

Date: 20071001

Docket: IMM-4409-06

Citation: 2007 FC 985

Ottawa, Ontario, October 1, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JESUS GIRON SOBERANIS

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated July 17, 2006, which determined that the applicant was neither a Convention refugee nor a person in need of protection.

[2] The applicant seeks:

1. an order in the nature of *certiorari* setting aside the decision of the Board; and
2. an order in the nature of *mandamus* directing the Board to grant the applicant a new hearing before a differently constituted panel of the Board.

Background

[3] The applicant, Jesus Giron Soberanis, is a citizen of Mexico. He alleged having a fear of persecution based upon his membership in a particular social group, namely, homosexual men. The applicant also claimed to be a person in need of protection. The circumstances leading to the applicant's claim for protection were set out in his Personal Information Form narrative (PIF).

[4] The applicant explained that as a homosexual man, he had faced discrimination, harassment and abuse in his home-town. His family was deeply religious and strongly opposed to his lifestyle. He claimed to have attempted suicide as a result of the psychological abuse he had suffered. The applicant was aware of at least ten homosexual people killed on account of their sexual identity in the last five years; however, nothing had been done to investigate their deaths. The applicant moved to Acapulco in order to escape abuse, but continued to face discrimination.

[5] The applicant met Oscar Irrar in January 2003, and they entered into a relationship. The relationship started well, but became abusive. Oscar worked for the official political party (PRI) and asked the applicant to help campaign in the region where he used to live. The applicant's role was to contact voters and offer them accident insurance for school children as an incentive to vote for the

PRI. The scheme surfaced at the end of the campaign, which was politically costly to the PRI. The applicant was suspected of having leaked information about the vote-buying scheme.

[6] The applicant never told Oscar that he had mentioned the scheme to his friend, Merced Morales. Regardless, Oscar was angry with him and beat the applicant for ruining his political career. The applicant later heard that Merced had been stabbed on election day, and that he might be next. He went to see his family, however, his father had been informed of his sexual identity. The applicant's nephew overheard his father say that he would prefer him dead over being homosexual.

[7] The applicant returned to Acapulco and was abducted by two men. The men cut him with a razor blade and inserted a stick into his anus. He fainted and upon awakening, sought refuge at a friend's home. He did not seek medical attention as he was ashamed of the incident and feared making the situation worse. Following his friend's advice, the applicant reported the incident to the police. The police insulted him and laughed at the incident. They made him wait for hours and did not take his complaint seriously, saying that he had enjoyed the abuse. The police refused to make an official report, therefore, the applicant and his friend left the station.

[8] The applicant called Oscar, who asked him if he was having fun. The applicant asked Oscar if he was going to murder him like he had murdered Antonio. Oscar had dated Antonio and later arranged to have him murdered. Oscar responded by saying that the applicant knew what was going to happen to him. The applicant did not seek protection from Oscar, because he feared revenge. In addition, he believed that the police would not take his complaint seriously. The applicant claimed

that he feared the Mexican police because they mistreated homosexuals. He gave several examples of such abuse.

[9] The applicant also claimed that he was shot at by two men in a car. When he returned to work, a co-worker stated that two men had been looking for him. Their description matched that of the men who had shot at him earlier. The applicant feared for his life and prepared to leave Mexico. He fled Mexico for Canada on March 5, 2005, and claimed refugee protection on March 22, 2005. The applicant's refugee hearing took place on April 4, 2006, and his claim was refused by the Board, by decision dated July 17, 2006. This is the judicial review of the Board's decision.

Board's Reasons

[10] The determinative issues with respect to the claim were the well-founded nature of the applicant's fear of persecution and the availability of state protection. The Board found that in light of documentary evidence indicating that Mexico was making serious efforts to protect its citizens, there was no objective basis for the applicant's fear. On the issue of potential criminality and violence from his former partner and fear of discrimination, the Board found that there was adequate enforcement of laws against criminal behaviour in Mexico.

[11] The documentary evidence indicated that state protection was available to the applicant in Mexico. While there was considerable crime in Mexico, the evidence indicated that the government was engaged in meaningful efforts to combat crime and corruption. The Board noted that the

presumption of state protection applied to Mexico, as it was a functioning democracy (see *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1). The applicant failed to rebut this presumption and the Board noted that local failures to provide effective policing did not amount to a lack of state protection (see *Zhuravlev v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 3, (2000) 187 F.T.R. 110 (T.D.)).

[12] The applicant stated that he did not seek state protection because he was afraid that his former partner would seek revenge, and believed that the police mistreated homosexuals. The Board found the documentary evidence more credible than the applicant's opinion of state protection. The evidence showed that Mexico had legislative, enforcement and correctional institutions to protect victims of corruption and crime. Mexico was also making efforts to end corruption and had developed internal control mechanisms to deal with police misconduct.

[13] The Board found that the applicant's failure to take any steps to ensure his own protection was unreasonable (see *Szucs v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1614 (QL)). It was noted that state protection need not be perfect. The Board was not convinced that Mexico would not be reasonably forthcoming with serious efforts to protect the applicant, if he were to return there (see *Zalzali v. Canada (Minister of Citizenship and Immigration)*, [1991] 3 F.C. 605, (1991) 126 N.R. 126 (F.C.A.)).

[14] The Board acknowledged that strong homophobic sentiment existed in Mexico, which resulted in discrimination, harassment and arrests. However, it was found that Mexico was

adequately addressing the problems faced by homosexuals through legislative and policy efforts, and that political gains had been made by sexual minorities in metropolitan areas. The applicant had failed to meet his obligation to approach the state for protection, given that there was documentary evidence to the effect that it was available. The psychological report of Dr. Judith Pilowsky was given some weight with respect to the applicant's psychological state, but was not relevant to the Board's state protection finding. The Board concluded that the applicant was neither a Convention refugee nor a person in need of protection.

Issues

[15] The applicant submitted the following issues for consideration:

1. Did the Board err in law by making a decision in a perverse or capricious manner when it failed to properly consider the evidence of the applicant on the record?
2. Did the Board violate the applicant's right to natural justice and procedural fairness when it arrived at its decision?

[16] I would rephrase the issues as follows:

1. Did the Board err in finding that state protection was available to the applicant?
2. Did the Board violate the principles of procedural fairness by referring to an undisclosed document in support of its decision?

Applicant's Submissions

[17] The applicant submitted that the Board improperly considered evidence regarding his efforts to seek state protection in Mexico (see *Gagliano v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1629 (QL) (F.C.T.D.)). The Board's reasons state that the applicant did not seek state protection in Mexico. However, the applicant's testimony and PIF narrative show that he sought protection from the police and explained why he did not seek further assistance.

[18] The applicant submitted that the Board misinterpreted his evidence in making the following finding:

In oral and written evidence, the claimant stated that he did not seek state protection because he was afraid of revenge from Oscar and because he believed that the police "mistreats gays".

[19] It was submitted that the applicant's statement was taken out of context. In response to a question from counsel about his efforts to obtain police protection, the applicant described the incident where he was unable to obtain help from them. In his PIF, the applicant indicated that he feared revenge from Oscar and believed that the police did not protect gays. The applicant submitted that his belief that the police would not protect him was supported by his previous experience in seeking their help.

[20] The applicant submitted that in light of documentary evidence indicating the police were corrupt, it was reasonable for the applicant not to seek additional protection after being rebuffed by the police. It was submitted that the Board failed to consider the impact of corruption in Mexico

upon the applicant. The applicant submitted that the Board failed to give appropriate consideration to the psychological report. It was submitted that the report should have been given more weight, as it demonstrated the psychological impact of the state's failure to protect the applicant.

[21] The applicant submitted that the Board violated the principles of procedural fairness by relying upon evidence that was not on the record (see *Noormohamed v. Canada (Minister of Employment and Immigration)* (1993), 67 F.T.R. 66 (F.C.T.D.); *Chalal v. Canada (Minister of Citizenship and Immigration)* (2003), 232 F.T.R. 36, 30 Imm. L.R. (3d) 17). It was submitted that the applicant did not know the case to meet and could not reply to the undisclosed document. Further, it was submitted that the Board breached Rule 29 of the *Refugee Protection Division Rules*, S.O.R./2002-228 (the Rules) in failing to disclose the document.

Respondent's Submissions

[22] The respondent submitted that there was sufficient basis without the undisclosed document for the Board to conclude that state protection was available. It was submitted that the applicant had not indicated how he would have presented his claim differently had he been provided with the document, and had therefore failed to show that he was denied procedural fairness (see *Monteagudo v. Canada (Minister of Citizenship and Immigration)* (2004), 135 A.C.W.S. (3d) 904, 2004 FC 1687).

[23] In *Noormohamed* above, the undisclosed document was an important part of the Board's decision. In *Chalal* above, the decision was entirely based upon undisclosed evidence. The respondent submitted that these cases were distinguishable from the case at hand, since the undisclosed document was one of many relating to the availability of state protection. Further, it was submitted that the document was not important to the decision. In *Uppal v. Canada (Minister of Citizenship and Immigration)* (2006), 289 F.T.R. 196, 2006 FC 338, the Court held that there was no breach of procedural fairness where the applicant was aware of the case to meet and had been given an opportunity to participate in the process.

[24] The respondent submitted that even if the Board had not referred to the document, or had disclosed it, the decision would have been the same. It was submitted that it was futile to allow an application for judicial review because of the undisclosed document (see *Yassine v. Canada (Minister of Citizenship and Immigration)* (1994), 172 N.R. 308, 27 Imm. L.R. (2d) 135 (F.C.A.)).

[25] The respondent submitted that absent a complete breakdown of the state, it was presumed that Mexico could protect the applicant (see *Ward* above). It was submitted that the applicant was obligated to provide clear and convincing evidence to rebut this presumption. The respondent noted that state protection could be available from state run or funded agencies, not only the police. It was noted that the applicant did not try to access state protection after his sole report to the police (see *Pal v. Canada (Minister of Citizenship and Immigration)* (2003), 123 A.C.W.S. (3d) 737, 2003 FCT 698). The respondent submitted that in light of the documentary evidence, it was open to the

Board to find that state protection was available to the applicant. It was submitted that the Court should not reweigh the evidence.

[26] The respondent submitted that given Mexico's status as a democratic state, the applicant had to do more than make one report to the police in order to rebut the presumption of state protection. It was submitted that the more democratic a state, the more the applicant must have done to exhaust all avenues of protection (see *N.K. v. Canada (Minister of Citizenship and Immigration)* (1996), 143 D.L.R. (4th) 532, 206 N.R. 272 (F.C.A.)). The applicant only sought protection one time in Mexico. The respondent submitted that it was open to the Board to find that he had not taken all reasonable steps to avail himself of state protection.

[27] Although the Board failed to mention the applicant's sole attempt to seek protection, it was submitted that it was open to the Board to find that he had failed to rebut the presumption of state protection. The Board had noted that local failures in policing did not amount to a lack of state protection. It was submitted that the Board was entitled to prefer the documentary evidence regarding state protection over that of the applicant (see *Zhou v. Canada (Minister of Employment and Immigration)* (1994), 49 A.C.W.S. (3d) 558 (F.C.A.)). Finally, it was submitted that the psychological report was irrelevant to the Board's finding of state protection.

Applicant's Reply

[28] The applicant submitted that it was impossible to determine if the Board's decision would have been the same without the undisclosed document, therefore, the decision should not be allowed to stand. In the alternative, it was submitted that the Court should not condone the Board's improper actions in the case. The applicant submitted that he was not obligated to demonstrate how he would have presented his claim differently if the document had been disclosed.

[29] The applicant submitted that the Board failed to understand that he sought protection from the police and was rebuffed. It was submitted that had this evidence been considered, the Board may have reached a different conclusion regarding state protection. The applicant noted that the Board's decision failed to mention his attempt to seek police protection.

[30] The applicant submitted that upon a proper review of the documentary evidence, it was not clear whether there was adequate state protection for the applicant. It was submitted that the Board inappropriately preferred evidence in order to support its desired conclusion. The applicant submitted that there was sufficient documentary evidence on the record to show that the police regularly did not protect homosexuals.

Analysis and Decision

Standard of Review

[31] The prevailing view is that while the underlying factual findings are subject to the standard of patent unreasonableness, the Board's findings on the adequacy of state protection is a question of mixed fact and law that is reviewed on a standard of reasonableness (see *Machedon v. Canada (Minister of Citizenship and Immigration)* (2004), 256 F.T.R. 211, 2004 FC 1104). It is well established that breaches of procedural fairness and natural justice are subject to review on a correctness standard.

[32] **Issue 1**

Did the Board err in finding that state protection was available to the applicant?

The Board reached the following conclusion with respect to the issue of state protection.

In this particular case, the claimant did not take all reasonable steps. Indeed, the claimant took no steps at all. The panel is of the opinion that the claimant ought to have shown that he had taken all steps reasonable in the circumstances before seeking international protection in Canada.”

(Emphasis added)

[33] The applicant's PIF narrative stated the following regarding his attempt to seek protection from the police in Mexico, following a savage beating:

The next day David asked me to go to the police station to report the incident. I was hesitant but he insisted, so we went. The only thing that happened at the police station was that we were subjected to all

kinds of insults and we were laughed at by the police officers and the people who were supposed to help us. First they made us wait for three hours and when they told us that faggots like us only caused problems and that we liked complaining about everything except having things up the ass. When they finally asked us to explain what had happened, they started to laugh at my story and said that the nature of the things that had happened were not worth the paper they were using, because we were describing something that we certainly enjoyed. They even said that it was not their fault if the games that we participate in sometimes get out of hand. They refused to make a report of the incident. I was so furious and frustrated that I just asked David to go, and we did. After that I saw no point to get protection from the police or any other authorities.

[34] The applicant's testimony regarding his attempt to seek help from the Mexican police is as follows:

COUNSEL FOR THE CLAIMANT: What efforts did you make to get protection from Oscar, say by going to the police or other state officials?

CLAIMANT: Yeah, I went to the police station.

COUNSEL: And what did they do there when you went there?

CLAIMANT: I came to put a denunciation about the threats and the things that he was doing to me.

COUNSEL FOR THE CLAIMANT: And were you able to make that denunciation and get protection from Oscar?

CLAIMANT: We tried to make a denunciation. They did not accept the denunciation.

COUNSEL FOR THE CLAIMANT: Do you know why they didn't accept the denunciation?

CLAIMANT: I was with a friend and they made fun of us because we were homosexuals. They made us wait for three hours and at the end – and we had to leave the station because they were allowing other people to go through and not us.

COUNSEL FOR THE CLAIMANT: So ultimately was the report taken or not?

CLAIMANT: No, they said that they were not going to waste any paper on us, that they could not do anything about homosexual cases and we were looking for those problems.

[35] In my view, the Board's finding that the applicant made no effort to seek state protection is clearly erroneous. The applicant's PIF narrative and testimony both set out the circumstances surrounding his attempt to seek protection from the Mexican police. I would note that the Board did not make any findings with respect to the applicant's credibility. I believe that the Board made a patently unreasonable finding of fact regarding this aspect of its state protection analysis.

[36] I agree that a failure of state officials at the local level does not necessarily answer the question of state protection. However, in the present case, I have no way of knowing what the Board's finding on state protection would have been had the Board considered the evidence of the applicant's experience with the Mexican police.

[37] Because of my finding on Issue 1, I need not deal with the other issue.

[38] The application for judicial review is therefore allowed and the matter is referred to a different panel of the Board for reconsideration.

[39] The applicant submitted the following question for my consideration for certification as a serious question of general importance:

Can the Refugee Division (the tribunal) rely on evidence it introduces after the conclusion of the hearing without giving the claimant (applicant) a chance to respond?

I am not prepared to certify this question as there is already jurisprudence of this Court on this issue.

JUDGMENT

IT IS ORDERED that the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.:

<p>96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,</p> <p>(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p>(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.</p> <p>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</p> <p>(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of</p>	<p>96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:</p> <p>a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;</p> <p>b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.</p> <p>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:</p> <p>a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au</p>
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Article 1 of the Convention
Against Torture; or

sens de l'article premier de la
Convention contre la torture;

(b) to a risk to their life or to a
risk of cruel and unusual
treatment or punishment if

b) soit à une menace à sa vie ou
au risque de traitements ou
peines cruels et inusités dans le
cas suivant:

(i) the person is unable or,
because of that risk, unwilling
to avail themselves of the
protection of that country,

(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 of that country to
provide adequate health or
medical care.

(iv) la menace ou le risque ne
résulte pas de l'incapacité du
pays de fournir des soins
médicaux ou de santé adéquats.

(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.

The Refugee Protection Division Rules, S.O.R. 2002/228:

- | | |
|---|---|
| 29.(1) If a party wants to use a document at a hearing, the party must provide one copy to any other party and two copies to the Division, unless these Rules require a different number of copies. | 29.(1) Pour utiliser un document à l'audience, la partie en transmet une copie à l'autre partie, le cas échéant, et deux copies à la Section, sauf si les présentes règles exigent un nombre différent de copies. |
| (2) If the Division wants to use a document at a hearing, the Division must provide a copy to each party. | (2) Pour utiliser un document à l'audience, la Section en transmet une copie aux parties. |
| (3) Together with the copies provided to the Division, the party must provide a written statement of how and when a copy was provided to any other party. | (3) En même temps qu'elle transmet les copies à la Section, la partie lui transmet également une déclaration écrite indiquant à quel moment et de quelle façon elle en a transmis une copie à l'autre partie, le cas échéant. |
| (4) Documents provided under this rule must be received by the Division or a party, as the case may be, no later than | (4) Tout document transmis selon la présente règle doit être reçu par son destinataire au plus tard: |
| (a) 20 days before the hearing;
or | a) soit vingt jours avant l'audience; |
| (b) five days before the hearing if the document is provided to respond to another document provided by a party or the Division. | b) soit, dans le cas où il s'agit d'un document transmis en réponse à un document reçu de l'autre partie ou de la Section, cinq jours avant l'audience. |

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4409-06

STYLE OF CAUSE: JESUS GIRON SOBERANIS

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 15, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: October 1, 2007

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