Federal Court  Cour fédérale

Date: 20110330

Docket: IMM-3094-10

Citation: 2011 FC 389

Ottawa, Ontario, March 30, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

FRANCISCO MARINO GONZALEZ

Applicant

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 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 28 April 2010 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant was formerly a high-ranking financial administrator of the Airports and Auxiliary Services (ASA) in Tamaulipas, Mexico. The ASA is an agency within the Mexican federal government whose board of directors is composed of federal ministers, including the Minister of the Interior. The Applicant began working with the ASA in 1976.

[3] The Applicant claims that the ASA and union officials were engaged in corrupt activity, that he has over 20 years of valuable information regarding corruption within the ASA and the union, and that he was urged to engage in corrupt activity but refused. The ASA and the union retaliated by instigating the Applicant's dismissal from his position in April 2007. When the Applicant approached the head of the union in May 2007, he was told that his job had been given to someone corruptible but that the Applicant could buy it back for 200,000 pesos. The Applicant was deprived of his employment records and his pension benefits.

[4] In June 2007, the Applicant reported the corrupt activity of the ASA and the union to Sacatel, the government complaints hotline. He also gave an interview to the television media, but it was never aired. Later in June 2007, the Applicant met with the union leader, who appeared to know about his complaint to Sacatel. The union leader threatened and assaulted him. The Applicant submitted into evidence a medical report, detailing injuries to his legs and thorax. He also claims that he began to receive threatening phone calls. In July 2007, the Applicant attended the Public Ministry, where he filed his first criminal denunciation against the union leader who had assaulted him.

[5] In July 2007, fearing for his safety, the Applicant availed himself of a friend's assistance and went into hiding in the city of San Luis Potosi. In August 2007, the Interior Police located him in San Luis Potosi, at which time they beat and threatened the friend who had helped him. The Applicant filed a second denunciation in August 2007 in San Luis Potosi. He claims that his family has been continually harassed and that, at times, it has been unsafe for his son to attend school.

[6] The Applicant fled to Canada from Mexico City on 9 October 2007 and, on or about that same day, filed a claim for refugee status based on a well-founded fear of persecution due to his political opinion.

[7] The Applicant appeared before the RPD on separate hearing days which were months apart. He was represented by counsel and an interpreter was present. The RPD found that, on the second hearing day, the Applicant embellished the oral evidence given on the first hearing day, which affected his credibility. The RPD also found that there was no nexus between the Applicant's circumstances and a Convention ground. In a Decision dated 28 April 2010, the RPD found that the Applicant was neither a Convention refugee under section 96 nor a person in need of protection under section 97 of the Act. This is the Decision under review.

DECISION UNDER REVIEW

Credibility Findings

[8] In its Decision, the RPD noted two incidents wherein the Applicant's testimony on the second hearing day differed from his testimony on the first hearing day. On the first hearing day, the

Applicant said that unknown persons had broken the windows in his house after he left Mexico and that he did not know if it was random criminality. On the second day, however, he stated that these same unknown persons had identified themselves as belonging to the Ministry of the Interior and that they had also threatened his wife. He could not explain why this pivotal information had not been disclosed on the first hearing day. Consequently, the RPD rejected the new information and found that the incident did not occur.

[9] Also, the Applicant claims that his wife (who has remained with their son at the home of her mother in Mexico) has consistently received telephone calls from people asking where her husband is and threatening her. On the second hearing day, the Applicant "suddenly remembered" that his mother-in-law had changed her telephone number but that the callers quickly discovered the new number so as to continue their threats. The RPD characterized this as an "important oversight." It confronted the Applicant, who replied that he had not mentioned it on the first hearing day because he did not recall it at that time. The RPD notes that the psychological assessment from Clinical Assessment Canada never indicated that the Applicant could not be expected to remember major events. Moreover, it commented that the assessor's qualifications were not set out in the assessment. The RPD concluded, on a balance of probabilities, that the Applicant's claims that the telephone number was changed and that unknown callers obtained the new telephone number to perpetuate the harassment were false.

[10] When asked by the RPD why his wife had not relocated to another part of Mexico to escape the harassment, the Applicant stated that her health was adversely affected by high altitudes. The RPD commented that there was no evidence that the Applicant's wife was completely restricted

with respect to where she could live (there are Mexican cities located at a relatively low altitude) and that it was reasonable for the RPD to expect such evidence under RPD Rule 7. It also noted that the Applicant's wife has never reported the alleged harassment to the police and that his son continues to attend school. As nothing has happened to the family, the RPD concluded that any threats occurring over the past two years "appear to be idle" and have been further embellished by the Applicant to bolster his claim.

Section 96 Claim

[11] The RPD found that there was no nexus to the Convention ground of political opinion. The Applicant had never been involved in party politics and had never been told by the ASA or by the union to get involved in politics in order to keep his job. The RPD found that the Applicant had been assaulted and personally threatened and that money had been extorted from him, all of which makes him a victim of crime. Essentially, a corrupt person ordered the Applicant to pay money to keep his job; "he was not ordered to join a political party." The RPD observed that victims of crime generally fail to establish a link between their fear and a Convention ground. Furthermore, the RPD referred to Federal Court jurisprudence that has upheld RPD findings that a victim of crime, of a personal vendetta or of misuse of official position is not a Convention refugee.

Section 97 Claim

[12] The RPD then turned its attention to the Applicant's section 97 claim. It carefully reviewed the jurisprudence concerning the presumption of state protection and what the Applicant must do to

rebut that presumption. It found that, as Mexico is a functioning democracy, the onus on the Applicant to prove that he should not have to "exhaust all avenues of domestic recourse" is a heavy one. The RPD noted that the Applicant did not report the 200,000 peso extortion attempt to the police. Also, he did not report getting threatening phone calls after he contacted the Public Ministry for the first time to file a denunciation against the union leader who assaulted him.

[13] The RPD noted that, although the Applicant filed a second denunciation against the ASA and the union leader with the Public Ministry in San Luis Potosi, he did not mention the assault on his friend or the attempt to locate him. Therefore, the RPD concluded that, because no relevant information regarding these two events was ever reported in San Luis Potosi and because the matters that were reported had occurred outside San Luis Potosi, there was nothing that the police in that city could have done.

[14] The RPD noted that the Applicant did make a report concerning government corruption to Sacatel. However, the RPD disputed the Applicant's assertion that Sacatel had informed the union leader of the Applicant's complaint in contravention of its confidentiality obligations and that Sacatel and the union were cooperating together. The RPD found, to the contrary, that, if the union leader knew about the Applicant's report to Sacatel, it was because Sacatel had launched an investigation, just as the claimant had requested. Similarly, the fact that the Applicant began to get threatening phone calls after he first denounced the union leader to the Public Ministry was proof that the Public Ministry had begun its investigation. Finally, the RPD found that Sacatel did not follow up on the Applicant's complaint because the Applicant did not follow up with Sacatel.

[15] Although the Applicant claimed that the state was the agent of persecution, the RPD found that the union leader and the Applicant's boss were responsible. The RPD did not refer to the Applicant's submissions or to the documentary evidence on the subject of government corruption in Mexico. It concluded that the state undertook the investigations that the Applicant had requested of them. The RPD found that state protection was available to the Applicant in Mexico and that he had failed to take all reasonable steps to avail himself of it. Based on the credibility findings and section 96 and 97 analyses, the Applicant's claim was rejected.

ISSUES

[16] The Applicant raises the following issues:

i. Whether the RPD's credibility findings were unreasonable;

ii. Whether the RPD incorrectly identified the agent of persecution;

iii. Whether the RPD misapprehended the legal procedures of Sacatel and the Public Ministry of Mexico;

iv. Whether the RPD erred in finding that state protection was available to the Applicant in Mexico;

v. Whether the RPD misunderstood the scope of "political opinion" and, therefore, erred in finding no nexus to a Convention ground; and

vi. Whether the RPD failed in its duty of procedural fairness by not providing the Applicant with an opportunity to respond to its concerns regarding the psychological assessment.

STATUTORY PROVISIONS

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

Convention refugee	**Définition de « réfugié »**
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.
Person in need of protection	**Personne à protéger**
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	**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*) to a danger, believed on substantial grounds to exist, of torture within the meaning of	*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

Article 1 of the Convention Against Torture; or

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.

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 qualité 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

[18] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[19] The first three issues challenge findings of fact and credibility. These fall within the RPD's area of expertise and, therefore, attract a standard of reasonableness. See *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, 42 ACWS (3d) 886 (FCA); *Aguirre v Canada (Minister of Citizenship and Immigration)*, 2008 FC 571 at paragraph 14; and *Dunsmuir*, above, at paragraphs 51 and 53.

[20] With respect to the fourth issue, namely the RPD's state protection analysis, the Federal Court of Appeal has determined that the standard of review is reasonableness. See *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94; and my decision in *Jimenez Ruiz v Canada (Minister of Citizenship and Immigration)*, 2009 FC 337.

[21] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable

outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[22] The fifth issue concerns how the term "political opinion" has been interpreted by the jurisprudence. This is a question of law, which attracts a correctness standard. See *Klinko v. Canada (Minister of Citizenship and Immigration)*(2000), [2000] 3 FC 327, [2000] FCJ No 228 (FCA) (QL) at paragraphs 20 and 40. However, the findings of nexus to a Convention ground, such as political correctness, are questions of mixed fact and law, reviewable on the standard of reasonableness. See *Ariyathurai v Canada (Minister of Citizenship and Immigration)*, 2009 FC 716 at paragraph 6; *Soimin v Canada (Minister of Citizenship and Immigration)*, 2009 FC 218; and *Hamaisa v Canada (Minister of Citizenship and Immigration)*, 2009 FC 997.

[23] The sixth issue raises a question of procedural fairness; it also attracts a correctness standard. See *Dunsmuir*, above, at paragraph 129.

ARGUMENT

The Applicant

Credibility Findings Are Unreasonable

[24] The Applicant asserts that the RPD did not disbelieve the Applicant's allegations as set out in his PIF; it took issue with incidents that occurred after the Applicant left Mexico. It made no findings regarding the Applicant's allegation that he was fired and was stripped of employment records and benefits because he opposed corruption. It made no findings regarding internal flight alternative (IFA).

[25] The Applicant contends that the RPD's credibility findings were unreasonable. The hearing on the first day was 2.5 hours long. The RPD instructed the Applicant to limit his answers to the questions asked, so as not to confuse the RPD. The questions regarding who broke the windows in his house and the living conditions of the Applicant's wife were disposed of quickly at the end of the first hearing day, and the RPD asked little about the Applicant's statements. In contrast, the second day was a full-day hearing wherein counsel was able to ask questions and fill in the gaps. The Applicant asserts that he elaborated on his claim then because there was an opportunity to do so; he did not embellish his claim, as the RPD concluded. It was unreasonable for the RPD to conclude that, because the Applicant did not raise the change in telephone number until the second hearing day, it did not happen. These events took place after the Applicant left Mexico; he did not live these experiences, so it is not unusual that he could not immediately recall them.

[26] The RPD also incorrectly stated that the Applicant's son has continued to attend school when he has had to discontinue attending school from time to time in the circumstances. The Applicant also asserts that it is unreasonable for the RPD to expect him to provide medical evidence that his wife cannot relocate within Mexico. It is enough that his wife is ill and has a minor under her care. Moreover, it is the Applicant who is wanted by the agents of persecution, not his family.

The RPD Erred in Identifying the Agents of Persecution

[27] The RPD stated that the Applicant was fired at the direction of the union leader. The Applicant did not say this. He said that he was dismissed by his ASA boss as a result of a decision made by the general administration of airports in Mexico and the union. He also said that the union leader worked for the federal ministers who made up the ASA board of directors and the President's Cabinet. The Applicant argues that this error of fact is relevant because it incorrectly exonerates the ASA, a state agency, from responsibility for the persecution that followed.

The RPD Misapprehended the Legal Procedures in Mexico

[28] The RPD found that, because the union leader knew that Sacatel and the Public Ministry had begun an investigation into his conduct, this proved that the state was acting to protect the Applicant. The RPD concluded that these agencies contacted the union boss as part of their legitimate investigations and not because they were corrupt and colluding with the union. This finding is perverse.

[29] Sacatel is a confidential government complaint service that guarantees non-reprisal. The fact that the union leader, a non-government party, learned within a matter of days that a complaint had been launched against him and, in consequence, engaged in reprisals shows at minimum that the system does not work.

[30] With respect to the Public Ministry complaints, the RPD's own documentary evidence shows that these investigations take many months to get off the ground. It is unlikely that the union leader would be so speedily contacted as part of an official investigation. It is more likely that the filing of the complaint was leaked to him by the Public Ministry.

The RPD's State Protection Findings Are in Error

[31] The Applicant contends that the RPD imposed too onerous a burden on the Applicant to continue approaching the state for protection. A person need not continue approaching the state where it is objectively unreasonable to expect assistance. The Applicant is not legally required to risk his life "seeking ineffective protection of the state, merely to demonstrate that ineffectiveness." See *Canada (Attorney General) v Ward*(1993), [1993] 2 SCR 689, [1993] SCJ No 74 (QL) at paragraph 48.

[32] The Applicant relies on *Chaves v Canada (Minister of Citizenship and Immigration)*, 2005 FC 193 at paragraph 15, to argue that, in this case, the burden of proof and the democratic nature of the state are undercut by the fact that the state is the agent of persecution.

Findings Regarding Nexus Were Erroneous Because the RPD's Understanding of "Political Opinion" Was Too Narrow

[33] The Applicant argues that the RPD erred in characterizing him as a victim of crime; it failed to recognize that the Applicant's actions in speaking out against government corruption constitute an expression of political opinion.

[34] The Supreme Court of Canada in *Ward*, above, defined political opinion as any opinion on any matter in which the machinery of state, government and policy may be engaged. The Federal Court of Appeal in *Klinko*, above, at paragraphs 27 and 30-31, characterized opposition to corruption as an expression of political opinion. Justice Francis Muldoon of this Court, in *Reynoso v Canada (Minister of Citizenship and Immigration)* (1996), 107 FTR 220, [1996] FCJ No 117 (QL) held that political opinion is not confined to partisan opinion or membership in partisan movements. In *Reynoso*, the applicant knew too much about the activities of a corrupt mayor and lived in fear of death because of it. The Applicant contends that his situation is similar and that he falls squarely within the Convention grounds, as his claim arises from persecution based on political opinion.

[35] The Applicant also observes that the RPD failed to address his argument that the union and the ASA are state actors. It also failed to address the documentary evidence that unions are central to the state apparatus and that the government and unions often collude in illegal activities and corruption. This evidence was highly relevant to the Applicant's claim. In ignoring it, the RPD committed a reviewable error.

The RPD's Treatment of the Psychological Assessment Is Flawed

[36] The Applicant contends that the RPD dismissed the probative value of the psychological assessment without giving the Applicant an opportunity to respond to its concerns, thereby breaching the principles of procedural fairness. Although the assessment stated that the Applicant suffered from Post Traumatic Stress Disorder, the RPD found that there was no persuasive evidence that the Applicant could not be expected to remember major events. The RPD complained that the qualifications of the assessor were not set out and that the bulk of the assessment was a summary of the Applicant's own account of events.

[37] The Applicant submits that the RPD had a duty to put these concerns to him, particularly when these concerns nurtured a negative credibility finding. The Applicant had proof that the assessor was a clinical psychologist, qualified to carry out such an assessment. He could easily have satisfied the RPD on this point, possibly leading to a different decision. This denial of procedural fairness vitiates the whole Decision, so that the matter must be sent back for re-determination. See *Chandler v Alberta Association of Architects* (1989), [1989] 2 SCR 848, [1989] SCJ No 102 (QL).

The Respondent

Credibility Findings Are Reasonable

[38] The Respondent argues that the RPD's credibility findings are sound and are entitled to deference. See *Aguebor*, above. The Applicant raised new facts on the second hearing day and could not explain why he did not state them earlier. The Applicant's explanations that he did not

remember were unsatisfactory. The RPD is entitled to reject an explanation on this basis. See *Allinagogo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 545 at paragraph 7.

[39] The Applicant has been represented by counsel since the beginning of the claim and filed extensive documents. It was not unreasonable for the RPD to give little weight to the psychological assessment, as the information contained therein largely consisted of information provided by the Applicant, whom the RPD found not credible. There was no duty on the RPD to ask for additional information on the assessor's credentials, as the onus is on the Applicant to prove his case.

State Protection Findings Are Reasonable

[40] This Court has held that a reasonable finding of adequate state protection renders ineffective all other errors of the tribunal because its ultimate conclusion would be the same even if the errors had not been made. See *Sarfraz v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ No 1974 (TD) (QL); *Kharrat v Canada (Minister of Citizenship and Immigration)*, 2005 FC 106; and *Victoria v Canada (Minister of Citizenship and Immigration)*, 2009 FC 388 at paragraph 15.

[41] In the instant case, the RPD found that the Applicant failed to meet his burden, which was to adduce "relevant, reliable and convincing evidence" to rebut the presumption of state protection. See *Sosa v Canada (Minister of Citizenship and Immigration)*, 2009 FC 275 at paragraph 23; and *Carillo*, above. The RPD did not place too onerous a burden of proof on the Applicant. As Justice Robert Barnes opined in *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2008 FC

134 at paragraph 12, the burden on the applicant to show that he need not have exhausted all avenues of domestic recourse is a heavy one.

[42] Furthermore, the RPD reviewed the Applicant's efforts to access state protection and found that these efforts demonstrated the state's willingness to investigate his complaints, provided they were filed in the correct jurisdiction and accompanied by follow-up on the applicant's part. The Respondent contends that the Applicant's argument that the RPD misapprehended the legal procedures in Mexico indicates a microscopic reading of the Decision. The only relevant fact is that an investigation was underway, which shows that the state was responsive to the Applicant's complaints.

[43] The non-response of some police officers in Mexico is not sufficient to show a complete breakdown of the state apparatus or to rebut the presumption of state protection. See *Arenas v Canada (Minister of Citizenship and Immigration)*, 2006 FC 458 at paragraphs 8-9. This Court in *Burgos v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1537 at paragraph 33, recognized the ability of the Mexican state to protect its citizens, even where the agent of persecution is a member of the police force or the government. In the instant case, the RPD found that the Applicant's former boss and the union leader were the agents of persecution, not the state.

[44] The Respondent asserts that the RPD is presumed to have considered all of the evidence, including the evidence concerning state protection, and that the Applicant has not rebutted that presumption. See *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) (QL).

No Nexus to a Convention Ground

[45] The Respondent argues that the RPD acted reasonably finding that the Applicant was a victim of crime and not a victim of persecution based on a Convention ground, namely political opinion.

The Applicant's Reply

[46] The Applicant points out that most acts of persecution will be criminal in nature. Therefore, most Convention refugees will also be victims of crime. These categories are not mutually exclusive.

[47] The Applicant also asserts that the RPD consumed all of the time allotted for the first day of the hearing in asking its own questions. The Applicant was not allowed to elaborate on his answers, lest he confuse the tribunal. Because the second hearing day was longer, his story was more detailed. This is a reasonable explanation.

[48] With respect to the psychological assessment, the RPD gave it little weight in part because the record of events contained therein was based on the Applicant's own recollections; the assessor was not a witness to these events. However, the Applicant points out that all of the events reported in the assessment happened before the Applicant left Mexico. The RPD found all of these events to be credible and took issue only with the Applicant's evidence regarding events that happened after he left Mexico. The Applicant submits that, because he is able to establish the credentials of the

assessor and because all of the evidence in the assessment was accepted by the RPD, there is no reason for the RPD to reject the psychological assessment.

[49] The Applicant argues that it is unreasonable for the RPD to expect him to return to Sacatel and to the Public Ministry to follow up on his complaints when it was clear to him that Sacatel and the Public Ministry had immediately disclosed his complaint to the agents of persecution. It is illogical to suggest that the Applicant had a duty to risk his safety by pursuing the matter further, given that it was "objectively unreasonable" for him to approach the state. "[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." See *Ward*, above, paragraph 49.

[50] Finally, the Applicant submits that the decision to fire him should properly have been taken by the ASA alone. The fact that the head of the union was involved at all is evidence of collusion and corruption between the union and the federal government.

ANALYSIS

[51] The Applicant has raised a range of issues for judicial review. I do not need to deal with all of them because it is my view that the Decision is flawed in a fundamental way that requires reconsideration of the Applicant's claim.

[52] The RPD rejected the Applicant's submission that his fear of persecution was connected to a refugee ground:

> The claimant's fear in this case is not linked to race, nationality, religion, political opinion or membership in a particular group. I conclude that the claimant is a victim of crime, but this does not provide the claimant with a link to a Convention ground.

[53] In reaching this conclusion the RPD adopted an extremely narrow approach to "political opinion," the nexus claimed by the Applicant:

> The claimant was asked on the first day of his hearing if he ever, at any time, had to tell anyone his religion or politics in order to maintain employment or be promoted. He testified that he did not. He further testified, when asked by his own counsel on the second day of the hearing, that he never belonged to a party, never became involved in politics, and was never told to get involved in politics by his employer or the union, at any point during his life in Mexico. Hence, I find this claim has nothing to do with political beliefs and therefore, there is no nexus to the Convention. I do find that the claimant has been extorted, assaulted and personally threatened, making him the victim of crime. Had the claimant paid Espino 200,000 pesos he would have been able to keep his job, which the claimant refused to do. This clearly defines the parameters of the claim; he was ordered to pay money (extortion) to a corrupt person; he was not ordered to join a political party.

[54] As the Applicant points out, the RPD appears to have based this conclusion upon an error of fact and an error of law as to what can constitute a political nexus.

[55] The error of fact is that the Applicant "was dismissed from his position on April 27, 2007 by Diaz [his boss at the ASA], at the direction of a union leader Rogelio Espino (herein 'Espino')." However, the Applicant's evidence was that:

a. "Hugo Diaz told me my dismissal was a decision made by the general administration of airports in Mexico; that it was a decision taken along with the syndicate represented by Mr. Rogelio Espino";

b. Mr. Diaz also told the Applicant: “with DADDY government, you do not play, you can get burned”;

c. Mr. Diaz was following directions received from the ASA’s General Board (which is controlled by the Administrative Council, composed of federal ministers) with the consent of the union;

d. Espino was working for the bosses, i.e., the Federal ministers.

[56] In addition, I believe that the evidence as a whole makes it clear that neither Mr. Diaz nor Mr. Espino was acting personally. The evidence shows widespread collusion and corruption on the part of government and others, such as the union and the ASA, which, in this case, had a board of directors controlled by government ministers.

[57] This mistake of fact is highly material because it means that the RPD concluded that Espino, the union boss, was acting alone when he dismissed the Applicant and that the dismissal did not come from the ASA, which is a federal agency run by federal ministers.

[58] The definition of “political opinion” used by the RPD is incorrect. This Court has held that an individual knowledge of or opposition to corruption may constitute political opinion within the meaning of the refugee convention. See *Berrueta v. Canada (Minister of Citizenship)* (1996), 109 FTR 159, [1996] FCJ No 354 at paragraphs 4-5; and *Salvador (Bucheli) v Canada (Minister of Citizenship and Immigration)*(1994), 51 ACWS (3d) 306, [1994] FCJ No 1592 (TD) (QL) at paragraph 18.

[59] The meaning of “political opinion” is not confined to partisan opinion or membership in parties and movements and does not refer exclusively to national, political or municipal state politics. See *Reynoso*, above, at paragraph 10.

[60] In *Vassiliev v Canada (Minister of Citizenship and Immigration)* (1997), 72 ACWS (3d) 900, [1997] FCJ No 955 (FC) (QL), an employee of a regional government company refused to participate in corruption between business people and government officials. Justice Muldoon found, at paragraphs 12-13, that the Convention Refugee Determination Division had erred in finding that the applicant had not expressed his political opinion when he refused to participate in corruption.

[61] *Armson v Canada (Minister of Employment and Immigration)* (1989), 9 Imm LR (2d) 150 at 153, [1989] FCJ No 800 (QL), shares factual similarities with the instant case. The applicant in *Armson* was a Ghanaian teacher who had been arrested and beaten in his country of origin for speaking out against government corruption. He applied for Convention refugee status in Canada on the basis of his fear of persecution because of his political opinions. The Federal Court of Appeal decision stated that “non-membership in a political party when considered in isolation and without reference to the surrounding circumstances is irrelevant.” This is precisely what the RPD fails to appreciate in the instant case. It found that the Applicant’s “claim has nothing to do with political beliefs and therefore, there is no connection to the Convention” because the Applicant did not have to reveal his political views to maintain his employment or be promoted and because neither his employer nor the union ever forced him to join a political party. In *Armson*, Justice Darrel Heald for the Federal Court of Appeal observed:

> Thus, in counsel's view, in the circumstances of this case, the fact that the applicant was not a member of a political party was an irrelevant consideration. I think there is merit in this submission. The applicant's uncontradicted evidence was to the effect that he had, over the years, spoken out on the shortake of textbooks for schools, corruption in the government, Marxism, and oppression under the Rawlings regime …. Since the definition of "Convention Refugee" in the Immigration Act refers to political opinion, I agree with counsel that the fact of non-membership in a political party when considered in isolation and without reference to the surrounding circumstances is irrelevant.

[62] *Canada (Attorney General) v Ward* (1993), [1993] 2 SCR 689, [1993] SCJ No 74 (QL), is the leading Supreme Court of Canada case on the scope of political opinion. At paragraphs 81, the Court employs a broad definition of political opinion which includes “any opinion on any matter in which the machinery of state, government, and policy may be engaged.” Clearly, in the instant case, the Applicant’s denunciation of corruption in the ASA, a federal agency, constitutes an opinion on a matter in which the machinery of state is engaged. The Supreme Court also stated that the critical perspective of whether the applicant’s action would be perceived as a political opinion is not that of the RPD but of the persecutor “since that is the perspective that is determinative in inciting the persecution.” Looking at the Applicant’s comments and actions from the Mexican government’s perspective, it is clear that the comments regarding government corruption and collusion with the union threaten the government’s reputation and may have adverse political implications. At paragraphs 81-83 of *Ward*, Justice Gérard La Forest for the Court stated:

> Political opinion as a basis for a well-founded fear of persecution has been defined quite simply as persecution of persons on the ground "that they are alleged or known to hold opinions contrary to or critical of the policies of the government or ruling party"; see … [Atle Grahl-Madsen, The Status of Refugees in International Law (1966)] at p. 220. The persecution stems from the desire to put down any dissent viewed as a threat to the persecutors. Grahl-Madsen's definition assumes that the persecutor from whom the claimant is fleeing is always the government or ruling party, or at least some

> party having parallel interests to those of the government. As noted earlier, however, international refugee protection extends to situations where the state is not an accomplice to the persecution, but is unable to protect the claimant. In such cases, it is possible that a claimant may be seen as a threat by a group unrelated, and perhaps even opposed, to the government because of his or her political viewpoint, perceived or real. The more general interpretation of political opinion suggested by Goodwin-Gill, [Guy S. The Refugee in International Law. Oxford: Clarendon Press, 1983] at p. 31, i.e., "any opinion on any matter in which the machinery of state, government, and policy may be engaged", reflects more care in embracing situations of this kind.
>
> Two refinements must be added to the definition of this category. First, the political opinion at issue need not have been expressed outright. In many cases, the claimant is not even given the opportunity to articulate his or her beliefs, but these can be perceived from his or her actions. In such situations, the political opinion that constitutes the basis for the claimant's well-founded fear of persecution is said to be imputed to the claimant. The absence of expression in words may make it more difficult for the claimant to establish the relationship between that opinion and the feared persecution, but it does not preclude protection of the claimant.
>
> Second, the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs. The examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution. The political opinion that lies at the root of the persecution, therefore, need not necessarily be correctly attributed to the claimant. Similar considerations would seem to apply to other bases of persecution.

[63] *Vassiliev v Canada (Minister of Citizenship and Immigration)* (1997), 72 ACWS (3d) 900, [1997] FCJ No 955 (QL) (FCTD), like the instant case, deals with the applicant’s refusal to participate in government corruption. Justice Francis Muldoon of this Court found that the CRDD erred in determining that Mr. Vassiliev was not a Convention refugee simply because he did not express a political opinion when he refused to transfer bribes and launder money. I also find instructive Justice Muldoon’s distinction between speaking out against criminal activity (which does

not necessarily constitute opposition to the state) and speaking out against criminal activity that permeates state action (which does constitute opposition to the state and, therefore, political opinion). He observed at paragraphs 12-13:

> Refusing to participate in criminal activity, while laudable, has often been found not to be an expression of political opinion. In this regard, the Board's finding does not depart from recent jurisprudence of this Court which has found that opposition to criminal activity per se is not political expression. One example which this Court has considered is informing on drug traffickers [Munoz v. (M.C.I.), [1996] F.C.J. No. 234, (IMM-1884-95) (February 22, 1996) and Suarez v. (M.C.I.), [1996] F.C.J. No. 1036, (IMM-3246-96) (July 29, 1996)]. The situation before the Court is distinguishable from these cases. The facts as found by the CRDD show that in this case criminal activity permeates State action. Opposition to criminal acts becomes opposition to State authorities. On these facts it is clear that there is no distinction between the anti-criminal and ideological/political aspects of the claimant's fear of persecution. One would never deny that refusing to vote because an election is rigged is a political opinion. Why should Mr. Vassiliev's refusal to participate in a corrupt system be any different? His is an equally valid expression of political opinion and is contemplated by Mr. Justice La Forest's words in Ward. While this error alone is sufficient to send this decision back for reconsideration, the CRDD also erred in its assessment of State protection and internal flight alternative. [my emphasis]

[64] The most recent Canadian pronouncement comes from the Federal Court of Appeal decision in *Klinko v Canada (Minister of Citizenship and Immigration)* (2000), [2000] 3 FC 327, [2000] FCJ No 228, which applies the definition of political opinion employed by the Supreme Court of Canada in *Ward*. The facts of *Klinko* resemble those of the instant case. In that case, the male applicant, a citizen of the Ukraine, filed with the regional governing authority a formal complaint about widespread corruption among government officials. In consequence, he and his family suffered retaliation, including being beaten, receiving anonymous telephone calls, … damage and destruction of his property and an arrest for interrogation. The Federal Court of Appeal found that his complaint

was an opinion that engaged “the machinery of state, government, and policy.” Justice Gilles Létourneau for the Court stated at paragraphs 31 and 34:

> A political opinion does not cease to be political because the government agrees with it…. The opinion expressed by Mr. Klinko took the form of a denunciation of state officials' corruption. This denunciation of infractions committed by state officials led to reprisals against him. I have no doubt that the widespread government corruption raised by the claimant's opinion is a "matter in which the machinery of state, government, and policy may be engaged".

[65] In the present case the RPD does not address the involvement of the ASA in the decision to dismiss the Applicant and does not even consider whether Espino, the union’s secretary general, is a state agent. The assumption appears to be that Espino was acting at a personal level. This further causes the RPD to ignore all evidence in the documentation dealing with government/union corruption and its centrality to the state apparatus in Mexico.

[66] The same mistakes of fact and law also lead the RPD to conduct a state protection analysis that is solely directed at the Applicant as a victim of crime at the hands of Espino and that does not take into account the state’s role in persecuting the Applicant.

[67] There are other reviewable errors raised by the Applicant with which I agree but, for these reasons alone, this matter must be returned for reconsideration.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed, the Decision is quashed and the matter is referred back for reconsideration by a differently constituted RPD.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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