Federal Court		Cour fédérale

Date: 20110303

Docket: IMM-1021-10

Citation: 2011 FC 258

Ottawa, Ontario, March 3, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JULIAN JAVIER ARTEAGA SANCHEZ
IRMA GARCIA REYES
HARU AYLANI ARTEAGA GARCIA

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 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated January 28, 2010, wherein the Board determined that the applicants were not Convention refugees or persons in need of protection.

[2] The applicants request an order setting aside the decision of the Board and remitting the matter back for reconsideration by a different Board member.

Background

[3] The applicants are Julian Javier Arteaga Sanchez (the principal applicant), Irma Garcia Reyes (his wife) and Haru Aylani Arteaga Garcia (their daughter). They are all citizens of Mexico seeking refugee protection in Canada.

[4] According to the Board decision, the facts are as follows. The principal applicant fears a distant cousin named Mr. Hernandez, who began to regularly ask the principal applicant for money in 2007. The principal applicant tried to stop giving his cousin money when he learned that it was used to purchase illegal drugs. However, the cousin then used his gang to force the principal applicant to pay extortion money.

[5] On July 18, 2008, the principal applicant's aunt was abducted by three individuals who stole her property, insulted her and beat her. According to the principal applicant, one of the perpetrators was the girlfriend of the cousin that he fears.

[6] On August 29, 2008, the principal applicant's wife, who had received death threats over the phone, came to his place of work where some individuals yelled threats at them. They were able to escape and subsequently filed a denunciation with the police.

[7] On September 30, 2008, the principal applicant was abducted into a car by three armed men allegedly under the influence of drugs. He was hit, threatened with death and robbed of clothes, jewellery, money, his debit card and cell phone. He was warned against reporting the incident to the authorities. He was injured, requiring medication and two doctor's visits. He filed a denunciation with the police on October 1, 2008.

[8] The principal applicant's wife received another death threat by telephone two days before they left. The applicants arrived in Canada on October 24, 2008 and filed refugee claims on November 18, 2008.

Board's Decision

[9] The Board rejected their refugee claims because there was no nexus with a Convention refugee ground, because the presumption of state protection had not been rebutted and because the applicants should have availed themselves of their available internal flight alternative (IFA).

Nexus with Convention Refugee Grounds

[10] Since the applicants fear a cousin, they argue that as members of a particular social group, a family, they have a nexus qualifying them for Convention refugee status. The Board rejected this argument, stating that victims of crime (like the applicants) do not constitute a particular social group and that the difficulties of family members of those persecuted for non-Convention reasons –

if those difficulties occur solely by reason of their connection with the principal target – are not covered by the Convention. The Board cited case law to support this.

State Protection and Credibility

[11] Next, the Board set out the law on state protection, then identified credibility issues undermining the applicants' claims to have sought police assistance.

[12] The Board acknowledged that the applicants claimed to have gone to the police and filed denunciations on two occasions. However, the Board had concerns about the veracity of the denunciations: though the documents bear an original stamp, they appear to be photocopies and are not signed by the Public Ministry. Further, the perpetrator was not identified in either denunciation and information was missing in both the principal applicant's and his wife's denunciations.

[13] In addition, the principal applicant says that he had problems with his cousin since 2005, whereas his Personal Information Form (PIF) describes them as beginning in 2007. Further, he did not seek help until much later, in August 2008, allegedly because he had no proof of the extortion. Even when he did go to the police, he failed to identify the supposed perpetrator, allegedly because of his mistrust of the authorities. As such, based on the scant information given by the principal applicant, the authorities would have had no information on which to base an investigation, observed the Board.

[14] Furthermore, the Board noted that the principal applicant believed that his perpetrators were the same individuals who targeted his aunt. However, he claims to have only learned this after arriving in Canada, although this incident occurred before he and his wife were targeted in Mexico.

[15] Finally, even if the denunciations are authentic, they were filed just prior to the applicants' departure, giving the authorities insufficient time to initiate any action.

[16] The Board concluded that these credibility concerns raise doubt as to whether the applicants truly sought state protection. Even if they did, they did so only after over a year of alleged extortion and shortly before their departure to Canada.

Internal Flight Alternative (IFA)

[17] The Board began this section with several paragraphs setting out the two-pronged legal test on IFAs. Then, the Board stated that the applicants had an obligation to at least try to find a safe haven in Mexico before fleeing and unless it were patently unreasonable for them to do so, their failure to at least try would be fatal to their claims. The Board found that a viable IFA existed for the applicants in Guadalajara, but that they had never sought to relocate and had thus failed to fulfill their obligation to do so.

[18] The principal applicant says that he did not relocate domestically because he could be located by his aggressor anywhere in Mexico, either through the cousin's connections in the drug world or through his social insurance number. The Board rejected these concerns because of

documentary evidence showing that aggressors are more likely to contact family members to locate their prey than to use identifiers such as social insurance numbers or voting cards. In this case, the only persons aware of the applicants' location were the husband's parents, who know that he did not want his whereabouts divulged, so ostensibly the applicants should not have feared being located.

[19] The Board then discussed the availability of state protection in Mexico, which she apparently deemed sufficient. The Board explained that Mexico is a functioning democracy to which the presumption of state protection applies. She found that civilian authorities promote human rights and generally maintain effective control of security forces. The Board considered Professor Hellman's report (which the applicants submitted to support the claim that adequate state protection was not available), but rejected its findings because it contained "blanket statements" rather than "statistics". The Board went on in some detail to describe Mexico's functioning police system and the resources available for victims of crime.

[20] Further, the Board found that it would not be unduly harsh to require the applicants to seek refuge in another part of the country. They are a young family who was sufficiently adaptable to move to Canada, so moving to Guadalajara would be feasible for them. While there are problems of crime everywhere in Mexico, this issue is faced by all Mexicans, but does not make them all eligible for refugee protection, said the Board.

Issues

[21] The issues are as follows:

1. What is the appropriate standard of review?

2. Did the Board commit a reviewable error with respect to its findings on state protection?

3. Did Board commit a reviewable error with respect to its application of the legal test for an IFA?

4. Did the Board fail to provide adequate reasons for rejecting the Hellman report?

5. Did the applicants receive a fair hearing on the merits of their claim?

Applicants' Written Submissions

[22] The Board member began her IFA discussion by correctly setting out the two-pronged test from *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.), which requires an assessment of a) whether a safe location is available in the home country and b) whether it would be reasonable in the circumstances to require the applicants to go to this location.

[23] The applicants claim that the Board then went on to erroneously apply a third prong of the test, by stating that they had an obligation to seek safety in Mexico before fleeing to Canada and that their failure to do so was fatal to their claims (paragraphs 26 and 38). The applicants submit that these two paragraphs are a verbatim reproduction of the Board's reasons in an earlier decision, which was set aside by the Federal Court in *Estrada Lugo v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 170.

[24] In paragraphs 34 through 40, of *Estrada Lugo* above, I found that requiring the applicants to move to a potential IFA location before leaving Mexico was an error in law that justified setting aside the decision. Although the Board had correctly applied the first two prongs of the test, the findings on the third prong appeared to be an important factor in the decision, so it was impossible to know what would have been decided had only the correct test been applied. The applicants argue that the decision presently under review constitutes an analogous situation in that the same error was made and that this decision should be likewise be set aside.

[25] The Board's treatment of the report by Professor Hellman (the Hellman report) was also the subject of a previous judicial review. In *Villicana v. Canada (Minister of Citizenship and Immigration)* 2009 FC 1205 at paragraphs 72 to 77, Mr. Justice James Russell analyzed the report and Hellman's credentials at some length, finding that "Professor Hellman's work is authoritative and her conclusions are startling," and quoted the following passage, among others:

> . . . Mexicans have no recourse to the police for protection from wrongdoers as we do in Canada. It basically makes no sense to call on the police to rescue oneself from harm. On the contrary it would create greater risk for oneself in the situation.

[26] Mr. Justice Russell stated that while the Board did not have to accept the conclusions of the Hellman report, it was at least obligated to review it and explain why it could be discounted in favour of other reports.

[27] The applicants argue that the Board did not meet this obligation in the present case, where the Board discounted the Hellman report simply because it was "dated three years ago" and "refers to dated reports". She also said that it included "blanket statements" rather than "statistics on which

the Board can assess the merits" (see paragraph 34 of the Board's reasons). The applicants argue that these reasons for rejecting the report are neither reasonable nor logical.

[28] The applicants point out that the documentary evidence favoured by the Board is in fact equally or more dated than the Hellman Report and cites examples. Furthermore, they note that there is no evidence of an improvement in Mexico's security situation since the Hellman report was written. The applicants also remind the Court that only two months before the delivery of the Board's decision, Mr. Justice Russell, in *Villicana* above, considered the report to be authoritative and presumably, up to date.

[29] The Board's second reason for rejecting the Hellman report is its lack of statistics supporting the statement that "Mexicans are less able than ever to gain protection from the police". The applicants submit that this justification is unreasonable, since the Board's decision contains no indication that it was statistics in the documents that she preferred to the Hellman report that led her to consider the documents useful.

[30] Finally, the applicants submit that the report was rejected simply because the Board was predisposed to find that state protection was available. The applicants claim that the Board's reasons for rejecting the report betray a lack of attention to detail that is inconsistent with the gravity of the matter at hand.

[31] According to the applicants, the transcript of the first day of the hearing reinforces the impression that the Board failed to appreciate the gravity of the case before her. The transcript

reveals that while the applicants testified only for one hour and thirty-five minutes, the Board expressed irritation at the length of the hearing. She complained that he was “going on and on”, told the participants to conclude as quickly as possibly because she “was not going to go without lunch”, showed reluctance to accept written submissions because of the work entailed and emphasized that any rescheduled hearing had to finish on the rescheduled afternoon.

[32] As such, the applicants submit that their case was not properly heard by the Board and that justice does not appear to be done, given the “short shrift” accorded to the applicants’ testimony and evidence.

Respondent’s Written Submissions

[33] The respondent submits that contrary to the applicants’ assertions, the hearing was fair, noting that the applicants were represented by counsel at the hearing. The applicants did not raise the issue of unfairness or bias or reasonable apprehension of bias during the hearing. Thus, they waived their right to complain of unfairness at the judicial review stage.

[34] The respondent submits that the applicants have not shown that the hearing was unfair. The Board conducted a thorough analysis and was reasonable with respect to accepting written submissions. The transcript shows that the applicants were given ample time to present their case.

[35] The respondent notes that where the standard of review is reasonableness, the Court should not intervene with respect to reasonable decisions on IFA or state protection, which fall into the

Board's area of expertise (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). The Board's findings on these issues fell into the range of reasonable outcomes, as is evidenced by her reasons.

[36] The respondent submits that it was reasonable for the Board to conclude that the applicants had not rebutted the presumption of state protection. The denunciation documents were questionable, the applicants failed to give the authorities sufficient time or information to investigate and they failed to complain at all during the first year of the extortion.

[37] International refugee protection is available only where domestic state protection does not exist (see *Ward v. Canada (Minister of Employment and Immigration)*, [1993] 2 S.C.R. 689 at page 709). To receive refugee status, the applicants must show that they are unwilling or unable to avail themselves of domestic state protection. In order to rebut the presumption of state protection, it is insufficient for the applicants to merely show that Mexico has not always been effective at protecting its citizens (see *Canada v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.) at paragraph 7). The applicants' assertion that they avoided approaching the state because they did not trust the police, does not qualify them for Convention refugee status where it would have been objectively reasonable for them to have sought that protection (see *Canada (Minister of Citizenship and Immigration) v. Flores Carrillo*, 2008 FCA 94).

[38] The respondent reiterates that the Board's finding was compatible with IFA law. In order to be successful in seeking refugee status in Canada, a refugee applicant should demonstrate that there was no avenue of redress in his home country. As such, if an IFA is available, an applicant should

first avail himself of that option before seeking refugee status elsewhere (see *Ward* above). The Court must take a holistic look at the entire decision, which reveals that the Board reviewed the evidence and concluded that because the applicants had an IFA, their refugee claim should be dismissed.

[39] Furthermore, even if it is accepted that the Board did make an error in using the word obligation, it would nevertheless be futile to send the decision back for redetermination because there still exists a viable IFA in Mexico. Moreover, state protection is also available. Thus, reconsideration of the matter would result in the same finding, which justifies not setting the decision aside (see *Cartier* v. *Canada (Attorney General)*, [2003] 2 F.C. 317 at paragraph 31 (C.A.), citing *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at 228).

[40] In its analysis, the Board referred to documentary evidence which supported its finding that the Mexican criminal justice system is functional. Contrary to the applicants' arguments, the Board did consider the contents of the Hellman report, but decided to give it little weight, giving reasons for this decision.

[41] The Board is entitled to prefer other documentary evidence over the evidence offered by the applicants. Just because the Board disagrees with some of the evidence does not mean that all of the evidence has not been weighed.

Analysis and Decision

[42] **Issue 1**

What is the appropriate standard of review?

The applicants raise issues concerning the assessment of evidence, the application of the tests for IFA and state protection. These determinations are questions of fact and mixed fact and law which fall into the Board's area of expertise and are thus reviewable on a standard of reasonableness (see *Dunsmuir* above).

[43] However, this presupposes that the Board has correctly set out the test for the IFA, which is a question of law. The Board is not entitled to deference if it fails to correctly articulate the test (see *Estrada Lugo* above, at paragraphs 30 and 31; *Gonzalez* v. *Canada (Minister of Citizenship and Immigration)* 2010 FC 691 at paragraph 7).

[44] As for the issue of procedural fairness, the appropriate standard is correctness (see *Dunsmuir* above).

[45] **Issue 2**

Did the Board commit a reviewable error with respect to its findings on state protection?

It is important to note that the applicants did approach the police several times. However, the Board made a negative credibility finding about these police visits on the basis of what she deemed to be the questionable nature of the police denunciations filed and on the principal

applicant's confusion about the timing of his aunt's kidnapping. The credibility finding is problematic and I believe it merits the Court's intervention on the state protection issue.

[46] The Board was concerned with denunciation documents but it was noted later had the Board member analyzed the Hellman report in more detail, she might have reached a different conclusion on the veracity of the denunciation documents.

[47] The Board's final justification for the negative credibility finding was that the principal applicant claims to have learned the identity of his kidnapper only after he arrived in Canada, when he learned that his aunt had been kidnapped by the same group of perpetrators. Apparently, the Board finds this is implausible and the claim thus undermines his credibility. To my mind, the timing of when he learned about his aunt's kidnapping (and his credibility on that issue) is not relevant in accessing the credibility of his claim that he went to the police. If anything, his having learned the identity of his kidnapper later, rather than earlier, would explain his failure to identify the kidnapper in the police denunciation, which is something else the Board reproaches him for. In short, it seems to me that the reasons behind the Board's credibility findings are irrelevant or inconclusive.

[48] It may be true that the applicants could have visited the police earlier and could have been more forthcoming when they did so. However, if the Board had accepted the Hellman report showing that police protection was not in reality objectively available for Mexicans, then the applicants' failure to seek police help more aggressively might cease to be determinative of their claim. For more on this issue and the Board's potential errors in rejecting the Hellman

report, refer to Issue 4. At this point, I would like to add my findings in relation to the Hellman report which are the subject of Issue 4.

[49] The Board stated that the Hellman report is ". . . dated three years ago and contains attachments from 2005 and refers to dated reports."

[50] The applicants are correct in saying that the Board relies on evidence that is just as dated as the Hellman report. For example, the IRB *Issue Paper* to which the Board refers repeatedly (page 153 and following of the record) was published in 2007. Furthermore, it is also true that no evidence suggests that the security situation in Mexico has improved in the last three years.

[51] While some of the reports which the Board favours over the Hellman report, such as the U.S. Department of State's *Country Reports on Human Rights Practices for 2008* (page 188 and following of the record) do contain more references to numbers and statistics than does the Hellman report, I am not convinced that the Hellman report's more qualitative nature is a reasonable justification for setting it aside.

[52] I too find her reasons for rejecting the report to be unreasonable and agree that they may suggest she was simply predisposed to find that state protection was available, despite the findings of the report. However, I would not agree that the transcript suggests that she was unaware of the gravity of the matter at hand.

[53] As a result, I am of the opinion that the Board's decision with respect to state protection was unreasonable.

[54] **Issue 3**

Did the Board commit a reviewable error with respect to its application of the legal test for an IFA?

According to the applicants, the Board erred by adding a third prong to the proper two-prong IFA test by placing an onus on the applicants to actively seek out an IFA before fleeing. The applicants claim that an identical error was the basis for my decision setting aside a previous Board decision in *Estrada Lugo* above.

[55] My reading of the cases cited by the respondent is consistent with my description of the law in *Estrada Lugo* above. A refugee claimant bears the burden of showing that he or she is unable to return to the country of residence. Contrary to the respondent's suggestions, however, this rule does not impose a positive obligation on the applicants to have actually attempted to go to such an IFA location before leaving their country as did the Board.

[56] I agree with the applicants that the Board committed the same error in law in this case that it did in *Estrada Lugo* above. Factually, on the issue of IFA, the present case and *Estrada Lugo* above, appear analogous. The respective applicants feared a family member and resisted relocating within Mexico because they believed that they would be located there by their respective perpetrators. As for the reasons in the respective decisions, much of the Board's findings in this case are a verbatim reproduction of the reasons set aside in *Estrada Lugo* above. It appears to me that by imposing a

positive obligation upon the applicants to seek an IFA, the Board here has relied on the same faulty understanding of the law that the Court rejected in *Estrada Lugo* above.

[57] The respondent submits that even if the Board did err in using the word obligation, it would be futile to send the decision back for redetermination because a viable IFA in Mexico nevertheless exists. In paragraph 38 of *Estrada Lugo* above decision, I rejected an identical argument made by the respondent in that case. I noted that because the applicants' failure to meet the obligation to seek the IFA was an important factor in the Board's decision, it was impossible to know how the case would have been decided had that factor not been (erroneously) considered.

[58] It is worth noting that the respondent's submissions on this issue appear to be the same as their arguments in *Estrada Lugo* above, as illustrated by a comparison of the "No error in alternative finding of IFA in Guadalajara" section of the respondent's further memorandum and paragraphs 25 to 27 of the *Estrada Lugo* above, Federal Court decision. Given the similar facts and nearly identical impugned decisions, the respondent's reasoning, which was rejected in *Estrada Lugo* above, should also be rejected here.

[59] At the hearing, the applicants' counsel indicated that she was not relying on the argument contained in Issue 5.

[60] The application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

[61] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[62] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — 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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	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) 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.	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.
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	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

former habitual residence, would subject them personally	nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	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) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	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 themself 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.

FEDERAL COURT

SOLICITORS OF RECORD

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