

Federal Court



Cour fédérale

Date: 20110630

Docket: IMM-5603-10

Citation: 2011 FC 807

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 30, 2011

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

**Oswaldo Daniel LEON ALMAGUER
Adriana VILLEDA CHAVEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by a member of the Refugee Protection Division of the Immigration and Refugee Board (panel) submitted in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The panel rejected the refugee and protection claim of the applicants, a married couple of Mexican citizenship, on August 23, 2010.

[2] The main allegation of the male applicant, Oswaldo Daniel Leon Almaguer, is that judicial police officers are looking for him because of his involvement in a social movement to help citizens in the State of Oaxaca against abuses by the central government.

[3] According to the panel, the determinative issue “is whether or not the claimants did everything necessary in the circumstances to seek and obtain the protection of the Mexican authorities with regard to the threats made against them and the assaults they allegedly experienced”. The panel found the applicants to be credible.

I. Overview

[4] The male applicant testified that he joined a united movement in support of Oaxaca in January 2006 and was responsible for propaganda and collecting funds in the Mexican capital. He also participated in demonstrations in Mexico City, distributed pamphlets in the city centre and collected money from the public.

[5] In January 2008, he noticed that the judicial police were watching him and gathering information on him through his colleagues and through the management at the hotel he worked at. In May 2008, the male applicant said that he was threatened with death on two occasions if he did not leave the movement.

[6] The panel questioned the male applicant about whether he filed a complaint with the authorities. The exchange appears on pages 175 and 176 of the Tribunal Record:

[TRANSLATION]

Q. So, it was in the month of May that you thought about leaving, after the second threat. Did you think to report the incidents to the police or to other authorities?

A. But sir, they were the ones looking for me, who were after me, the judicial police. How could I report the judicial police?

Q. Wait, wait, wait. That is not what I asked you. Did you think to report the incident to someone or seek help?

A. No.

Q. Why did you not think to report those people to the authorities? You could have reported them to the police, the Human Rights Commissions in Mexico. . . Hold on. Why, why did you not think to report them?

A. Because ever since Felipe Calderon took power in Mexico, he has criminalized struggles for social rights and the police have done exactly the same; they would not have been able to help me, to the contrary.

Q. But why do you say that the police cannot do anything?

A. The police would have done nothing, to the contrary.

Q. No, no, but why do you say that they cannot do anything?

A. Because I would have been trying to report police officers, so I. . .

Q. So, you are saying that the police do nothing in Mexico?

A. Against the police, no. The police against the police, no, nothing can be done.

Q. Did you think to consult other organizations, like the Human Rights Commissions?

A. I thought about it, yes, just when I was on the point of travelling here to Canada. I was interested in ensuring protection and safety for me and my children, which meant leaving the country. Sorry, my wife. For me and my wife.

Q. So, you thought about the Human Rights Commission, but you did nothing?

A. No, I did nothing. Because I was already . . . at that moment, I was already about to leave, I feared that something was going to happen to me, there, that I could be attacked, I was already (inaudible).

Q. So, you did not take any step with any organization, the police, or any authority before leaving.

A. No.

[Emphasis added.]

II. Panel's decision

[7] The panel, at paragraph 7 of its decision, wrote the following:

. . . the panel must refer to the well-established case law principle that a refugee protection claimant must have sought the protection of his or her country before claiming international protection. Except in the case of a complete breakdown of the state apparatus, there is a presumption that a state is capable of protecting its citizens. This presumption can only be rebutted by means of “clear and convincing” evidence of the state’s inability to provide protection. The Federal Court of Appeal has also stated that a refugee protection claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. According to *Kadenko [v. Canada (Solicitor General)]* (1995), 32 Imm. L.R. (2d) 275 (F.C.T.D.), “. . .the more democratic the state’s institutions, the more the claimant must have done to exhaust all the courses of action open to him or her.”

[Emphasis added.]

[8] The panel rejected the principal claimant’s explanations and found that he “has not shown that it was reasonable to refuse to seek the protection of the Mexican authorities.” The panel also wrote the following:

[10] Although Mexico has some problems with corruption, it cannot be described as a country in which there has been a complete breakdown of the state apparatus and where it is impossible to obtain state protection.

[9] In support of this statement, the panel listed the legislative measures taken to combat corruption, the list of government-funded institutions that assist those having difficulty obtaining state protection, possible recourse for victims of corruption by government officials federally, including agencies to which such corruption can be reported and the protection available, the possibility of filing a complaint with the police in a state other than the one in which the crime was committed and the procedure for filing a complaint with the office of the federal attorney general.

[10] The panel was guided by the Federal Court of Appeal in *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130, in finding that Mexico “makes serious efforts to protect its citizens who have been the victims of or have been threatened with criminal activities” and that, in this case, the male applicant had not rebutted the presumption that the Mexican authorities were able to protect him.

[11] Finally, the panel found that the applicants could have benefited from an internal flight alternative (IFA). However, I note that the panel did not address the male applicant’s submission that the police could have found him easily using his voting card.

[12] I also note that the panel failed to mention the fact that the male applicant had indicated that, on May 29, 2008, while he was in hiding in Toluca, he had tried to contact an organization that

defends human rights to protect him but the offices were closed for one week (point of entry notes, Tribunal Record, at page 95).

III. Parties' submissions

[13] The parties raise well-settled case law. On the one hand, the applicants' submission relies on the principle that a demonstration that the state or the police is the agent of persecution creates an exception to refugee law, which states that a claimant must seek protection from his or her country before seeking international protection and, in that context, having reasonably exhausted all of the recourses available.

[14] This principle arises from the Supreme Court of Canada's decision in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, in which Justice La Forest wrote the following, at page 724:

Like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only 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. Put another way, the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state.

[Emphasis added.]

[15] Justice La Forest previously indicated that it was unreasonable for a claimant to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness, which would be the case if the state was the agent of persecution or complicit to this persecution.

[16] The applicants cite the following decisions, among others: *Zepeda v. The Minister of Citizenship and Immigration*, 2008 FC 491; *Soto v. The Minister of Citizenship and Immigration*, 2010 FC 1183; *Chaves v. The Minister of Citizenship and Immigration*, 2005 FC 193; *De Leon v. The Minister of Citizenship and Immigration*, 2007 FC 1307; *Nieves v. The Minister of Citizenship and Immigration*, 2010 FC 497, and *Yanez v. The Minister of Citizenship and Immigration*, 2010 FC 1059.

[17] On the other hand, counsel for the respondent claims that the panel's decision is well founded because the applicants did not take all reasonable steps to seek state protection. He submits that Mexico has acknowledged that police corruption exists in that country, which led it to put effective measures in place. He cites the cases on which the panel relied as well as the following decisions: *Valencia v. The Minister of Citizenship and Immigration*, 2005 FC 1136; *Castaneda v. The Minister of Citizenship and Immigration*, 2010 FC 393; *Sanchez v. The Minister of Citizenship and Immigration*, 2008 FC 696; *Monroy v. The Minister of Citizenship and Immigration*, 2006 FC 834, and *Soto v. The Minister of Citizenship and Immigration*, 2005 FC 1654.

IV. Analysis

[18] It has been established that questions on the adequacy of state protection are questions of mixed fact and law and that they are reviewable against the standard of reasonableness (*Hinzman v. The Minister of Citizenship and Immigration*, 2007 FCA 171). The Supreme Court of Canada, in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 47, teaches us how to apply this standard:

... A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the

process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[19] Internal flight alternative issues are questions of fact. Pursuant to *Dunsmuir*, above, the applicable standard of review is also reasonableness.

V. Conclusion

[20] This application for judicial review must be allowed. I believe that the problem raised by the panel's decision is that it failed to assess, or improperly assessed, the true nature of the applicants' fear—fear of persecution by the state and its police because the principal applicant supported a movement that the state wanted to suppress. The case law is clear that, when the state or the police is the agent of persecution, the analysis of the need to seek protection must be adapted accordingly, which the panel did not do.

[21] The panel's IFA finding suffers from the same infirmity. The panel failed to analyze whether the police would have been able to find him in the territory of the IFA if the principal applicant had continued to support the movement.

[22] The application for judicial review will therefore be allowed. The question of importance suggested by the applicants is irrelevant given the result.

JUDGMENT

The application for judicial review is allowed. The decision dated August 23, 2010, by a member of the Refugee Protection Division of the Immigration and Refugee Board is set aside and the matter is referred back to a differently constituted panel of the Board for redetermination.

“François Lemieux”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-5603-10

STYLE OF CAUSE: Oswaldo Daniel LEON ALMAGUER,
Adriana VILLEDA CHAVEZ v. THE MINISTER OF
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