

Date: 20091016

Docket: IMM-2183-09

Citation: 2009 FC 1057

Vancouver, British Columbia, October 16, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**LUCIA AVILA ORTEGA
MARIA CAROLINA AVILA ORTEGA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to section 72 of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27 (the Act), of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the Board). The Board determined that Lucia Avila Ortega and Maria Carolina Avila Ortega were neither Convention refugees nor persons in need of protection within the meaning of the Act. The determinative issue was whether they had made adequate efforts to seek state protection prior to availing themselves of international

protection, and whether these efforts and their evidence had rebutted the presumption of state protection.

[2] For the reasons that follow, this application is dismissed.

BACKGROUND

[3] Ms. Lucia Avila Ortega, 27, and her sister, Maria Carolina Avila Ortega, 25, are citizens of Mexico who lived in the neighbourhood of Tultitlan, in the Federal State of Mexico.

[4] In late 2004, the sisters began being harassed by two alleged narco-traffickers, who had moved next door to the family home. One of these men was nicknamed El Tigre. In the beginning, the harassment was limited to verbal abuse, sexual harassment, and threats of violence. The harassment and threats made the sisters fearful to leave their home, and as a result, they dropped out of school in April of 2006. The sisters did not tell their family of their problems with these men for fear that their family's reaction could expose their family to violence from the men.

[5] On February 25, 2007, the situation escalated dramatically. The sisters were approached from behind by El Tigre and another man, held at gunpoint, and sexually assaulted. The men threatened the sisters with further violence if they made a report to the police. The sisters discussed this incident with their older sister, but decided not to go to the police because they thought that would make matters worse and because their attackers had previously claimed responsibility for killing a police officer.

[6] On April 6, 2007, the sisters were again attacked. This time they were forced into the neighbouring house where they were both sexually assaulted. The sisters' memories of this incident are not very clear. Neither their Personal Information Forms nor the Board's decision appear to reference the fact that one of these two men was El Tigre, but this appears to be implied by their testimony. The sisters then told their family about the incident. It was agreed that the women should go to Veracruz for a few days. The police were not contacted with respect to either of the sexual assaults.

[7] The sisters went to Veracruz, a city hundreds of kilometres from their home and in a different State, to stay with a family friend. They observed El Tigre outside the home where they were staying. After disclosing this information to their family friend, the sisters were convinced to file a report at the local police station. The sisters went to the police station on April 8, 2007. The sisters say that they were not interviewed by the police, but that they made a written statement, and that they were told they would be contacted later. No immediate form of protection was offered to them.

[8] The sisters state that, that same evening, their family friend observed the same car El Tigre was driving the previous day, and that an unidentified person was heard near the house. The sisters determined that they were not safe in Veracruz and returned home. The sisters had previously purchased tickets to Vancouver for travel on April 12, 2007. After coming to Canada, the sisters learned that their brother had been attacked on April 28, 2007, by these alleged narco-traffickers. This incident led the sisters to file claims for refugee protection on May 1, 2007.

[9] In September 2007, the sisters were informed that the police investigation into their complaint in Veracruz had been reserved, in part, because the identity of the accused could not be determined. This notice informed the sisters that they had ten days to make an appeal. No appeal was made; the sisters were already in Canada.

[10] The Board found the claimants to be generally credible, and accepted their explanations for any discrepancies that existed between their testimony and the documentary record. The Board stated that the determinative issue in the claim was state protection. It noted that the claimants had sought protection for the events that occurred between late 2004 and April 2007 on only one occasion. The Board stated:

The claimants never filed a complaint with the police in the area where they lived, where the harassment had gone on for years, where the men allegedly conducted their drug trade and where the two violent sexual attacks on both sisters had occurred. The local police not only could have been given the full details of what had occurred but also been pointed right next door where the assailants lived. The failure to seek protection in the area where they lived was unreasonable.

The above noted conduct is not consistent with either a well-founded fear that the sisters might be further harmed or reflective of any genuine attempt to obtain state protection. They did not do everything they reasonably could to alert the police or to provide information to them. The claimants also testified that the police never solicited any bribes in order to provide protection.

[11] The Board cited *Canada (Minister of Citizenship and Immigration) v. Kadenko* (1996), 143 D.L.R. (4th) 532 (F.C.A.) for the proposition that the “claimant’s burden of proof to rebut the presumption of state protection is directly proportionate to the level of democracy in the state in

question.” The Board noted that Mexico is a “fledgling democracy”, and that as a result, there is an expectation that the claimants would have sought protection from the authorities.

[12] The Board cited *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 99 D.L.R. (4th) 334 for the proposition that effective protection does not mean a guarantee of protection at all times, and *Smirnov v. Canada (Secretary of State)*, [1995] 1 F.C. 780 (T.D.) for the proposition that the level of effective protection must not be set too high. The Board concluded: “as long as the government is taking serious steps with an acceptable level of effectiveness to provide or increase protection for individuals then the individual must seek state protection”.

[13] The Board summarized the steps that Mexico has taken to increase protection. It concluded that even though the Mexican criminal justice system is flawed, “there is no significant evidence which leads” to the conclusion “that the system is wholly broken or that the police would refuse to investigate serious, non-domestic, sexual assaults.” The Board, citing *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, stated that the burden is on the claimants to rebut the presumption of state protection by adducing relevant, reliable and convincing evidence of inadequate state protection.

[14] The Board noted that state protection would be determinative of both claims under sections 96 and 97 of the Act. On this basis, the Board concluded that the claimants were neither Convention refugees nor persons in need of protection and rejected their claims.

ISSUE

[15] The Applicants raise the following issue: Whether the Board erred in applying the test for state protection to the facts.

ANALYSIS

[16] The Applicants raise a number of issues that they state indicates that the decision is unreasonable.

[17] They submit that the decision was unreasonable because:

- a. the Board failed to engage in a contextual approach to assessing state protection;
- b. the documentary evidence before the Board supported the conclusion that effective state protection was not available to them;
- c. the Board mentioned only documentary evidence from 2004-2006 and failed to consider more recent evidence;
- d. the Board failed to explain why the relied upon evidence is preferred to contradictory evidence;
- e. the Board failed to consider the response of the police in Veracruz, which they state is indicative of the response that the claimants would have received in Mexico City;
and
- f. the Board failed to consider evidence that the police in Mexico cannot protect themselves, let alone ordinary citizens.

[18] The Respondent argues that the Board stated the test for state protection correctly, and that its application of the test was reasonable. The Respondent contends that the Board did consider and weigh all the evidence because it stated that it had “considered the entirety of the evidence....” The Respondent asserts that the Board’s reference to five specific pieces of documentary evidence further suggests a detailed and careful engagement with the evidentiary record, and characterizes the attack in this regard as an unjustified attempt to reweigh the evidence: *Zrig v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178.

[19] The Respondent argues that the Board’s reasoning was clear and transparent and that it adequately explained its reasons. The Respondent asserts that the Board’s analysis of the facts was reasonable and that it was logical to assume that the police in Mexico City would be more reactive and effective in addressing the Applicants’ complaint than the police in Veracruz, had the former been approached.

[20] The parties are in substantial agreement about the law regarding state protection, but disagree about whether it was applied properly in this case. Whether effective state protection is available is a question of mixed fact and law and as such is reviewable on a standard of reasonableness: *Zepeda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 at paras. 8-10.

[21] There is a presumption that all states are able and willing to provide effective protection to their citizens: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 725. This presumption is

consistent with and reinforces the notion of refugee protection as a surrogate system of protection: *Ward* at 726. The presumption creates an evidentiary burden that must be rebutted by an applicant adducing some clear and convincing evidence that is both relevant and reliable, and sufficient to convince the Board, on a balance of probabilities, that state protection is inadequate: *Carillo v. Canada (Minister of Citizenship and Immigration.)*, 2008 FCA 94.

[22] An applicant does not have to seek state protection where it is objectively reasonable to presume that state protection would not be forthcoming. “[O]nly 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” [Emphasis added]: *Ward* at 724.

[23] In *Ward*, at 724-725, Justice LaForest described two types of evidence that an applicant could provide to rebut the presumption of state protection: (1) evidence of the claimant’s actual attempts to seek state protection that resulted in no protection, and (2) evidence of similarly situated individuals who were unable to obtain state protection. He did not intend that these examples be exhaustive; however, they do reflect the most common types of evidence led by claimants.

[24] State protection cannot be determined in a vacuum. The willingness and ability of states to protect their citizens may be linked to the nature of the persecution in question. In short, context matters. The Applicants argue, citing *Garcia v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 79, that the Board failed to take a contextual approach to assessing whether effective state protection would have been reasonably forthcoming had they made subsequent efforts at seeking

protection. I agree that a contextual approach is required in assessing state protection, but I disagree that the Board failed to do so in this case. The Board acknowledged the nature of the persecution in question, and it is apparent that the Board assessed the availability of state protection on this basis. The Board concluded that there was no evidence to suggest on a balance of probabilities that had the police been approached in a more concerted manner that they “would refuse to investigate serious, non-domestic, sexual assaults”. In this passage, the Board displays its awareness of the context of the situation, that being serious, non-domestic, sexual assaults; this is what the Board was required to do, and it is not evidence of a reviewable error.

[25] Before turning to the one actual attempt the Applicants made to seek state protection, I turn to the evidence the Applicants submitted to the Board. In their Memorandum of Fact and Law they state the following concerning the evidence that was submitted:

Approximately one hundred pages of documentary evidence was filed with respect to the ability of the police force in Mexico to protect citizens from crime. In particular, the documentary evidence focused on the state’s ability to protect citizens from the threats of violence of narco-traffickers and the special problems faced by women who were the victims of sexual violence and/or domestic violence. The article and reports were all very recent, dating from May 2006 until November of 2008, a month prior to the hearing.

[26] I note that the Officer does state in his decision that he read and considered all of the evidence submitted, including that which the Applicants state was overlooked as it was not specifically referenced by the Officer.

[27] The documents submitted reflect the following topics: there is a failure to sufficiently recognize violence against women in the home, Mexican drug cartels are alleged to have caused the crash of an airplane carrying Mexican officials involved in prosecuting those in the drug trade, that some North American holiday seekers are avoiding Mexico because of its dangers relating to the drug trade, that state police have been ambushed and shot by persons believed to be connected to the drug trade, that the Chief of Police in Mexico resigned over allegations of corruption in the force, that severed heads were sent to the police located close to the US border, that school children in Tijuana were traumatized after seeing a site where a number of men had been murdered by drug cartel members, that there is a fear of kidnapping in Mexico, that police officers have been arrested for their connections to the drug cartels, that women arrested by police during a crack down on street vendors alleged that many had been raped by the police officers, and similar stories.

[28] While all of these stories, if true, are tragic, they do not reflect the personal circumstances of these Applicants. They do not provide evidence of similarly situated individuals who were unable to obtain state protection. Similarly situated individuals in this context are women who have been harassed and sexually assaulted by non-family members. In this case the assaults were conducted by persons who are alleged to be drug dealers. There is no evidence in the material that the Applicants submitted that drug dealers are immune from police investigation, despite their efforts to intimidate the police force. In fact, the evidence of the murder of police officers and officials suggests that the police are engaging with drug dealers; otherwise such action would be unnecessary. Further, the police in Veracruz, when approached by the Applicants, did not refuse to assist (even though the

Applicants question the level of assistance) despite the fact that the persons complained of were drug dealers.

[29] In short, there is nothing in the evidence submitted by the Applicants that would indicate that the Board's finding that "the police would refuse to investigate serious, non-domestic, sexual assaults" is unreasonable. Further, the record does not reveal that there was more recent evidence submitted that was contrary to that relied on by the Officer and which he ought to have considered, mentioned and distinguished.

[30] The second type of evidence suggested by Justice LaForest that could rebut the presumption of state protection is the claimants' actual attempts to seek state protection that resulted in no protection.

[31] In this case, that is the approach they made to the police in Veracruz. It is submitted that the police there failed to provide them with protection. However, this must be assessed in light of the complaint they made to the police. First, no copy of the denunciation was submitted to the Board. Second, the only document in evidence describes their complaint as the crime of "threats and anything resulting from them". Third, the police did investigate but took the complaint no further because "the requirements dictated in Section 16 of the General Constitution of the Republic were not met; in addition, the identity of the alleged defendants has not been established."

[32] It seems from the police report that the Applicants complained only of threats made to them by El Tigre – no complaint was made regarding the sexual assaults they had experienced. In fact, it is not at all certain what was reported to the police. Accordingly, it cannot be said that the complaint to the Veracruz authorities and their response constitutes clear and convincing evidence of an attempt to secure state protection that resulted in no protection.

[33] There is no question that the situation in Mexico is challenging, nor is there any question that the level of state protection is not what one would hope for; however, it has not been established that state protection is not reasonably available in these circumstances. The Applicants submit that the evidence of police deaths at the hands of the drug dealers shows that the police cannot protect themselves. It is then argued that if they cannot protect themselves, how can it be asserted that they can offer protection to the citizens they are to protect? I do not think that the second proposition flows from the first, even if the former is true. Criminals will often target those who wish to affect their criminal activity. It happens everywhere, including Canada, albeit with less regularity than in Mexico.

[34] I therefore find that the evidence before the Board did not support a conclusion that effective state protection was not available to the Applicants.

[35] This application is dismissed. Neither party proposed a question for certification. There is no certifiable question on these facts.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed; and
2. No question is certified.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

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