

**Date: 20071212**

**Docket: IMM-6429-06**

**Citation: 2007 FC 1307**

**Ottawa, Ontario, December 12, 2007**

**PRESENT: The Honourable Orville Frenette**

**BETWEEN:**

**ANDROMEDA DIAZ DE LEON**

**Applicant**

**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 (the “Act”) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”), dated November 8, 2006, in which the presiding Board member found that the Applicant is not Convention refugee nor a person in need of protection.

## **ISSUES**

[2] The present application raises only one issue: did the Board err by concluding that the Applicant failed to rebut the presumption of state protection?

## **FACTUAL BACKGROUND**

[3] The Applicant is a citizen of Mexico and was born on June 12, 1977. Her claim for refugee protection arises from the fact that she was targeted by members of local drug cartels in the Mexican state of Chihuahua where she worked as a radio host and journalist. She therefore claims protection on the grounds of membership in a particular social group, and political opinion.

[4] The Applicant worked as a news reporter for a radio station, Radio Noticias 920 AM, between April 1994 and September 2003. In 1998 the Applicant was licensed as a radio host by the Office of Public Education, and in 2001 she registered with the Journalist's Forum. In 2001 the Applicant began a journalism course at the Autonomous University of Chihuahua Mexico, and in September of 2003 she moved to work at another radio station.

[5] Between April 1997 and March 1999, a man by the name of Edmundo Fernandez was the news director at Radio Noticias. It was through their work at the radio station that the Applicant and Fernandez developed both a working relationship and a friendship.

[6] The Applicant and Mr. Fernandez reconnected in 2004 when the Applicant approached her former colleague for advice and guidance regarding an investigative journalism course offered

during her third year of study. The Applicant was doing practical work investigating the drug operations in Chihuahua. Since Mr. Fernandez had become Special Forces Operations Director for the state of Chihuahua's municipal security unit in October of 2004, and was in charge of investigations of criminal groups and drug trafficking in the area, the Applicant became a source for Mr. Fernandez.

[7] She provided him with names and addresses of people involved in drug trafficking, as well as the locations of underground rave parties, where drug sales were prevalent, particularly sales to minors. Mr. Fernandez proceeded to arrest several people on the basis of the information provided by the Applicant.

[8] Mr. Fernandez became a target of drug traffickers as a result of his work, and began to receive threats in January 2005. He warned the Applicant of these threats. On June 13, 2005 he was murdered by armed assassins while he was walking out of a store at midday.

[9] Around midnight on June 15<sup>th</sup>, 2005, the day of Mr. Fernandez' funeral, the Applicant received a phone call from an unidentified person, threatening that the next funeral would be hers because she was meddling in the business of others.

[10] The Applicant contacted the police by phone immediately to ask for protection, and later visited the Public Ministry with her mother to report the threatening call. She was asked if she had caller ID and could provide police with the number from which the call came. When she told them

she could not, the officer indicated that nothing could be done, but that she should keep their number close in case there was another incident. No report was made by the officer.

[11] Following the threat the Applicant, fearing for her safety, ceased her investigative work, ended her association with the journalist group in Chihuahua and resigned from her job.

[12] Other assassinations occurred in the Applicant's home city around the same time. The Applicant makes particular note of an incident which occurred on June 26, 2005 in which a Chihuahua Police Chief Commander R.G. Levario and his partner agent Frias were assassinated. The men were found with their index fingers amputated and placed in their mouths, which signifies that the victims were identified as informants.

[13] The Applicant fled to Mexico City on September 15, 2005, approximately 27 hours away by bus, where she lived with her aunt. On September 24, 2005, around 10:00 pm, she received a second threatening phone call in Mexico City. The unidentified caller told the Applicant that she was an idiot to not have heeded the previous warning. Fearing for her life, and having no faith in the Police response if she complained, she immediately returned to Chihuahua to organize her affairs and make arrangements to travel to Canada. She arrived in Canada on October 4, 2005.

#### **DECISION UNDER REVIEW**

[14] The Board determined that the Applicant was neither a Convention refugee nor a person in need of protection, because her fear had no objective basis.

[15] At the outset of the analysis the Board asserted that the Applicant's identity was established, and that her credibility was not in question. The only ground put forward by the Board for rejecting the claim is that the claimant has not rebutted the presumption that state protection is available to her in Mexico, and that it was objectively reasonable to require the Applicant to make additional efforts to seek state protection in Mexico. The following reasons are given in support of this finding:

- a. It was objectively reasonable to require the Applicant to make additional efforts to seek state protection in Mexico. She made no effort to seek national protection in Mexico. Instead she made a single report to the public ministry. Further, neither the police nor judicial authorities were contacted following the second telephone threat.
- b. The Board found that because the Applicant's problems stemmed from her involvement in government-related work, that state protection would be forthcoming.
- c. The Board relied on the fact that the documentary evidence indicated that combating drug trafficking in Mexico is a key focus of the Mexican government. Despite the fact that there is corruption and collusion with traffickers within the police force the government is making an effort to combat trafficking and to protect Mexican citizens.
- d. The Board found it evident that the drug trafficking situation in the state of Chihuahua was very serious. The Board also acknowledged that there is documentary evidence stating that journalists and reporters have been victimized.

However, there was no persuasive evidence that the State of Mexico is unwilling or unable to provide the Applicant with protection.

## ANALYSIS

### *The documentary Evidence*

[16] The Board considered the documentary evidence, acknowledging that according to that evidence, there was corruption among the police and security forces in Mexico, some of whom colluded with the drug traffickers and that there was inefficiency and corruption in the judicial system.

[17] However, the Board was impressed by the Attorney General's and the Federal Investigation Agency's significant efforts to combat criminality and drug trafficking, while protecting Mexican citizens.

[18] It also mentioned the victimization of journalists and reporters. A simple reading of this documentation reveals that a 2000 annual report on Mexico states "despite the good news, Mexico is still a relatively dangerous place to work as a journalist. The investigation of drug trafficking leads to death threats – three of the five journalists murdered in 1997 and 1998 had been investigating the subject..." The same document refers to threats, attacks and arrests and kidnapping of journalists. The Reuters document for 2006 is entitled "Mexico hit by fresh wave of drug killings".

[19] It is a fact that president Vincento Fox promised renewed efforts to combat crimes yet in a letter from Canada dated October 7<sup>th</sup> 2005, the association complained of violation of human rights in Mexico, and the murders of journalists.

[20] The Board should have examined the totality of the evidence, particularly the documentary evidence to realize that notwithstanding President's Fox's promises and efforts, investigative journalists in Mexico still face threats and risk of death. This evidence together with the Applicant's recital of facts and events especially support her objective and subjective fears for her life in Mexico.

*Standard of Review*

[21] The standard of review applicable to the Board's decision of whether the Applicant adequately demonstrated the state's inability to protect is reasonableness *simpliciter*. Tremblay-Lamer J. arrived at this standard after applying the pragmatic and functional analysis in *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, [2005] F.C.J. No. 232, which has since been followed consistently by this Court. See e.g. *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 982, [2007] F.C.J. No. 1276. I agree that reasonableness is the appropriate standard.

*Rebutting the presumption of state protection*

[22] In order to determine whether the Board erred, it is first useful to review the principles underlying the presumption of state protection and how the Applicant may rebut the presumption.

[23] The Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74, establishes the test for state protection:

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 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.

The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant.

[Emphasis added]

[24] In *Kadenko v. Canada (Solicitor General)*, 143 D.L.R. (4th) 532, the Federal Court of Appeal confirmed that a refugee claimant must do more than show that he or she approached some members of the police force and that the attempts to seek protection were unsuccessful. This interpretation of the law has been recently applied by Justice Martineau in *Ramirez et al. c. MCI*, 2007 CF 1191.



[25] The Applicant in this case submits that the Board erred by overlooking the murders of Mr. Fernandez, of the two police officers who were labelled as informants, and the numerous journalists identified by the documentary evidence as having been targeted. The Applicant submits that these are similarly situated individuals who were let down by the state. The Applicant further submits that because Mr. Fernandez and the officers were senior officials, they would have had greater access to protection. Despite this access to protection, they were targeted and killed, and those responsible Mr. Fernandez' death have not yet been apprehended. The Applicant contends that this makes it objectively unreasonable for the Applicant to be required to seek further protection from the state.

[26] The Respondent submits in response that the Applicant was a student journalist, with a low-profile, unlike Mr. Fernandez and the police officers, and she would therefore not be a target. Similarly, the Board found that because she had aided a government official, that protection would be more readily forthcoming.

*The presumption of state protection*

[27] In *Ward*, above, the Supreme Court of Canada decided that in refugee law, there is a presumption of state protection and to rebut this presumption, there must be a “clear and convincing confirmation of state’s inability to protect must be provided ...”. In *Hinzman v. Canada (Minister of Citizenship and Immigration)*; *Hughey v. Canada (Minister of Citizenship and Immigration)*, [2007] FCA 171, [2007] F.C.J. No. 584, the Federal Court of Appeal quoted its own decision in *Kadenko v. Canada (Solicitor General) (1996)*, 143 D.L.R. (4<sup>th</sup>) 532, at page 532, stating that the more

democratic a country, the more a claimant must seek protection from his or her home state.

However, this proviso must pass the test, as to whether the state protection “might reasonably have been forthcoming” (*Hinzman*, para 54).

[28] In the case of a country considered a true democracy, as the United States of America as determined in *Hinzman* above, the presumption of state protection is difficult to overturn, but in a country like Mexico, considered more as a developing democracy, where corruption, drug trafficking is prevalent, involving some government officials, police and security forces, the presumption can be more easily overturned, see: *Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 320. [2007] F.C.J. No. 439.

[29] Evidently, each case must turn on its particular facts, therefore every refugee claim from a Mexican citizen will not satisfy the criteria required; for example judicial reviews were refused in the following cases concerning Mexican citizens:

*K.T.S.G. v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1669, [2005] F.C.J. No. 2070;

*Monroy v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 834, [2006] F.C.J. No. 1180;

*Canseco v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 73, [2007] F.C.J. No. 115 and;

*Ramirez*, above

[30] Considering the evidence in the present case, I believe that the Board’s decision was unreasonable. The Board’s failure to consider the fact that the very people from whom the Applicant is asked to seek protection could not avail themselves of protection constitutes a reviewable error. As was the case in *Irhuegbae v. Canada (Minister of Citizenship and*

*Immigration*), [2003] F.C.J. No. 671, 2003 FCT 522, the evidence of these murders was mentioned in the Board's decision, but was not addressed in the context of the state's inability to protect the Applicant:

[27] The Applicant provided evidence of similarly situated individuals let down by the state protection arrangement. He gave evidence that another lecturer was murdered two nights after the Applicant gave his lecture. This lecturer was a fellow anti-cult activist (tribunal record page 19). The Applicant, in his Personal Information Form ("PIF") stated that a registrar of Delta State University, the Applicant's alma mater, told him in May 1999 that he had been offered police protection against the cultists. A few weeks later, the registrar was murdered. The Board did not state this evidence was not credible. As well, the Board found that the Applicant had not provided clear and convincing evidence that the government is unable to protect him. However, in my opinion, the Applicant did provide evidence of similarly situated individuals let down by state protection (e.g. the registrar at Delta State University who was killed). This evidence was mentioned in the Board's decision, but it was not addressed in the context of the state's inability to protect the Applicant. As *Ward, supra* states, one of the ways to establish the inability of a state to protect a person is by showing its inability to protect other similarly situated individuals. Therefore, this constitutes a reviewable error on the part of the Board.

[Emphasis added]

[31] The individuals whose stories the Applicant relied upon to illustrate the state's inability to protect her were in senior, public positions. Their inability to receive adequate protection is therefore more convincing that it would be if they were ordinary citizens working as informants. Further, it constitutes a clear and convincing confirmation of the state's inability to protect the Applicant in this particular circumstance. The Respondent's argument that the Applicant's lower profile occupation would shelter her from persecution is contradicted by the fact that she received death threats. The fact that she was a target was at no time called into question by the Board, nor was the Applicant's credibility generally.

[32] This Court has found that when a state is the alleged perpetrator of persecution, an Applicant is not required to exhaust all avenues of protection in order to rebut the presumption of state protection. For example, in *Chaves, supra*, Justice Tremblay-Lamer stated the following:

In my view, however, *Ward, supra* and *Kadenko, supra*, cannot be interpreted to suggest that an individual will be required to exhaust all avenues before the presumption of state protection can be rebutted (see *Sanchez v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 536 (T.D.)(QL) and *Peralta v. Canada (Minister of Citizenship and Immigration)* (1996), 123 F.T.R. 153 (F.C.T.D.)). Rather, where agents of the state are themselves the source of the persecution in question, and where the Applicant's credibility is not undermined, the Applicant can successfully rebut the presumption of state protection without exhausting every conceivable recourse in the country. The very fact that the agents of the state are the alleged perpetrators of persecution undercuts the apparent democratic nature of the state's institutions, and correspondingly, the burden of proof. As I explained in *Molnar v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. 339 (T.D.), *Kadenko, supra* has little application when the "[...] police not only refused to protect the Applicants, but were also the perpetrators of the acts of violence"; *Molnar, supra* at para. 19.

[Emphasis added]

[33] Similarly, it is my opinion that in circumstances where agents of the state whose job it is to protect the Applicant were unable to receive the necessary protection for themselves, that fact may be used by an Applicant whose credibility is not challenged in order to rebut the presumption of state protection. It is appropriate to distinguish this case from *Kadenko, supra* on these particular facts. Here, it was not objectively reasonable to require the Applicant to seek further protection when the very agents whose job it is to protect the public, cannot themselves receive adequate protection.

[34] For the above reasons, it is my opinion that the Board committed a reviewable error.

[35] No question is certified and none is raised.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

The application for judicial review is allowed and the matter is to be referred back for reconsideration by a differently constituted panel.

"Orville Frenette"  
\_\_\_\_\_  
Deputy Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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