

[8] On September 12, 2005, as the principal applicant was leaving the house where her family was hiding, she allegedly saw one of the police officers who she often saw in the company of Francisco Chico. A little while later, a man allegedly told her to be careful, as people were looking for her. On that same day, the applicants complained to higher authorities at the office of the attorney general of the state of Sinaloa.

[9] On October 2, 2005, while the applicants were driving along a road in an automobile, they were attacked by Franciso Chico and three other armed men, who tied them up. A bus stopped to help them, causing the attackers to flee. Before they left, they told the couple they had been marked for death.

[10] The applicants then took refuge in the city of Hermosillo, where they obtained their passports.

[11] They left Mexico for Canada on October 19, 2005.

3. Impugned decision

[12] On April 4, 2006, the Board decided that the applicants were not refugees within the meaning of section 96 of the IRPA or persons in need of protection within the meaning of section 97 of the IRPA.

[13] The decision was based on the fact that the Board had serious doubts as to the truth of the applicants' story, because the Board found it implausible that the alleged persecutors would drive seven hours to attack them alongside a busy road. The Board also criticized the applicant, Mr. Burgos, for not having gone to a clinic after having been beaten and for not having made a new complaint at that time, as the police would have had evidence of extortion.

[14] The Board was also of the opinion that the applicants failed to meet their obligations by not seeking state protection following the two most serious incidents, that is, the assault in the alleyway after the theft of the automobile and the attack on the road in Culiacan. The Board added that Mexico was a democratic state able to protect its citizens.

4. Issues

[15] The issues to be dealt with by the Federal Court in this case may be summarized as follows:

A. Did the Board make a reviewable error in assessing the credibility of the applicants?

B. Did the Board make a reviewable error in determining that there was adequate protection in Mexico?

5. Standard of review

[16] The first issue concerns credibility. It is trite law to say that the standard applicable to such determinations is that of patent unreasonableness. See: *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (QL); *R.K.L. v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 162 (QL) and *Khaira v. Canada (Minister of Citizenship and Immigration)*, 2004 F.C. 62. A decision is patently unreasonable when, in view of the circumstances, it is clearly abusive, flagrantly unjust, contrary to common sense or lacking any basis in law or in fact.

[17] The second issue to be dealt with by this Court concerns the determination of the ability of the state to ensure the protection of the applicants. In *Chaves v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 232 (QL), Madam Justice Danièle Tremblay-Lamer of this Court, after conducting a pragmatic and functional analysis to determine the applicable standard of review, concluded this was a question of mixed fact and law, to which the standard of reasonableness *simpliciter* applies. I will adopt the analysis and standard applied in *Chaves* for the purposes of considering the second issue in dispute. An unreasonable decision is one that is not supported by any reasons of fact or of law that can stand up to a somewhat probing examination. (*Director of Investigation and Research v. Southam Inc.*, [1997] 1 S.C.R. 748.)

6. Analysis

A. *Did the Board make a reviewable error in assessing the credibility of the applicants?*

[18] The applicants essentially submit that the conclusion reached by the Board on the issue of credibility was patently unreasonable. Accordingly, they argue that the decision is ambiguous in that the Board decided that they were not credible without giving reasons for its conclusions. They add that their testimony was credible, was given in good faith, and was not put into issue by the decision-maker. They also submit that the Board did not give any reasons for its finding it implausible that Chico Francisco travelled seven hours to hunt them down.

[19] The respondent submits that the Board's decision is well founded in fact and in law.

[20] There is a well-established principle in case law to the effect that an administrative tribunal is in a privileged position to assess the credibility of witnesses, which implies that the Court must exercise deference when it reviews this type of conclusion. This principle is expressed in *R.K.L. v. Canada (Minister of Citizenship and Immigration),* [2003] F.C.J. No. 162 (QL). In this decision, the Court ruled that "the Board is entitled to conclude that an applicant is not credible because of implausibilities in his or her evidence as long as its inferences are not unreasonable and its reasons are set out in 'clear and unmistakable terms'".

[21] In spite of the deference it must show, this Court has the authority to intervene in matters of credibility where there are patently unreasonable errors.

[22] Over time, case law has developed a certain number of principles which must be applied when assessing the credibility of a party. Accordingly, the Federal Court of Appeal has determined that the failure to explain the reasons for casting doubt on a party's credibility in clear and unmistakable terms may open the door to judicial review (*Hilo v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 228 (F.C.A.) (QL); *Armson v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 800 (F.C.A.) (QL)). I am of the opinion that the following excerpt from the decision rendered by Mr. Justice Darrell Heald in *Hilo* is relevant to the case at bar:

> In its reasons, the Board made the following comments with respect to the appellant's testimony (pages 176-177):
>
> > The claimant's testimony lacked detail and was sometimes inconsistent. He was often unable to answer questions and sometimes appeared uninterested in doing so. While this may be partly due to the claimant's young age, the panel was not fully satisfied of his credibility as a witness."
>
> The appellant was the only witness who gave oral testimony before the Board. His evidence was uncontradicted. The only comments as to his credibility are contained in the short passage quoted supra. That passage is troublesome because of its ambiguity. It does not amount to an outright rejection of the appellant's evidence but it appears to cast a nebulous cloud over its reliability. In my view, the Board was under a duty to give its reasons for casting doubt upon the appellant's credibility in clear and unmistakable terms. The Board's credibility assessment quoted *supra* is defective because it is couched in vague and general terms. The Board concluded that the appellant's evidence lacked detail and was sometimes inconsistent. Surely particulars of the lack of detail and of the inconsistencies should have been provided. Likewise, particulars of his inability to answer questions should have been made available. (Emphasis added.)

[23] However, the Federal Court of Appeal determined there was a difference in the way conclusions on the issue of credibility must be considered, depending on whether they are based on contradictions in the evidence or on implausibilities. Although the Board may conclude that a story is implausible, its conclusion must "be based on the totality of the evidence and must be clearly supported in the Board's reasons." Moreover, upon judicial review, the Court is not required to show as much deference, because triers of fact are not in a better position to assess credibility on the basis of criteria that are extrinsic to testimony (*Leung v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 774 (F.C.A.) (QL); *Giron v. Canada (Minister of Employment and Immigration*), [1992] F.C.J. No. 481 (F.C.A.) (QL)).

[24] The Board's reasons concerning the credibility of the applicants are summed up in the following paragraphs:

> To begin with, the panel strongly doubts the veracity of their story. The documentary evidence confirms that police corruption exists in Mexico, and it may be that a police force member tried to extort money from the female claimant, who operated a business.
>
> However, the panel considers it implausible that this same policeman and his men pursued the family to Culiacan, a seven-hour journey, to attack four people beside a busy highway. That makes no sense.

[25] I am of the opinion that the Board failed to support in clear and unambiguous terms its conclusion to the effect that the applicants were not credible. Upon reading the reasons given, it becomes clear that the Board did not mention the source of the doubts it had concerning the truth of the applicants' story. This alone warrants the review of the Board's decision on the issue of credibility. The following, which was written by Mr. Justice Reid of the Ontario Divisional Court, underlines the importance of providing reasons for determinations on issues of credibility:

> The task of determining credibility may be a difficult one but it must be faced. If the board sees fit to reject a claim on the ground of credibility, it owes a duty to the claimant to state clearly its grounds for disbelief. The board cannot simply say, as the member did here, "I feel that I have not received credible evidence to rescind the decision of the Respondent." Some reason for thinking the evidence not credible must be given if an appearance of arbitrariness is to be avoided.
>
> In a now famous address, Sir Robert McGarry, Vice-Chancellor of England, has reminded judges that the most important person in a lawsuit is not the judge, sitting in elevated dignity on the dais, nor the lawyers, however eminent they might be; it is the losing party: see "Temptations of the Bench" [1978] XVI Alta. L. Rev., p. 406. In order that faith may be maintained in the legal system, it is necessary that losing parties be satisfied that they have been fairly dealt with, that their position has been understood by the judge, and that it has been properly weighed and considered. It is, therefore, important that the reasons for a decision be stated, and stated in language that the party who has been dealt the blow can comprehend.
>
> I think that this applies with equal weight to the decisions of tribunals. (*Pitts v. Ontario (Minister of Community and Social Services)*, 51 O.R.(2d) 302) (Emphasis added.)

This is reason enough to review the Board's decision on the issue of credibility; however, in the interests of being thorough, I will continue with the examination of these conclusions.

[26] One of the reasons supporting the Board's conclusion is an implausibility it noted in connection with the last incident of which the applicants were victims. The Court does not have to show such a high degree of deference when reviewing such a conclusion, even though the standard of judicial review is still that of patent unreasonableness. In the case at bar, I am of the opinion that the evidence submitted to the Board did not admit such an inference.

[27] The documentary evidence established that corruption was commonplace in Mexican police forces. This same evidence shows that a small proportion of crimes committed are reported to the authorities, and very few of these reported crimes are investigated. More specifically, the documentary evidence in the Board's National Documentation Package dated December 7, 2005, reveals the following information:

- in an opinion poll conducted by Universal Survey, more than half of the respondents reported having been victims of extortion by police officers;
- in spite of initiatives undertaken by President Fox, public and private corruption continued on a regular basis in 2003 and in 2004;
- in an opinion poll, more than 39 per cent of business owners polled admitted having paid off civil servants to ensure the continued operation of their businesses;
- the level of corruption varies according to the institution, but the police and local courts are considered to be especially corrupt;
- persons in charge of law enforcement acknowledged having difficulties in prosecuting cases involving corruption;
- in Mexico, for every one hundred crimes committed, approximately twenty are reported to the authorities;
- of the twenty offences reported, five or six were being investigated in the state of Oaxaca at the time the study was written, and this sample is representative of the country as a whole.

[28] Moreover, the testimony given by the applicants was not contradicted and is supported by documentary evidence, that is, copies of the various complaints they made to the Mexican authorities. The fact that Chico Francisco's men were allegedly stalking the applicants when they were in Culiacan was not doubted by the Board. The applicants explained that their persecutor wanted to make an example of them for the other merchants. They also testified that the

merchants in Obregón would have known about the reprisals by Chico Francisco because all deaths are published.

[29] Insofar as the Board did not cast doubt on any of this evidence, the Court cannot conclude that the applicants' story is implausible. With respect, I am of the opinion that this error in the assessment of the applicants' credibility is reviewable because it was not based on the uncontradicted evidence available to the Board. Moreover, as I mentioned earlier, the Board's failure to explain its reasons concerning credibility in clear and unambiguous terms is in itself a sufficient ground to warrant intervention by this Court.

B. *Did the Board make a reviewable error in determining that there was adequate protection in Mexico?*

[30] Next, the applicants submit that the Board did not properly analyze the matter of state protection, in that the applicants requested this protection on several occasions, but to no avail. They add that the Board should not have even considered the issue of state protection, in that the Board did not believe the applicants' story. Accordingly, they suggest that the matter be referred back to a differently constituted panel so that an analysis of state protection might be conducted in more detail. Finally, they submit that they have discharged the burden of proof on them in presenting clear and convincing evidence of the inability of the state to protect them.

[31] The respondent, however, argues that the applicants failed to exhaust all the courses of action open to them and did not submit clear and convincing evidence of the state's inability to provide protection. From this perspective, the respondent notes that Mexico is a democratic state

and that it has been determined in several decisions that Mexico was able to protect its citizens even when the persecutors were police officers. The respondent also submits that the burden of proof on the applicant is directly proportional to the level of democracy in the state in question.

[32] The Supreme Court of Canada, in a judgment written by Mr. Justice Laforest in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, ruled that, in the absence of a complete breakdown of state apparatus, it must be presumed that a state is able to protect its citizens. He added that, in the absence of an admission from the state of its inability to provide protection, a claimant must submit clear and convincing evidence on that point. Moreover, Laforest J. stated that "[a]lthough this presumption increases the burden on the claimant, it does not render illusory Canada's provision of a haven for refugees".

[33] Mexico has been recognized on many occasions by this Court as being a democratic state able to protect its citizens, even if the persecutor is a member of a police force or the government (*B.O.T.* v. *M.C.I.*, 2005 FC 284, paragraph 4; *Valdes v. M.C.I.*, 2005 FC 93, paragraph 4; *Filigrana v.M.C.I.*, 2005 FC 1447). Accordingly, for her claim for refugee protection to be granted, the applicant had to adduce clear and convincing evidence of the state's inability.

[34] The matter of determining what is clear and convincing evidence has been the subject of numerous decisions. In *Kadenko v. M.C.I.*,[1996] F.C.J. No. 1376 (F.C.A.) (QL), paragraph 5, the Federal Court of Appeal ruled that the applicant's burden of proof was directly proportional to the level of democracy in the state in question. The Court of Appeal also added that, in that

case, a simple allegation that steps undertaken with the police were fruitless is insufficient to establish the state's inability.

[35] Mr. Justice Denis Pelletier of the Federal Court, as he then was, stated that the failure of local authorities to maintain order in an effective manner is not equivalent to a lack of state protection (*Zhuravlvev v. Canada (M.C.I.)*, [2000] F.C.J. No. 507 (QL)). He added that the evidence must establish a broader pattern of state inability or refusal to extend protection in order to prove the lack of state protection.

[36] However, when it considers the issue of state protection, the Court cannot require that the protection currently available be perfectly effective. The following excerpt written by Mr. Justice James Hugessen in *Villafranca v. M.E.I.*, [1992] F.C.J. No. 1189 (F.C.A.) (QL), sets out this principle:

> On the other hand, where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection

[37] In spite of this, the mere willingness of a state to ensure the protection of its citizens is not sufficient in itself to establish its ability. Protection must nevertheless have a certain degree of effectiveness (*Bobrik v. M.C.I.*, [1994] F.C.J. No. 1364 (T.D.) (QL).

[38] In the case at bar, the applicants submitted copies of the two complaints of extortion against Chico Francisco that they filed with the Mexican authorities. The applicants' narrative shows that, following the first complaint made to local authorities, Mr. Burgos was attacked that

same day by two men who allegedly tore up the complaint he filed. Following this assault, the applicants left for Obregòn. The first complaint was made to local authorities, and the second was made to the office of the attorney general of justice of the state of Sinaloa. However, the applicants' story shows that each time they made a complaint their situation got worse. The Board blamed the applicants for not having reported the two most important incidents to the police, that is, the attack on Mr. Burgos following the first complaint and the attack when they were on the road after having made the second complaint to the office of the attorney general because they now had evidence to support their complaints. As far as this omission was concerned, the Board also rejected the applicants' explanation to the effect they had lost confidence in the police.

[39] Mr. Justice François Lemieux recently noted that each case concerning state protection turns on its own facts (*Arellano v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1265).

[40] In the case at bar, I do not think that the applicants can be blamed for not having made complaints following the assaults on August 21, 2005, and October 2, 2005. The first assault seems to have been a direct consequence of the complaint made locally. To the extent that the local police did not offer efficient protection on one occasion, the applicants were warranted in leaving the city to ensure their safety rather than simply making a new complaint. The second assault by commander Francisco Chico and three armed men, which was not reported to the authorities, took place approximately two weeks after a complaint had been made to the office of the attorney general of Sinaloa. Insofar as no effective protection was given either by the local

police or by the attorney general, and as there is no evidence on record showing that certain measures were actually taken by the authorities, it was not unreasonable for the applicants to leave the state of Mexico rather than make another complaint. However, it should be noted that, in its decision, the Board appears to attach significance to the applicants' failure to report these two assaults when they apparently had the opportunity to provide the authorities with evidence supporting their allegations at that time. Insofar as nothing shows that the failure of the authorities to give the applicants protection is a result of the lack of evidence in support of their complaints, I am of the opinion this is not relevant to the analysis of state protection.

[41] The Court acknowledges that Mexico is a democratic state generally able to protect its citizens and that President Fox is making significant efforts to eliminate corruption. The Court also acknowledges that it is impossible to expect perfect state protection. Notwithstanding these findings, case law recognizes that the presumption of state ability is rebuttable, even when dealing with a democratic state. In fact, Laforest J. stated, as mentioned earlier, that this presumption must not "render illusory Canada's provision of a haven for refugees". However, it is obvious in this case that the police officers were involved in the threats and assaults against the applicants. In addition, the applicants made a complaint at the local level, tried to seek refuge in another state in Mexico and tried without success to file a complaint with the office of the attorney general of that state. Considering the evidence and the special circumstances in the case at bar, I am of the opinion that the presumption of state protection was rebutted. Therefore, in these circumstances, I am satisfied that the applicants discharged their burden of proof in presenting clear and convincing evidence of the inability of the state of Mexico to protect them in this case.

[42] By determining that there was adequate protection in Mexico and that the applicants could have made a complaint following the incidents of August 21, 2005, and October 2, 2005, the Board rendered an unreasonable decision, in that it failed to take into consideration that the situation of the applicants was aggravated on both occasions when they made complaints to two different authorities. This conclusion is contrary to the principle established by the Supreme Court in *Ward*, according to which an applicant does not have to "risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness". This error warrants intervention by this Court insofar as this determination could not stand up to a probing examination.

7. Conclusion

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

[44] The parties did not suggest a serious question of general importance to be certified as provided under paragraph 74(*d*) of the IRPA. I am of the opinion that no such question is raised in this case, Therefore, no question will be certified.

ORDER

THE COURT ORDERS that:

1. The application for judicial review be allowed.

2. The decision of the Board be set aside, and the matter be referred back to a differently constituted panel for rehearing and redetermination.

3. No question be certified.

"Edmond P. Blanchard"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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