

Federal Court



Cour fédérale

Date: 20100301

Docket: IMM-1351-09

Citation: 2010 FC 234

Ottawa, Ontario, March 1, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

LUIS FELIPE GONZALEZ TORRES

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant asks the Court to review and set aside a decision by the Refugee Protection Division of the Immigration and Refugee Board that found that he was neither a Convention refugee nor a person in need of protection within the meaning of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27. The determinative issues were whether the applicant had rebutted the presumption of state protection and the availability of an internal flight alternative (IFA).

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

BACKGROUND

[3] The applicant is a citizen of Mexico. Mr. Torres was the owner of three clothing stores in San Luis Potosi, the first of which he purchased in December 2002. Shortly after purchasing the first store, he met Robert Rios who became the principal supplier of merchandise to the stores. After purchasing his second store in April 2003, Mr. Torres made the decision to buy directly from suppliers in the U.S., rather than through Mr. Rios. He says that this angered Mr. Rios, and that Mr. Rios sent his bodyguards to harass and intimidate him.

[4] While doing business with Mr. Rios, he was introduced to Rafael Armendariz Blazquez, the father-in-law of Mr. Rios. Mr. Torres says that he was approached by Mr. Armendariz in November 2003 with a proposal to use his stores to launder drug money. Effectively, Mr. Armendariz offered him money to expand his business at a 5% interest rate, a rate he testified was two or three times below which he could obtain from a legitimate lender. Mr. Torres refused the proposal. Mr. Torres states that because of his refusal he was attacked on November 15, 2003, by bodyguards to Mr. Rios and Mr. Armendariz with pepper spray and a tire iron. The attack was so severe that he was knocked unconscious, suffered permanent damage to his vision, required surgery to reconstruct his shoulder, and was hospitalized for four days. He provided documents to support the injuries received.

[5] On November 16, 2003, agents with the Public Ministry visited him in the hospital to take his statement. Mr. Torres says that when he accused Mr. Rios and Mr. Armendariz of being responsible for the attack, the agents responded that his complaint would not go anywhere because of the powerful profile of his alleged assailants. Mr. Torres states that he was interviewed by the police upon his release from the hospital, and again told that his complaint would go nowhere.

[6] After the November 15, 2003 attack, Mr. Torres continued to be harassed by Mr. Rios and Mr. Armendariz. He alleges that on one occasion gun shots were fired into the house where he was living with his wife and child. Mr. Torres states that he did not see it happen and was not sure who did it, although he suspected it was agents of Mr. Armendariz, and consequently he did not report this incident to the police.

[7] On March 20, 2005, another attack took place. Mr. Torres states that he was driving with his wife and child when they were intercepted by Mr. Armendariz and two of his bodyguards. Mr. Torres states that shots were fired at his vehicle, which caused him to lose control and the vehicle to flip. As a result, Mr. Torres and his family were seriously injured, requiring hospitalization. Mr. Torres states that he again made a complaint to the Public Ministry but that the complaint went nowhere.

[8] Mr. Torres states that in August 2005 he and his wife separated because she could no longer endure the risk of being associated with him. He states that his wife and child relocated to La

Huasteca, some seven hours drive away. Mr. Torres states that he then closed two of his three stores, leaving open only the original store that he purchased.

[9] A fourth attack took place on January 2, 2007. Mr. Torres was leaving his store with his cousin when they were attacked by four bodyguards of Mr. Rios and Mr. Armendariz. He states that they were beaten with a baseball bat, causing fractures to his cousin's hand and feet, and knocking Mr. Torres unconscious. Mr. Torres states that while he was unconscious, the bodyguards threatened his cousin, stating that next time Mr. Torres would be killed if he did not comply with Mr. Armendariz's requests, and that if the two reported the incident to the police they would be killed.

[10] After leaving the hospital on January 5, 2007, Mr. Torres and his cousin made a complaint to the Public Ministry. Mr. Torres also made a complaint to the Federal PGR because the Public Ministry had not provided protection in the past. Seventeen days later Mr. Torres left Mexico for Canada.

[11] Mr. Torres states that after he left Mexico his cousin was killed in their home town at the direction of Mr. Armendariz because of his outspoken opposition to the latter's successful campaign to become President of the Mexican Association of Hotels and Motels.

[12] Mr. Torres also states that after he left Mexico his ex-wife was detained on a stolen vehicle charge and that he believes this charge was at the bequest of Mr. Armendariz.

[13] On February 20, 2009, the Board rejected Mr. Torres' claim. The Board concluded that there was no nexus between the incidents alleged and a Convention ground and found that there was no basis for a positive section 96 determination. That finding is not challenged. The Board then proceeded to analyze the basis for a section 97 determination.

[14] The Board reviewed the jurisprudence on state protection and then proceeded to apply that law to Mexico and the facts of this case. The Board noted that Mexico is a democracy with free and fair elections, and observed that Mexico is a signatory to the Refugee convention, suggesting it is committed to the protection of human rights. The Board noted that Mexico is not in a state of complete breakdown and that it has a functioning security force.

[15] The Board reviewed the options that Mexican citizens can pursue if faced with police corruption or inefficiency:

Mexicans who face police misconduct, inefficiency or corruption can ask The Secretariat of Public Administration (SFP), the Program Against Impunity, or the Office of the Attorney General (PGR) to investigate federal and state police failures or misconduct. Also offering redress to Mexicans from corrupt or complicit officials is the *Comision Nacional de los Derechos Humanos* (CNDH), otherwise known as National or State Human Rights Commissions, and the General Comptroller's Assistance Directorate. The CNDH can receive complaints, but its recommendations are nonbinding and carry no legal weight.

[16] The Board reviewed the steps the Mexican government has taken to prevent police corruption and ensure effectiveness such as "new recruiting procedures, drug testing, economic

incentives, education and certification of officers” and sanctions or prosecutions against corrupt or ineffective officers. The Board cited its own persuasive decision on Mexico for the proposition that there is not “a lack of action by the state authorities against corrupt government officials, including the police.”

[17] Commenting on the police response to the first attack on the applicant the Board stated:

It appears that the police took the matter seriously because of the number of times they followed up on the matter. The claimant states that the police kept trying to persuade him to not proceed with the matter. It is implausible that they would continue to do this unless there was a duty on them to proceed with the matter. The claimant stated that he had studied law in Mexico and he understood that the matter was still outstanding. He did not give any evidence that he took any further action to follow up on this matter.

[18] Commenting on the third attack the Board stated:

[The applicant] says his wife gave a statement to the state police while she was in hospital. He says the truck insurance company helped him to follow up on the matter. He states that he went back to the police on numerous occasions to ask them what was happening. He was told that they were investigating the matter and the claimant says that he believes the matter is still outstanding.

[19] Commenting on the last attack the Board stated:

He says that he reported the attack of January 5, 2007, on him and his cousin to the state authorities, as well as to the Federal PGR. This was the only time that he reported any of that matters to any another level of police. It is implausible that the police did not take any actions against these individuals. These were clearly criminal offenses. [emphasis added]

[20] The Board determined that the applicant's allegation regarding Mr. Armendariz's alleged role in the detention of his ex-wife was implausible. The Board also determined that the applicant had not provided sufficient evidence to support the conclusion that Mr. Armendariz was responsible for the murder of his cousin.

[21] The Board concluded:

It is accepted that Mexico has had some difficulties in the past with addressing criminality and corruption. ... While there are some inconsistencies among sources, the preponderance of the objective evidence regarding current country conditions suggests that, although not perfect, there is effective and adequate state protection in Mexico, that Mexico is making serious and genuine efforts to address the problem of criminality and police are both willing and able to protect such victims. Police corruption and inefficiencies, although existing and noted, are not generalized and they are being addressed. The claimant has not established that were he to return to Mexico today, protection would not be reasonably forthcoming or that it is objectively unreasonable for him to seek that protection.

[22] The Board determined that the applicant had not taken adequate steps to follow-up on the complaints that he had filed with police. The Board determined that the applicant left Mexico so soon after filing a complaint with federal authorities that it was not possible to conclude he would not have received protection at level. The Board said that the applicant had not provided evidence of similarly situated individuals let down by the police. The Board stated "It appears that the police have done their job in investigating the matters that have been reported to them." The Board concluded that "the claimant has failed to rebut the presumption of state protection with clear and convincing evidence."

[23] The Board then turned its attention to the availability of an IFA, concluding “that there is an IFA for the claimant in Mexico City or Guadalajara.” The Board reviewed the jurisprudence on IFAs and the test described by the Court of Appeal in *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (C.A.). The Board noted the geographical and population size of Mexico City and Guadalajara. The Board determined that state protection would be available in both cities. The Board stated:

There is no persuasive evidence that Almendarez or Rios or their associates would have the resources to find the claimant in Guadalajara or Mexico City. On a balance of probabilities, the fact that Armendarez is the president of the Hotel and Motel Association of Mexico, does not lead to a conclusion that he could easily find the claimant if the claimant moved to Mexico City or Guadalajara. There was no persuasive evidence as to how this position would allow Almendarez to find him.

The Board concluded that it would be reasonable for the applicant to avail himself of either IFA.

[24] Having determined that the applicant had not rebutted the presumption of state protection and that an IFA was available, the Board concluded that “the claimant would not be subjected personally to a risk to life or a risk of cruel and unusual treatment or punishment, if he were to return to Mexico” and that he was therefore not a person in need of protection within the meaning of section 97 of the Act.

ISSUES

[25] The applicant raises two related issues:

1. Whether the Board’s state protection finding is unreasonable; and
2. Whether the board’s IFA finding is unreasonable.

ANALYSIS

[26] The parties are in agreement that the proper standard of review is reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9. Accordingly, if the decision does not fall “within the range of possible, acceptable outcomes which are defensible in respect of the facts and law” it must be set aside.

[27] 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. The presumption thus creates an evidentiary burden that must be rebutted by an individual claiming refugee protection. Accordingly, a refugee claimant must adduce 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 F.C.A. 94.

[28] In most cases a person seeking protection must provide evidence that he sought state protection and it was not forthcoming; however, he is not required to seek state protection where it is objectively reasonable to presume that state protection would not be forthcoming. As the Court observed in *Ward*: “...[I]t would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state merely to demonstrate that ineffectiveness.”

[29] Justice Lemieux in a recent decision summarized the relevant legal principles relating to state protection as found in this Court's jurisprudence: *Mendoza v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 119 at para. 33. Two of those principles are very relevant to this case:

6) Where a tribunal determines the applicant has failed to take steps to seek protection this finding is only fatal to the claim if the tribunal also finds that protection would have been reasonably forthcoming. A determination of reasonably forthcoming requires that the tribunal examine the unique characteristics of power and influence of the alleged persecutor on the capability and willingness of the state to protect.

7) Similarly, where a non-state actor is alleged to have persecuted the claimant, the tribunal must examine the motivation of the persecuting agent and his ability to go after the applicant locally or throughout the country, which may raise the question of the existence of internal refuge and its reasonableness.

[citations omitted; emphasis in original]

[30] The applicant submits that the Board erred in its analysis of state protection and IFA in this case in that it ignored the evidence of the profile of the agent of persecution.

[31] He says that the Board's recognition in its decision of the profile of the applicant's agent of persecution is limited to the following:

- a. He proposed a money laundering scheme to the applicant;
- b. He was elected president of the Mexican Association of Hotels and Motels and in this position deals with state governors; and
- c. He has acquaintances in Mexico City and Guadalajara (the two proposed IFAs).

[32] The applicant submits that the following evidence of the profile of the agent of persecution was not mentioned by the Board, nor did it factor into its decision:

From the applicant's Personal Information Form

- a. He is believed to be involved in drug-trafficking, arms trafficking, and prostitution;
- b. He has “connections to powerful and important politicians and law-enforcement people in the city of San Luis Potosi” (where the incidents of persecution occurred) “and on a federal level, including the governor of the state” and the “former Director of the Judicial Police of the state” who, it is believed now occupies a high-ranking position in Mexico City, and he has contracts with the police in San Luis Potosi to use some of his cheaper hotels as detention centres;
- c. He has held positions in city and state entities; and
- d. He and his son-in-law have bodyguards who work as their “muscle” to keep people in line and they are “protected by law-enforcement authorities on all levels.”

From the applicant's testimony

- a. He has had political responsibilities at the state and municipal level;
- b. He has sponsored many political campaigns;
- c. One of his hotels is used as a detention centre to the judicial police;

- d. As National President of the Hotels and Motels Association he has a “relationship with powerful government and state personalities and each one of the police delegations or stations of the 31 States of the Mexican Republic;” and
- e. “He is connected to the police [and] is connected to the government.”

[33] This evidence was referred to by the applicant when he made his closing submissions to the Board. He submitted to the Board that the agent of persecution was a well-known and powerful man in Mexico with friends in high places, including in the police and government. Further, that he knew senior politicians and officials throughout Mexico, including in the two IFAs proposed.

[34] There was no finding made by the Board that the evidence of the applicant was not credible. The only part of his evidence that the Board did not accept was that his nephew had been ordered killed by the agent of persecution which the Board held was an embellishment by the applicant. There was no question that his nephew had been killed but the Board found that it was a random act of violence.

[35] In addition, there is also the following evidence from the applicant given at the Board’s hearing that was not referenced by the Board and which, I find is significant.

- a. “...[H]e mentioned money laundering and that I would be protected the same way he was through the authorities.” [emphasis added]
- b. “They [i.e. the police] were telling me to withdraw my complaints – to withdraw my complaints that it was for my own good.”

c. “I went to the PGR which that kind of police do not deal with cases like the one I was going through.” “They took my statement ... so I mentioned the three complaints that I had filed before about these people and I asked for a copy, and there was nothing there.” “They took my statement, but it was not followed.”

d. That the wife of the agent of persecution is a part of or works with the Human Rights Commission and so he could not complain there about his mistreatment.

[36] It is trite law that a tribunal need not refer to or mention every piece of evidence placed before it; however, the more significant that evidence is, the more likely it is that a failure to reference it will result in a finding that the decision was unreasonable: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 (T.D.). It is expected that significant evidence will be mentioned, analyzed, and considered, especially when it appears to be contrary to the finding of the tribunal.

[37] A contextual approach is required when assessing the availability of state protection and whether a claimant has rebutted the presumption of state protection: *Garcia v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 79; *L.A.O. v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1057. As I said in *L.A.O.* at para. 24: “State protection cannot be determined in a vacuum.” When undertaking a contextual approach in determining whether the refugee claimant has rebutted the presumption of state protection, many factors ought to be considered, including the following:

1. The nature of the human rights violation;
2. The profile of the alleged human rights abuser;
3. The efforts that the victim took to seek protection from authorities;
4. The response of the authorities to requests for their assistance; and
5. The available documentary evidence.

[38] The nature of the human rights violation is important in the state protection analysis because there are many countries that provide adequate state protection generally, but fail to do so for specific types of violations, for example, gender-based violence. Further, the frequency and severity of violations are important in determining both what steps a claimant is expected to take as well as what track record of protection the state was able to provide over a period of time. If all the alleged human rights violations happened within a short period of time, a state's protection apparatus may not have had time to effectively function. At the same time, when faced with a provable imminent risk to their life, claimants may not have to take the same efforts to rebut the presumption of state protection as when there is no imminent risk.

[39] The profile of the alleged human rights abuser is important due to the fact that, even in democratic countries, certain individuals can be above the law. The adequacy of state protection frequently depends on the characteristics of the abuser. If the abuser is in a position of power or has close ties to the police or other authorities, it may be very difficult, if not impossible, for a claimant to obtain protection.

[40] The efforts that the victim took to seek protection from authorities are crucial, because absent evidence of similarly situated individuals, the claimant's efforts to seek protection are all that can rebut the presumption of state protection, unless the agent of persecution is the state itself. The RPD must examine whether the claimant sought protection and from whom. The RPD must examine whether the claimant pursued any complaints that were made, either by following up with the authorities, or by taking their complaint to a higher authority. If the claimant did not seek protection or made only minimal efforts, then any reasons for this must be canvassed and evaluated. This will require, at a minimum, an analysis of the evidence of similarly situated individuals whose efforts in seeking such protection may explain and justify the efforts made by the claimant.

[41] The response that a claimant received from authorities is essential in determining the adequacy of protection that they received. While there is no requirement that the response be perfect, there is a requirement that the response provide adequate protection to the claimant. It is important to inquire whether authorities took the complaint seriously, and whether they undertook the steps that one would expect them to take given the nature of the human rights violation identified.

[42] Finally, all of the foregoing factors must be situated against the available documentary record. Such an exercise can inform the RPD whether the circumstances of the case are plausible within the context of a given country. The documentary record can inform whether such human rights violations are a regular event in a given country, whether the response of the authorities is in line with what normally happens, whether other avenues of protection exist that were not sought,

and whether the institutions present in a country are regularly able and willing to provide protection. The purpose of reviewing the documentary record is not to state unequivocally whether there is state protection in a given country. The purpose of reviewing the documentary record is to inform the analysis of the foregoing factors in order to determine whether the claimant has rebutted the presumption of state protection.

[43] In this case, the Board thoroughly reviewed the incidents of abuse that the applicant suffered. However, the Board provided only minimal discussion of the profile of the abusers. There was no substantive discussion of the applicant's allegations that Mr. Almendariz was involved with organized crime, or that he was politically connected, or that he had connections to the police. These issues are important in determining whether the Mexican authorities would be able and willing to provide protection, particularly in light of the documentary record that suggests powerful individuals in Mexico can commit crimes with impunity.

[44] The Board reviewed the efforts that the applicant took to seek protection from the authorities, but the Board's analysis of the response is wanting. The Board assumes that the authorities took the matter seriously because of the number of times that they interviewed the applicant. The evidence of the applicant was that once the authorities found out whom it was that he was accusing the follow-up visits were largely efforts to persuade him to drop his complaint. It is not reasonable to conclude that they took the complaint seriously from a police standpoint when the sole response was to attempt to persuade him to drop his complaint.

[45] The Board notes, but does not explain, why the authorities would dissuade the applicant from pursuing the complaints further. One would expect that effective police, when faced with the serious criminal acts evident in this case and the victim's identification of his attackers, would take steps beyond speaking to the victim. Such steps may have taken place. However, the fact that the same people attacked the applicant on three separate occasions over a period of three years strongly suggests that the police were either unable or unwilling to perform their role, and thus that the protection provided, to the extent that any protection was provided, was inadequate.

[46] The Board treats the police response to each attack in isolation rather than situating the response within the entirety of the violations experienced. In this case, over a three year period, the police were entirely unsuccessful in preventing further attacks by the same attackers against the applicant, even though the applicant had identified the attackers to the police in his initial complaint. The Board noted that it could not analyze the potential response of the federal authorities given that the applicant fled Mexico before they would have had a chance to respond (or not respond) to his complaint. While such a finding is open to a Board in many circumstances, after all the police in every country are burdened with work, it does not explain why, in this case, there had not been more immediate action. The context here is important as well. There had been three previous complaints filed and no action taken and the applicant was now coming to the federal authorities complaining of another vicious assault by the agent of persecution. He left Mexico 17 days later, because he feared for his life. If one accepts the history of attacks from the same source, the failure to date of any protection to be provided to him, and the vicious final assault and the threat of death the next

time, it would be objectively unreasonable to expect the applicant to wait longer for a response from the police, knowing that he might not live to see it.

[47] I find that the Board's conclusion that "it is implausible that the [federal] police did not take any actions against these individuals [as] these were clearly criminal offences" to be both unreasonable and naive. The record is replete with examples of well-connected persons being protected by or at least not investigated by the police at all levels in Mexico. In the face of the documentary record, this statement from the Board would be reasonable only if the profile of the agent of persecution was that of an ordinary citizen of Mexico. This statement, in my view, reinforces the conclusion that the Board failed to properly analyze state protection in the context of this case.

[48] The Board provided a reasonable, although perhaps one-sided, review of the documentary record. The Board noted the steps that the applicant could have taken to pursue the ineffectiveness of the police. The Board did not discuss whether protection from these additional mechanisms might reasonably have been forthcoming.

[49] A Human Rights Watch report, that the Board did not cite, on the National Human Rights Commission states:

The CNDH's principal objective is to ensure that the Mexican state remedies human rights abuses and reforms the laws, policies, and the practices that give rise to them. Given the pervasive and chronic failure of state institutions to do either, the CNDH is often the only meaningful recourse available to victims seeking redress for past abuses....

The report goes on to state that even the National Human Rights Commission has not been particularly effective. Another RPD document states: "...although there is a mechanism that allows citizens to register a complaint [against the police], it should not be assumed that a thorough investigation and adjudication occurs."

[50] It is not enough for the Board to simply cite alternative protective mechanisms available to the applicant without discussing in some detail the documentary evidence that suggests that these institutions are also ineffective. If the documentary evidence suggests that these alternative mechanisms are generally effective, the Board must then ask whether they might reasonably be effective in the particular circumstances of a given claimant. For example, in this case, there was evidence that the spouse of the agent of persecution was associated with the CNDH, making the likelihood of a meaningful response all the more unlikely.

[51] When all of these factors are considered together, I am of the view that the Board's conclusion on state protection was unreasonable. The applicant suffered from multiple serious attacks over a three-year period. He sought the protection of police on many occasions. The police spoke with the applicant often, but despite being provided with the identity of his attackers, they provided no protection. The applicant followed up with the police to ask what was going on. The police dissuaded the applicant from pursuing his complaint further, telling him that the complaint would go nowhere because of the identity of the attackers.

[52] The applicant sought protection from a higher authority on one occasion, and did not remain in the country long enough to rebut the potential protection that might have been provided from this entity. The Board failed to discuss whether the documentary evidence supported a finding that the higher authority might reasonably have been expected to provide adequate protection given the profile of the agent of persecution. In short, the Board failed to adequately discuss the profile of the applicant's attackers and whether this would have an influence on the availability of adequate protection.

[53] The Board also concludes that Mr. Almendariz would not have the national reach to follow the applicant to either of the proposed IFAs but provides no justification for this conclusion. As was discussed above, the applicant alleged that Mr. Almendariz had connections with organized crime and with powerful political figures, in addition to his role as the President of the Mexican Association of Hotels and Motels. The Board did not address these and did not, as has been said, examine the IFAs considering the profile of the agent of persecution. Its analysis of the availability of an IFA given the identity of the agent of persecution was unreasonable.

[54] For these reasons this decision is set aside.

[55] Neither party proposed a question for certification and in my view there is none.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed and the applicant's application is remitted back to a hearing by a differently constituted Board; and
2. No question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1351-09

STYLE OF CAUSE: LUIS FELIPE GONZALEZ TORRES v.
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 17, 2010

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

DATED: March 1, 2010

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