Date: 20080606

Docket: IMM-4422-07

Citation: 2008 FC 706

Ottawa, Ontario, June 6, 2008

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

ALEJANDRO PEREZ NAVA
MARIA DEL CARMEN AGUILAR ROCHA
(A.K.A. MARIA DEL CARME AGUILAR ROCHA)
DANIEL ALBERTO PEREZ AGUILAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Nava family is comprised of the male applicant (Alejandro), his common-law wife and their minor son. They claim to fear persecution in Mexico on the basis of perceived political opinion. The Refugee Protection Division (the board) concluded that the applicants had not rebutted the presumption of state protection and that, in any event, state protection exists for the family in Mexico. Consequently, it rejected their claims.

[2] The applicants contend that the standard to rebut the presumption of state protection applied by the board was too high. Further, they assert that the board erred in determining that state protection exists in Mexico. For the reasons that follow, I conclude that the board did not err as alleged. Consequently, the application will be dismissed.

Background

[3] The applicants claim to fear a "corrupt but influential magistrate" (Perez-Zarate), a political enemy of Alejandro's father (Perez-Cordova). The contextual background concerns Perez-Cordova's replacement of Perez-Zarate, as Magistrate of the Superior Tribunal of Justice, when Perez-Zarate was accused of fraud.

[4] Distilled, the facts (as stated by the applicants) are set out here. Alejandro worked, as his father's assistant, part-time in 2003, and full-time beginning in February of 2004. The investigation into Perez Zarate's alleged fraud began in 2002 and continued through to his reinstatement in January of 2005. Alejandro claims that his father became a target of Perez-Zarate because he had filled Perez-Zarate's position and was privy to information regarding the fraud case. The media paid close attention to the situation and provoked a rivalry between the two men.

[5] In mid-2004, Alejandro entered into a common-law relationship with the female applicant. In June of 2004, because he started a new job, he worked for his father only three days per week. Near the end of November, Alejandro began to receive anonymous, threatening telephone calls wherein the callers demanded that he stop passing information to the media about Perez-Zarate.

[6] When Alejandro spoke with his father about the calls, he learned that his father had received threatening calls as well. His father advised him to ignore the calls and to change his cellular phone number. Alejandro followed his father's advice.

[7] In late December, while staying at his partner's parents' home, Alejandro received a call from a neighbour informing him that shots had been fired at his house. Alejandro reported the incident to the police in Tlaxcala state. At the suggestion of the police, he reported it as a crime against "whoever is responsible" because he had no specific information that it was perpetrated by people working for Perez-Zarate. Alejandro was dissatisfied with the response of the police. He learned from his father that the police report was not an official one. Moreover, the police did not come to his home to investigate.

[8] Alejandro and his partner had a son in December of 2005. In February of 2006, two men grabbed Alejandro, twisted his arm behind his back and put a gun to his head. The men threatened him and told him not to start a lawsuit against Perrez-Zarate. Alejandro did not report the incident due to fear of retaliation. He believed the police would not help him.

[9] Alejandro arrived in Canada in April of 2006 on a six-month visitor visa. He decided to wait until his partner, his son, and his father arrived before approaching immigration authorities. His partner and son arrived in May of 2006. His father informed him in late August that he did not intend to come to Canada.

[10] On September 8, 2006, the family claimed refugee protection and, alternatively, claimed to be persons in need of protection. The basis for their claim was amended to include not only political opinion, but also membership in a particular social group.

The Decision

[11] The Refugee Protection Division concluded that the applicants were neither Convention refugees nor persons in need of protection. Elements critical to the board's conclusion include the following:

- The determinative issue is whether the applicants have a well-founded fear of persecution (including whether they have rebutted the presumption of state protection);

- State protection is available to the applicants if they return to Mexico. The totality of the evidence does not support a conclusion of state breakdown nor does it rebut the presumption that the state is able to protect its nationals;

- The applicants did not exhaust their potential remedies for obtaining protection in Mexico. Although Alejandro approached the authorities in December of 2004 to report the shooting at his home, he did not go back to the police when he was allegedly attacked at gun-point in February of 2006;

- The factual allegations that Alejandro's father is a lawyer, was chosen to replace Perez-Zarate, and subsequently had to step down to give the position back to Perez-

Zarate were accepted. The fact that the father is still residing in Mexico was specifically noted. The idea that Alejandro's father was not subjected to any incidents of persecution because of his high position was rejected. Rather, the father's high rank would make it more likely for him (rather than Alejandro) to be subject to persecution since Alejandro never held a political position and was not paid by the government for his work with his father. Additionally, the father's position would enable him to be aware of the avenues available for his son to seek protection in Mexico;

- Mexico has a deeply entrenched culture of impunity and corruption. However, documentary evidence provides clear evidence that there are processes in place to solve crimes and assist victims of crimes. Greater probative value was assigned to the documentary evidence than to the testimony of the applicants in relation to the availability of state protection in Mexico;

- The section 97 claim fails due to the existence of adequate state protection.

The Standard of Review

[12] *Dunsmuir v. New Brunswick*, 2008 SCC 9 directs that where the standard of review can be ascertained by reference to existing jurisprudence, there is no need to engage in a standard of review analysis. The issue of state protection, a question of mixed fact and law, has been determined to be reviewable on a standard of reasonableness in *Chaves v. Canada (Minister of Citizenship and Immigration)* (2005), 45 Imm. L.R. (3d) 58 (F.C.) and a host of subsequent decisions of this Court.

Analysis

[13] The applicants' position can be succinctly stated. They argue that, regarding their obligation to displace the presumption of state protection, the board erred in requiring that it be "convinced" by the evidence. Further, it erred by looking for "serious efforts" from the state rather than "effective protection".

[14] With respect to the issue of the burden of proof, the Federal Court of Appeal's decision in *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 resolves all doubt or confusion. An applicant must "first introduce evidence of inadequate state protection and then must convince the trier of fact that the evidence adduced establishes that the state protection is inadequate…the [applicant] must assume his or her legal burden on a balance of probabilities" (paras. 18-20). Thus, the balance of probabilities is the requisite standard. The quantity and quality of evidence required to rebut the presumption of state protection is "some clear and convincing evidence": *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689. However, it is evident that, in accordance with *Carillo*, the "clear and convincing" requirement does not constitute a licence for the board to impose a standard higher than the normal, civil standard.

[15] That said, it does not necessarily follow that merely because a board uses the word "convince", it is imposing an incorrect burden. The board's decision must be read in totality. It bears noting that in *Carillo*, Justice Létourneau, while defining the burden as balance of probabilities, states that the claimant must convince the panel (on the civil standard).

[16] Reading the decision as a whole, I am satisfied that the board is not applying anything other than the balance of probabilities standard in relation to the rebuttal of the presumption of state protection. The board's decision is cogent, comprehensive, well-reasoned and fair. Apart from one instance where the word "convince" appears, there is nothing in the board's reasons to indicate than an onus higher than balance of probabilities was applied. Put another way, the decision displays the existence of justification, transparency and intelligibility within the decision-making process and falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[17] The applicants' position regarding the board's use of the phrase "serious efforts" is misconceived. Again, regard must be had to the context in which the phrase is used. In this case, the board examined the question of whether the state "would not be reasonably forthcoming with serious efforts to protect the claimants if they were return to Mexico". It concluded that "the totality of the evidence does not support a conclusion of state breakdown, nor does it rebut the presumption that a state is able to protect its nationals. A state is not expected to be able to provide perfect protection to its citizens."

[18] The applicants rely on *Garcia v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 79 to advance their position that "serious efforts" is not sufficient. Notably, Garcia also states that the test in relation to "serious efforts" will be met where it is established that the capability and expertise is developed well enough to make a credible, earnest attempt" (para. 16). In other words, "serious efforts" must be viewed at the operational level. Is the state attempting to put its policy for state protection into operation? Here, following a comprehensive review of the documentary

evidence and the evidence of the applicants, the board concluded that state protection is available and adequate. Nothing turns on the use of the words “serious efforts” in this situation.

[19] The applicants also submit that the board erred in concluding that the inability of the police to assist Alejandro, on the one occasion that he sought assistance, was insufficient to rebut the presumption of state protection. The Federal Court of Appeal in *Hinzman v. Canada (Minister of Citizenship and Immigration)* (2007), 362 N.R. 1 (F.C.A.), at paragraph 37, identified the threshold issue in matters of state protection as follows:

> However, to qualify for refugee status, the [applicants] would have to first satisfy the [board] that they sought, but were unable to obtain, protection from their home state, or alternatively, that their home state, on an objective basis, could not be expected to provide protection.

[20] At paragraphs 56 and 57 of *Hinzman*, the Court instructs that applicants cannot easily avoid the requirement that they approach their home countries for protection before seeking international refugee protection. Applicants are faced with the burden of establishing that all possible protections available have been exhausted.

[21] The authorities relied upon by the applicants do not assist them because, in those cases, the police were the agents of persecution. That is not the situation here. The panel specifically notes that Alejandro approached the authorities in December of 2004 to report the incident of the shooting at his home. It also accepted that the police informed Alejandro that there was no direct evidence against Perez-Zarate. Nonetheless, the board concluded that the applicants “did not exhaust their

potential remedies for obtaining protection from the Mexican government". It cited a number of factors in support of its conclusion, none of which are disputed.

[22] The board's determination in this respect constitutes a finding of fact. As such, it is reviewable on the grounds enumerated in paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at para. 38. See also: *Colistro v. BMO Bank of Montreal*, 2008 FCA 154. The applicants have not demonstrated that the board's finding in this respect is flawed.

[23] As to the whole of the reasons, the board turned its mind to the problems associated with state protection in Mexico. It assessed and weighed the evidence in totality and concluded that, in this case, adequate state protection is available. For me to conclude otherwise would require that I usurp the function of the board. That is not my role. My intervention is not warranted.

Counsel did not suggest a question for certification and none arises.

JUDGMENT

The application for judicial review is dismissed.

"Carolyn Layden-Stevenson"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4422-07
STYLE OF CAUSE:	ALEJANDRO PEREZ NAVA ET AL. v. MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 28, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Layden-Stevenson J.
DATED:	June 6, 2008

APPEARANCES:

Geraldine MacDonald	FOR THE APPLICANTS
Lisa Hutt	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Geraldine Macdonald Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT