Federal Court  Cour fédérale

Date: 20091029

Docket: IMM-625-09

Citation: 2009 FC 1087

Ottawa, Ontario, this 29th day of October 2009

Before: The Honourable Mr. Justice Pinard

BETWEEN:

Jaime Enrique MAYA GONZALEZ
Maria Silvia GARCIA MENDOZA
Jaime Enrique MAYA GARCIA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by the applicants pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "Act") of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the "Board"), dated January 20, 2009, wherein Board Member Roslyn Ahara found that the applicants were not Convention refugees nor persons in need of protection. The Board denied the claim on the basis that

adequate state protection was available and that there was not a serious possibility that the applicants would face persecution upon removal to Mexico.

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[2] Jamie Enrique Maya Gonzalez (the "applicant") and his wife, Maria Silvia Garcia Mendoza (the "female applicant") are citizens of Mexico. The minor applicant, Jaime Enrique Maya Garcia is a dual citizen of the United States and Mexico. Hereinafter, I will refer to the family as "the applicants".

[3] The applicants are from the agricultural state of Tamaulipas where the applicant worked as an agricultural engineer for the Ministry of Agriculture, Cattle, Rural Development, Fishing and Food (*Secretaria de Agricultura, Ganareria, Desarroll Rural, Pesca y Alimentacion* – or SAGARPA). In May 2007, the government approved a budget of 200 million pesos for a program called *Allianza con el Campo* (Alliance with the Countryside). This was an aid program for poor rural farmers to help them buy machinery, gas, seeds and technical assistance. The male applicant worked with many farmers who were approved for funding through this program.

[4] Funds were not provided to the farmers. The applicant heard rumors that the money had been diverted to political officials and their friends. He first approached the head engineers where he worked and he was told it was none of his business. He was told that he had not worked there too long but soon he would share the benefits of keeping quiet about these things. The second person he approached was State Delegate (the Head of the Ministry), Luis Carlos Garcia Albarrá. At their

meeting he was again told not to get involved. Meanwhile, the farmers became frustrated that they had not received their money and organized demonstrations in front of the offices of SAGARPA.

[5] After these informal meetings inquiring into the missing funds, the applicant received threatening phone calls at home telling him to stop investigating. On July 20, 2007, his wife was assaulted at home and she was hospitalized as a result. When confronted, the male applicant's bosses did not deny their involvement in the assault and told him that this happened because he was playing investigator and fired him. He realized that he was suspected of leaking information to the rural communities about the embezzlement of funds. He again met with the State Delegate who informed him that the mayor was unhappy with him.

[6] With the assistance of a lawyer, the applicant submitted a complaint to the Public Ministry about the assault on his wife. He was instructed to ratify his complaint at a later date. Without ratification, no complaints are investigated. He returned three times and each time he was told his complaint was not on the list to be ratified yet. After he moved to Monterrey, a city eight hours away from Tamaulipas, his lawyer continued to follow up on the report.

[7] On September 26, 2007, the applicant was assaulted and abducted. He was told by his assailants that he should not have met with the State Delegate. He was beaten unconscious and left on the road. A passerby took him to the Red Cross. Again, he filed a report with the Public Ministry.

[8] The family moved again to Poza Rica, which is a city approximately twenty hours away. Around this time, the applicant's lawyer in Tamaulipas informed him that he too was receiving threats and no longer would work on the applicant's file.

[9] On December 16, 2007 the female applicant interrupted an attempted abduction of the minor applicant. They reported it to the Public Ministry who recorded it as an attempted kidnapping. The applicants came to Canada on December 31, 2007.

[10] The applicant's brother-in-law has informed the applicant that since his departure, there have been two incidents where people have come looking for him. On one occasion they identified themselves as working for the Ministry of Agriculture and assaulted the caretaker of the home.

[11] Both the male and female applicants testified at the Board's hearing. The Board member accepted their credibility. The minor applicant did not testify.

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[12] The Board determined that the applicant fears reprisals as a result of his filing complaints with the Public Ministry for misuse of Government funds. Furthermore, the agent of persecution would perceive the applicant's actions of denouncing the government as political opinion. The applicant satisfied the Board that his fear was based on an enumerated Convention ground (section 96 of the Act). The Board accepted the applicant's testimony as credible.

[13] The determinative issue in this hearing was state protection. The Board concluded that the applicant had not reasonably exhausted the avenues available to him. In support of its conclusion, the Board points to the evidence that the applicant failed to ratify the initial report he submitted to the Public Ministry regarding the assault on his wife in Tamaulipas. Further to this, the Board notes that he filed reports with the Public Ministry in two other states but did not follow up with either. Finally, the Board expressed the view that the applicant ought to have sought help from non-police and non-judiciary organizations, such as SIEDO ("Special Investigations into Organized Crime").

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[14] The applicants do not suggest an applicable standard of review but argue that the conclusions reached by the Board are unreasonable because of a deeply flawed analysis of state protection. The respondent argues that the Board's findings of fact of adequate state protection should be given much deference. The applicable standard of review is reasonableness (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190). The Board's conclusion regarding state protection is reviewable if it does not pass the justification, transparency and intelligibility requirement articulated by the Court in that case.

[15] In the impugned decision, the Board found that the normal protocol for denunciation was not followed and the initial complaint was never ratified. Consequently, an investigation never commenced. I agree with the applicant that this lack of response is evidence that this process of engaging the state for protection was not an effective avenue for him. Furthermore, having regard to the identity of the persecutor, this non-response is more likely than not evidence that the Public

Ministry did not proceed with the denunciation for political reasons. It is more likely than not that the state is unwilling to protect the applicant against itself. While the findings of fact suggest the Board did take a personal approach to the state protection analysis, the conclusion is nonetheless unreasonable because the Board failed to take into account the unique identity of the persecutor.

[16] If evidence of a timely and/or appropriate response by the police can indicate a willingness to protect (see *Soriano v. Minister of Citizenship and Immigration*, 2008 FC 952, and *Alvarez v. Minister of Citizenship and Immigration*, 2008 FC 933), it follows that an absence of police response tends to show an unwillingness to protect. This, coupled with the identity of the agent of persecution should have led the Board to conclude that the applicant was unlikely to expect state protection.

[17] I further agree with the applicants' argument that the Board was unreasonable to conclude that the applicant did not exhaust the avenues of state protection available to him. The Board included non-police and non-judiciary organizations, like SIEDO, as possible other avenues of protection that the applicant could have sought.

[18] Indeed, the context of a high level official orchestrating the persecution necessarily alters the analysis of relevant agencies and reasonable efforts by the applicant. At best, the Board surmised that the applicant was having an administrative problem ratifying his complaint and thus, he should have sought out help from agencies that assist people making complaints about corruption in the state. In this context it would be relevant that the Board take notice of agencies that the applicant did not approach. However, the applicants make a persuasive argument that the Board erred in failing to

consider the applicant's reasonable expectation of protection from the state against itself, specifically from high level political officials.

[19] The Board's finding that SIEDO was a relevant alternative to the police is not substantiated by the documentary record. The only case cited that suggests SEIDO is an appropriate agency for protection is *Gutierrez v. Minister of Citizenship and Immigration*, 2008 FC 971. But in that case the applicant was receiving threats from non-state agents in an attempt to coerce him into organized crime. In the present case, the evidence does not persuade me that the corruption the applicant was attempting to denounce was in any way connected to organized crime such that he should have approached this organization.

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[20] It is, therefore, apparent that the Board failed to properly engage in a personalized analysis of state protection and unreasonably required that the applicants should have approached other non-police agencies. In the circumstances this makes its decision reviewable.

[21] Consequently, the application for judicial review will be allowed and the matter sent back for reconsideration by a differently constituted panel of the Board.

JUDGMENT

The application for judicial review is allowed. The decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the "Board"), dated January 20, 2009, is set aside and the matter is sent back for redetermination by a differently constituted panel of the Board.

"Yvon Pinard"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-625-09
STYLE OF CAUSE:	Jaime Enrique MAYA GONZALEZ, Maria Silvia GARCIA MENDOZA, Jaime Enrique MAYA GARCIA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
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APPEARANCES:

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