

Date: 20090506

Docket: IMM-4157-08

Citation: 2009 FC 457

OTTAWA, Ontario, May 6, 2009

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

**CHRISTIAN VELOZ GUDINO
ERIN JUDITH SALOMA PEREZ
AYARI FERNANDA VELOZ SALOMA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (Board), dated August 28, 2008 (Decision). The Board found that the Applicants, citizens of Mexico, were not credible and were neither Convention refugees nor persons in need of protection within the meaning of sections 96 and 97 of the Act.

[2] The applicant also submitted a motion to file additional affidavit evidence, which motion the court allowed. The additional evidence relates to the alleged murder of the principal applicant's uncle.

Background

[3] Christian Veloz Gudino is the principal applicant. Erin Judith Saloma Perez is his wife and Ayari Fernanda Veloz Saloma is their minor child. Mr. Gudino was the manager of his grandfather's hardware store prior to leaving Mexico. His grandfather is a well known and successful businessman who lives on the premises behind the store.

[4] In March 2007, the applicant claims that he was assaulted by four men who tried to drag him into a vehicle outside the store. Neighbours came to his assistance and the kidnappers were frightened away. Mr. Gudino says that he received threats by telephone at work from three different people before and after this incident. He did not tell his family members and fled to Canada on June 10, 2007, planning to stay until things calmed down so he could return to Mexico. He did not seek protection from the Mexican authorities prior to leaving as he and his wife feel that the authorities are all corrupt and are in collusion with the criminals.

[5] While in Canada, Mr. Gudino was informed by his wife that she had received threatening telephone calls and/or letters at home and that there had been an attempted kidnapping of their daughter while she was at school. The child did not return to school after that and Ms. Perez continued her post-secondary studies from home. Ms. Perez and their daughter arrived in Canada

on December 24, 2007, and claimed refugee status at the airport. Mr. Gudino made his claim in January 2008.

Decision under Review

[6] The Board determined that the kidnapping attempt and threats were acts of criminality, which lack a nexus to a Convention ground such that the applicants were not Convention refugees.

[7] The determinative issue was credibility. Little weight was given to letters from family, since they did not have direct knowledge of the problems before Mr. Gudino left Mexico. The evidence with respect to police corruption was also given little weight because counsel had to be reminded frequently not to ask leading questions. At different points in the process, Ms. Perez said that she had received telephone threats, other times that it was letters and still others that there were both.

[8] The Board found it unlikely that extortionists or kidnappers would target the applicants over a prolonged period without contacting other family members, such as the grandfather, who was well-known and affluent. He also did not find it credible that Ms. Perez, left in Mexico with her daughter, would not share her concerns with anyone, even though she lived with her parents. As such, the Board finds that it is not probable that the attempted kidnapping and threats escaped the parents' attention.

[9] The Board is concerned with the allegations with respect to a lack of state protection. The applicants failed to seek state protection. They showed no interest in identifying the kidnappers and failed to share information with their family members for mutual protection, all of which causes the Board to draw a negative inference on the credibility of the applicants. The applicants did not allege that their persecutors have had a continued interest in them since they arrived in Canada. The Board does not find it credible that the agents of persecution would lose all interest in the family because the three applicants are now abroad.

[10] The six-month delay in claiming further impugned the credibility of claims of a well-founded fear of persecution. The delay was explained by Mr. Gudino as he was waiting for the situation to improve. He did not claim until he found out about the further problems of his wife and child and they had filed claims for refugee status.

[11] The Board stated that it is possible that the March 2007 kidnapping attempt occurred but the balance of the evidence in support of the claims is, according to the Board, not credible.

Issue

[12] The issues on this application for judicial review are:

- 1. Did the Board err in its credibility findings?*
- 2. Did the Board err in finding that there was no nexus to a Convention ground?*
- 3. Did the Board err in its analysis of the s. 97 claim?*

4. *Did the Board err in finding that the Applicant failed to rebut the presumption of state protection?*

Standard of Review

[13] Credibility findings are assessed on a reasonableness standard: *Aguirre v. Canada (M.C.I.)*, 2008 FC 571, at para. 14. The second question is really a pure question of law, as the applicants are asking whether the group they identify with has a nexus to Convention grounds. As such, it is subject to a reasonableness standard: *Suvorova v. Canada (M.C.I.)*, 2009 FC 373, at paras. 17 & 24. The third question is one of mixed fact and law, since s. 97 must be applied to the facts of the case, and is subject to a reasonableness standard: *Acosta v. Canada (M.C.I.)*, 2009 FC 213, at para. 9. The last question, relating to state protection, is also subject to reasonableness as a question of mixed fact and law: *Guzman v. Canada (M.C.I.)*, 2008 FC 490, at para. 10.

Analysis

1. *Did the Board err in its credibility findings?*

[14] The applicants submit, in their written submissions, that their sworn statements benefit from a presumption of truth: *Maldonado v. Canada (M.C.I.)*, [1980] 2 F.C. 302. Furthermore, the Board must explain, in clear and unmistakable terms, why a claim is rejected for lack of credibility: *Armson v. Canada (M.C.I.)* (1989), 9 Imm. L.R. (2d) 150. The applicants submit that neither of these principles were respected in this case.

[15] The findings, though not termed as such, are essentially plausibility findings. Such findings are inherently subjective, which makes it particularly important to explain clearly the facts that were relied on: *Leung v. Canada (M.C.I.)* (1994), 81 F.T.R. 303. The applicants submit that the Board merely concluded that, because the grandfather was a well-known and affluent businessman, he would have been a logical target rather than the principal applicant. This conclusion fails to consider the possibility that they attempted to kidnap the principal applicant to be able to extort the grandfather. Adverse credibility findings must be made on reasonably drawn inferences, not speculation: *Kong v. Canada (M.C.I.)* (1994), 73 F.T.R. 204.

[16] The applicants also submit that delay in claiming is not, in itself, decisive in determining whether a well-founded fear of persecution exists. The Court agrees with the submission. The principal applicant planned to be in Canada until the threats abated and to later return to Mexico. It is only upon of the attempted kidnapping of his daughter and the arrival in Canada of his wife and daughter that he made his claim, which the applicant states was a reasonable explanation that should have been accepted.

[17] The Respondent's submissions summarise the Board's findings on credibility. The Respondent submits that a review of the reasons shows that the Board provided detailed explanations for its findings. For a story to be credible, the Board must be satisfied as to its probability, not only the possibility that it is true: *Orelien v. Canada (M.C.I.)*, [1992] 1 F.C. 592. Primarily, the plausibility of the story is suspect and, when there are clear reasons for such a finding,

the presumption of truth is rebutted. Furthermore, the presumption of truth applies to the facts recounted and not any deductions made based on those facts. There is nothing so unreasonable as to warrant intervention in this decision: *Aguebor v. Canada (M.C.I.)* (1993), 160 N.R. 315.

[18] The Respondent is correct that the presumption of truth may be rebutted where evidence is not credible or is implausible. The Board finds it implausible that the kidnappers would not seek to attack other family members and that the applicants would not mention the incident to their family members. This appears to be a reasonable conclusion considering that the grandfather lived right beside the store and the kidnappers contacted Ms. Perez at her home where she lived with her family. It seems odd that the family would not hear of such an uproar or face similar risks. The Board member explained the reasons for her conclusions.

2. Did the Board err in finding that there was no nexus to a Convention ground?

[19] According to the applicant, the Board erred in finding that acts of criminality do not provide a nexus to a Convention ground. The applicant submits that he is a member of the group of “persons living in Mexico who have been targeted for kidnapping and threats by persons operating outside of the justice system of the country in circumstances where the state or agents of the state are unable or unwilling to offer protection”.

[20] The Respondent submits that the applicants’ fear stems from general criminality, which does not provide a nexus with a Convention ground: *Sokolov v. Canada (M.C.I.)* (1998), 87 A.C.W.S.

(3d) 1193. Being a member of a family targeted by criminals is not considered to be a particular social group even where criminality is allowed to flourish due to dangerous and unsettled conditions. The risk faced by the Applicants could be perpetrated by one of innumerable criminals against one of innumerable victims and is, as such, a generalised risk.

[21] The social group identified by the Applicant is not one recognised under s. 96 so no error was made. In a similar case, *Moali de Sanchez v. Canada (M.C.I)*, 2001 FCT 183, where the applicants had suffered from extortion, it was found that they were not part of a social group as per s. 96. This was explained as follows:

The status of a landed proprietor does not in any way fall within the "general underlying themes of the defence of human rights and anti-discrimination" (Ward, supra, at 739) and is not a "characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs" (Ward, supra, at 738). (para. 6)

[22] Similarly, as victims of failed kidnapping attempts, the applicants' fear of kidnapping and extortion in Mexico does not make them members of a particular social group such that they satisfy the s. 96 definition of a Convention refugee.

3. Did the Board err in its analysis of the s. 97 claim?

[23] The applicant recognises that claims based on generalised risk cannot be successful under s. 97(1)(b). However, the applicant submits that personal threats and vendettas may qualify under that provision as they are not indiscriminate or random.

[24] The respondent submits that the decision turned on credibility, such that it was open to the Board to conclude that the applicants were neither Convention Refugees nor in need of protection. Once they were found non-credible with respect to s. 96 and there was no further credible evidence, there were no grounds to support a s. 97 claim: *Gill v. Canada (M.C.I.)*, 2005 FC 34, at para. 14.

[25] No error was made with respect to the s. 97 analysis. The failure to conduct a separate s. 97 analysis will not be fatal in all cases as, for example, where there is inadequate evidence to support a s. 97 claim: *Sellan v. Canada (M.C.I.)*, 2008 FCA 381, at para. 3; *Ndegwa v. Canada (M.C.I.)*, 2006 FC 847, at para. 12; *Kathiran v. Canada (M.C.I.)*, 2008 FC 250, at para. 11. If the applicants' story is found to be implausible, as is the case here, then the evidence to support a s. 97 claim is lacking.

4. Did the Board err in finding that the Applicant failed to rebut the presumption of state protection?

[26] The applicants were unwilling to seek protection because they felt that the authorities were unable or unwilling to protect them. The applicant submits that this was an entirely reasonable

conclusion considering the pervasiveness of corruption at all levels in Mexico. The Board did not make any reference to efforts being made to address the problem.

[27] The respondent submits that, absent complete breakdown, state authorities are presumed to be able to protect their citizens: *Canada v. Ward*, [1993] 2 S.C.R. 689. The respondent submits that the applicants have failed to satisfy their burden to provide convincing evidence of Mexico's inability to protect. The more democratic the country, the harder that will be to prove: *N.K. v. Canada (M.C.I.)* (1996), 143 D.L.R. (4th) 532, at para. 5. Mexico provides adequate state protection according to the Respondent.

[28] The decision does make some peripheral comments concerning state protection, but does not rely on them to justify the decision, nor does it include a full analysis of state protection in Mexico. As such, and since the credibility findings stand, I will not address this issue.

[29] Accordingly, the application for judicial review must be dismissed. No question of general importance was submitted by the parties for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

“Max M. Teitelbaum”

Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

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