

Federal Court



Cour fédérale

Date: 20100621

Docket: IMM-3160-09

Citation: 2010 FC 670

Ottawa, Ontario, June 21, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

**AGUSTIN SAAVEDRA TALAVERA
MARIA ISABEL SANCHEZ GALVAN
HECTOR SAAVEDRA SANCHEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision dated May 5, 2009, by the Refugee Protection Division of the Immigration and Refugee Board (the Board), wherein the Board found the applicants were not Convention refugees or persons in need of protection pursuant to subsections 96 and 97(1) of the Act.

[2] The applicants did not appear at the judicial review hearing before this Court. The Court thus delayed the commencement of the hearing and the Registrar tried unsuccessfully to contact the applicants. The Court then proceeded to the judicial review hearing absent the applicants. At no time thereafter did the applicants present themselves to the Registry or the Court. Notwithstanding, the Court reviewed and took into account the applicants' submissions as set out in their memorandum of argument.

Factual Background

[3] The principal applicant, Agustin Saavedra Talavera (the applicant), his wife, Maria Isabel Sanchez Galvan and his nephew, Hector Saavedra Sanchez, are citizens of Mexico. The applicants claim refugee protection pursuant to sections 96 and 97 of the Act.

[4] The main applicant owned a bus company in Queretaro, Mexico. On July 7, 2005, the applicant fired one of his employees, Eduardo Aguillon, due to absenteeism. The applicant alleges that following this event, Mr. Aguillon began threatening to kill him and his family if he was not provided with severance pay meeting his expectations.

[5] The applicant also alleges that on July 21, 2005, he was confronted by Mr. Aguillon and some judicial police officers who told him that if he did not comply with his demands, they were going to meet up with him again.

[6] On August 15, 2005, the applicant received a lawsuit from Mr. Aguillon, which was to settle on June 30, 2006. According to the applicant, Mr. Aguillon refused the payment offered by him through his lawyer and left very angry.

[7] On July 10, 2005, the applicant's nephew was driving a bus owned by the applicant's company. He was allegedly intercepted by some members of the judicial police who ordered him to pull over. The applicant's nephew alleges that he was beaten up, that more threats were made against him and his family regarding the money they owed to Mr. Aguillon. He was also allegedly told that if he went to the police, he and his family would pay with their lives. None of the applicants reported the event to the police.

[8] The applicant's wife also alleges to have been threatened if they did not comply with Mr. Aguillon's demands.

[9] On July 15, 2006, the applicant was allegedly attacked by gun shot while he was driving his bus. He recognized one of the men shooting as Mr. Aguillon but he managed to flee unharmed. After this event, the applicant went to the police to file a report but alleges that nothing was done because Mr. Aguillon was well protected.

[10] On July 16, 2006, the applicant and his family moved to Michoacan for refuge. On July 23, 2006, the applicant alleges that they were located by men. The applicant believes that these men have ties with Mr. Aguillon because while they were driving, a car repeatedly tried to get them off

the road. On July 24, 2006, the applicant's wife allegedly was stopped and a knife was put to her throat. The individual told her that Mr. Aguillon was still waiting for his settlement.

[11] Following his daughter's advice, the applicant decided it would be safer to leave the country. The applicant and his family arrived in Canada on August 22, 2008 and applied for protection on September 18, 2008. The applicant claims that, if he and his family were to return to Mexico, there would be a risk for their lives and a risk of cruel and unusual treatment.

[12] On March 24, 2009, the Board decided that the applicant was not a Convention refugee or a person in need of protection.

Impugned Decision

[13] Based on the totality of the evidence adduced, the Board found that the applicants were not Convention refugees because they did not establish a well-founded fear of persecution. The Board also found that the applicants were not persons in need of protection and that returning to Mexico City would not subject them to a risk to their lives or to a risk of cruel and unusual treatment.

[14] The Board concluded that the applicant was a victim of a personal vendetta and a victim of crime which does not provide a link between their fear of persecution and one of the five Convention grounds.

[15] In addition, the Board found that adequate state protection exists in Mexico because it is a developing and functioning democracy. The Board found the applicants did not meet the burden of establishing “clear and convincing” proof of a lack of state protection for people in his situation in Mexico.

[16] The Board noted that the applicant’s testimony was not credible because the applicant failed to provide any substantive documents to strengthen his claim. The applicant also failed to provide the Board with evidence pertaining to his ownership of the bus, the event where his wife had a knife to her throat and the gun shot attack which the applicant alleges are pictures that were taken by the insurance company.

Issue

[17] This application raises the following issue: Did the Board err in finding the applicants were not Convention refugees or persons in need of protection because they have not reversed the presumption of state protection in Mexico?

[18] For the following reasons, the application for judicial review will be dismissed.

Statutory provisions

[19] The following provisions of the Act are applicable in these proceedings:

Convention refugee

96. A Convention refugee is a person who, by reason of a

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié

well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

— la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le

cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Standard of Review

[20] Since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Board's

conclusions on state protection are subject to review under the reasonableness standard (*Hinzman v.*

Canada (Minister of Citizenship and Immigration), 2007 FCA 171, [2007] F.C.J. No. 584 at para. 38; *Huerta v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 586, [2008] F.C.J. No. 737 at para. 14; *Chagoya v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 721, [2008] F.C.J. No. 908 (QL) at para. 3; *Dunsmuir* at paras. 55, 57, 62 and 64). According to the Supreme Court, the factors to be considered are justification, transparency and intelligibility within the decision-making process. The outcome must be defensible in respect of the facts and the law (*Dunsmuir* at para. 47).

[21] Reasonableness is also the appropriate standard when reviewing the Board's consideration and treatment of evidence. See *Y.Z. v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 749, [2009] F.C.J. No. 904 at para. 22.

Analysis

[22] This case turns around credibility, state protection and internal flight alternative.

[23] The RPD determined that the applicant's evidence was neither credible nor trustworthy.

[24] This Court notes that the Board is in the best position to assess the explanations provided by the applicant with respect to the perceived inconsistencies. It is not up to this Court to substitute its judgment for the findings of fact drawn by the Board concerning the applicant's credibility (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 181, [2006] F.C.J. No. 228 at para. 36;

Mavi v. Canada (Minister of Citizenship and Immigration), [2001] F.C.J. No. 1, 104 A.C.W.S. (3d) 925 (QL)).

[25] In this case, the Board's findings were not unreasonable given the multiple discrepancies in the applicant's testimony and evidence. The applicant was unable to provide adequate answers to several questions from the Board, including why the applicant could not provide any pictures of the bus although he had made an insurance claim and stated that pictures were taken; no evidence about the settlement agreement with Mr. Aguillon was provided; no evidence was provided supporting the allegation that Mr. Aguillon and his family had influential connections to the federal police. Moreover, this Court finds that the applicant's decision to return from Michoacan to Queretaro - the place where the alleged incidents occurred - is inconsistent with someone having a subjective fear of persecution.

[26] This Court therefore finds that the applicant failed to substantiate his testimony with pertinent documents and could not corroborate their refugee claim with credible and trustworthy evidence (*Osman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 921, [2008] F.C.J. No. 1134 at para. 39). As such, the Board's finding can be considered rational and acceptable with regard to the evidence submitted (*Dunsmuir*, above at paragraph 47).

[27] The applicant, as submitted in writing in the memorandum of argument, alleges that the Board erred in its assessment of state protection and internal flight alternative. According to the applicant, the Board failed to consider Mexico's real capacity to protect its citizens and simply

noted the government's statements of its good intentions to improve the situation (*Mitchell v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 133, [2006] F.C.J. No. 185).

[28] The respondent alleges that the Board's decision is supported by the documentary evidence. The onus is on the applicant to rebut the presumption of state protection (*Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 134, [2008] F.C.J. No. 182). In order to rebut this presumption, a claimant must adduce relevant, reliable and convincing evidence which satisfies on a balance of probabilities that the state protection is inadequate (*Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] F.C.J. No. 399).

[29] From the outset, there is a presumption that a state is capable of protecting its citizens and the applicant may rebut this presumption by providing "clear and convincing proof of lack of state protection" in the country of origin. The applicant must first approach their state for protection, providing state protection might be reasonably forthcoming (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 153 N.R. 321). Evidence that protection being offered is "adequate though not necessarily perfect" (*Zalzali v. Canada (Minister of Employment and Immigration) (C.A.)*, [1991] 3 F.C. 605, [1991] F.C.J. No. 341) is not clear and convincing proof of the state's inability to protect its citizens, as no government can guarantee the protection of all its citizens at all times.

[30] In the case at bar, the RPD outlined that there is a well-defined process to be followed in reporting a crime. While acknowledging that crime and corruption persist in Mexico, the RPD also stated that the government is taking steps to address the issue. The RPD supported its analysis of

state protection with documentary evidence (Applicant's record at pp. 13-14) and outlined the efforts made by the federal law enforcement agencies in the current context e.g. the Citizens' Information and the Services Network (SIAC) and the Citizens' Information and Services Centre (CIAC). The documentary evidence also indicates that results flowing from the government initiatives are being achieved (Tribunal's record at pp. 140, 266 and 267).

[31] The applicant also submits that he sought protection from the police but his efforts were unsuccessful. This Court finds that in a democracy like the one in Mexico, the applicant has failed to demonstrate that all the courses open to him were exhausted. The inaction of the police officer is not enough in the present case to discharge the applicant from his burden of proof. In the decision *Arenas v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 458, [2006] F.C.J. No. 567, at para. 9, the Court refers to the observations made by Justice Dawson in *De Baez v. Canada (Minister of Citizenship and Immigration)*, (2003) 236 F.T.R. 148, 2003 FCT 785 at para. 16:

Thus, the actions of some police officers does not obviate the need to seek protection from the authorities. Discrimination by some police officers is not sufficient proof of the state's unwillingness to provide, or inability on the part of the applicants, to seek protection.

[32] In *Kadenko v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1376, 206 N.R. 272, the Federal Court of Appeal noted that one cannot automatically conclude that a democratic state is unable to protect one of its citizens because a local police officer refused to intervene. The applicant has not sought diligently to obtain protection from his country before coming to Canada. Therefore, the applicants have not provided clear and convincing evidence to

rebut the presumption that the state of Mexico was able to protect them (*Canada (Minister of Employment and Immigration) v. Villafranca* (F.C.A.), [1992] F.C.J. No. 1189, 150 N.R. 232).

[33] With respect to the internal flight alternative issue, the RPD considered Mexico City and found that it would be viable for the applicants. When asked by the RPD “why not Mexico”? the applicant answered: “I don’t know” (Tribunal’s record at pp.346-348).

[34] In any event, the applicant failed to provide evidence that his safety may be compromised and how Mexico City could not be a viable IFA for the applicant and his family (*Whenu v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1041, [2003] F.C.J. No. 1310; *Kumar v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 601, [2004] F.C.J. No. 731). Upon reviewing the evidence, this Court is of the view that the applicant has failed to meet his burden of proof that persecution will occur in the entire country and specifically in Mexico City (*Rasaratnam v. Canada (Minister of Employment and Immigration)* (C.A.), [1992] 1 F.C. 706; *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* (C.A.), [1994] 1 F.C. 589); *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 2118, 266 N.R. 380).

[35] This Court finds that the Board’s decision is reasonable. The Board conducted a full assessment of the evidence, including the applicant’s testimony and the totality of the documentary evidence on file. This decision was reasonable in the circumstances and this Court’s intervention is not justified. Therefore, this judicial review application will be dismissed. No question was proposed for certification and there is none in this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review be dismissed. No question is certified.

“Richard Boivin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3160-09

STYLE OF CAUSE: AGUSTIN SAAVEDRA TALAVERA et al v. MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 8, 2010

REASONS FOR JUDGMENT: BOIVIN J.

DATED: June 21, 2010

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