

Federal Court



Cour fédérale

Date: 20121022

Docket: IMM-6176-11

Citation: 2012 FC 1229

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 22, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

Between:

TEODORO VALDES VIVIAN

Applicant

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 the Refugee Protection Division [RPD] of the Immigration and Refugee Board dated August 16, 2011, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA]. The tribunal dismissed the applicant's appeal and found that Teodoro Valdes Vivian [the applicant] was neither a Convention refugee as defined by section 96 of the IRPA nor a person in need of protection under section 97 of the IRPA.

I. **Facts**

[2] The applicant is a Mexican citizen. He opened a grocery store in February 2008. On August 12, 2008, some men approached him to ask him to help them sell drugs, which he agreed to do because he was afraid of what might happen if he refused. The next day, the same people returned, threatening his life and that of his spouse and asking him to find people to sell drugs for them.

[3] The same day, the applicant closed his store and moved in with a cousin in a different neighbourhood of Mexico City. He left his spouse with her mother in Mexico City and left Mexico for Canada in September 2008, on his cousin's advice, and applied for refugee protection.

II. **Decision under review**

[4] The RPD accepted the applicant's identity in light of the evidence in the file. It found that the applicant had failed to make the necessary efforts to avail himself of the protection of the Mexican state after being threatened. The applicant failed to demonstrate substantial grounds to believe that he would be persecuted. The RPD determined that the applicant was neither a Convention refugee nor a person in need of protection.

[5] The RPD was not persuaded by the applicant's explanations as to why he had not filed a complaint with the Mexican authorities. The applicant claimed that the authorities only helped the wealthy and that he no longer trusted them because they had done nothing when he had

complained about being evicted from his residence. The RPD found that the applicant had not behaved reasonably and held his explanations to be unsatisfactory.

[6] The objective evidence in this case does not indicate that the Mexican authorities only come to the assistance of those with money. As for the eviction complaint, it is unrelated to the death threats he received in August 2011.

[7] While Mexico admittedly has some problems with corruption, it cannot be considered a country where the state apparatus is such that it is impossible for the applicant to avail himself of state protection. Mexico has an established police and military force. The mere fact that a state does not always succeed in providing protection for its citizens does not justify the claim that the Mexican state is unable to provide effective protection.

[8] The fact that the applicant decided to leave Mexico four or five days after the events took place shows that he had no intention of availing himself of the protection of the Mexican state.

[9] The applicant failed to provide convincing evidence that the individuals who had approached and threatened him in his store were linked to a powerful group of drug traffickers somehow connected with the Mexican state, in which case there would be no point in seeking protection.

[10] After he closed his business and moved, the group did not search for him. Furthermore, his spouse remained in Mexico and was not harassed by a member of the group.

III. Applicant's submissions

[11] The applicant argues that the RPD erred in failing to give weight to his explanations as to the reasons underlying his decision not to report the situation to the Mexican authorities.

[12] According to the applicant, the RPD considered his testimony but failed to analyze those aspects of the documentary evidence regarding the level of democracy that were contrary to its determination that the Mexican state is willing and able to protect its citizens effectively. The fact that legislation pertaining to the protection of citizens exists does not mean that it will be effective in practice. Moreover, it is unreasonable to require the applicant to put his life in danger to avail himself of the protection of his government (*Canada (Attorney General) v Ward* (1993), [1993] 2 SCR 689 at paragraph 48, 103 DLR (4th) 1 [*Ward*]).

[13] The applicant submits that the RPD erred in basing its finding on the assumption that the Mexican state could be associated with a developed democracy. The consequence of such a finding was to put the onus on the applicant to establish that he had exhausted all available recourses, in proportion to the level of democracy in Mexico. Applying such a burden is an error, since Mexico's level of democracy cannot be considered high given its problems with corruption.

[14] The applicant argues that the RPD should have addressed in its decision not only the measures put in place by the Mexican state, but also the problems with corruption and impunity, which it did not do. It therefore conducted a selective analysis of the evidence.

[15] Thus, the RPD erred in focusing on the efforts made by the Mexican government rather than on the reality of the situation.

[16] During the hearing, counsel for the applicant made a specific argument that had only been vaguely addressed in her memorandum. She argued that the RPD had failed to take into consideration the applicant's explanation that he could not turn to the authorities because the police had been seen in the drug traffickers' presence, shaking hands with them.

IV. **Respondent's submissions**

[17] The respondent submits that the RPD's findings with respect to the level of state protection in Mexico is reasonable and takes all of the evidence into account.

[18] The onus was on the applicant to provide clear evidence to rebut the presumption of state protection on a balance of probabilities. The respondent argues that the RPD validly rejected the applicant's explanations for his decision not to file a complaint. A convincing explanation based on clear evidence was required in this case. The applicant did not provide one.

[19] The respondent notes that the applicant made no efforts to avail himself of state protection and decided to apply for refugee protection in Canada within a few days of the events that prompted him to leave Mexico.

[20] As for the argument presented by counsel for the applicant at the hearing to the effect that the RPD had not addressed the fact that the drug traffickers had been seen with the police,

counsel for the respondent acknowledges that this is not addressed in the decision, but adds that the decision must be read as a whole and that a decision maker is not required to mention every point raised during a hearing.

V. **Issue**

[21] Did the RPD err in concluding that Mexican state protection is available to the applicant?

VI. **Standard of review**

[22] The applicable standard of review is reasonableness, as this is a question of mixed fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 164–66, [2008] 1 SCR 190).

VII. **Analysis**

A. *State protection in Mexico*

[23] At issue is the reasonableness of the RPD’s finding with respect to the level of protection offered to the applicant by the Mexican government and of its rejection of the applicant’s explanations as to why he had refused to file a complaint with the Mexican authorities.

[24] In *Capitaine v Canada (Minister of Citizenship and Immigration)*, 2008 FC 98 at paragraph 20, 2008 CarswellNat 256, the Court established that “Mexico is a democracy to which a presumption of state protection applies, even if its place on the ‘democracy spectrum’ needs to be assessed to determine what credible and reliable evidence will be sufficient to displace the presumption”. Decision makers have an “obligation to assess the evidence offered to establish that, in Mexico for example, the state is unable (although willing) to protect its citizens,

or that it was reasonable for the claimant to refuse to seek out this protection”. While Mexico faces documented governance and corruption problems, it is nonetheless a functioning democracy (*Yanez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1059 at paragraph 32, 93 Imm LR (3d) 144).

[25] It is also well established in *Ward*, above, at paragraph 50, that absent a complete breakdown of the state apparatus, it should be assumed that the state is capable of protecting the applicant.

[26] Contrary to the applicant’s contention, a review of the RPD’s decision reveals that it did not compare the applicant’s conduct to that of a national of a country with a high level of democracy. It did not fault the applicant for failing to exhaust all courses of action open to him, as it would in the case of that type of democracy (*Kadenko v Canada (Minister of Citizenship and Immigration)* (1996), 206 NR 272 at paragraph 5, 143 DLR (4th) 532 (CA)). What it in fact held against the applicant was the fact that he had done nothing to avail himself of the protection of the Mexican authorities.

[27] The RPD correctly assessed the level of protection offered by Mexico to its citizens. In its decision, the RPD considered the various mechanisms and resources put in place by the Mexican government to protect persons at risk of retribution from criminal groups. It then held that [TRANSLATION] “while Mexico may have certain problems with corruption, it cannot be described as a country where the state apparatus has completely broken down or where it is impossible to obtain state protection”.

[28] In particular, the applicant argues that the RPD erred in failing specifically to analyze the 2008 Department of State Report on Mexico. The report addresses cases of arbitrary arrests, corruption, evidence gathering without regard for human rights and other problems. The applicant cannot rely on this report to justify his decision not to file a complaint with the Mexican authorities, as the problems described therein are not indicative that it is impossible for a victim of drug traffickers to file a complaint with the police.

[29] Furthermore, contrary to the applicant's contention, the RPD did not assess the evidence of the measures that Mexico is in the process of implementing, but rather the resources that are already available to citizens, as it is required to do (*Garcia Bautista v Canada (Minister of Citizenship and Immigration)*, 2010 FC 126 at paragraph 15, 2010 CarswellNat 1440).

B. *The explanations provided by the applicant to justify his refusal to engage the Mexican authorities*

[30] Overall, the RPD reasonably concluded that the applicant had not provided a convincing explanation or evidence to justify his failure to file a complaint and had therefore not met his burden of rebutting the presumption that Mexico could provide him with adequate protection. In this case, it was unreasonable not to seek help from the Mexican authorities.

[31] A presumption of state protection exists for Mexico, even if it is not as strong as it would be for other democracies. Therefore, the onus is on the applicant to demonstrate with clear and convincing evidence on a balance of probabilities that the Mexican state is unable to protect him adequately (*Cortes Martinez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1200, 2010 CarswellNat 4516; *Flores Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paragraph 30, 69 Imm LR (3d) 309 (CA)).

[32] The applicant filed no evidence found to be satisfactory by the RPD that was specific to his situation and not based merely on generalized fear and a loss of trust in the Mexican government (*Escobar Martinez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 502 at paragraph 14, 2010 CarswellNat 1296; *Kim v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1126 at paragraph 10, 2005 CarswellNat 2443).

[33] As for his testimony that only the wealthy benefit from state protection, it was open to the RPD to reject this in light of the fact that it was not corroborated by the documentary evidence, which meant that the presumption that testimony is true could be rebutted (*Adu v Canada (Minister of Employment and Immigration)*, (1995), 53 ACWS (3d) 158, 1995 CarswellNat 2559 (CA)).

[34] The RPD recognized that Mexico has problems with corruption and that it is not always unreasonable for an applicant not to avail himself of state protection. However, it validly concluded in this case that such conduct was unreasonable given that nothing in the evidence

filed suggests that the group of drug traffickers that had threatened him had ties with the police. Therefore, his decision not to seek police protection was unreasonable in the circumstances.

[35] There was no evidence before the RPD in support of applicant's argument that exhausting his courses of action would have endangered his life.

[36] As for the applicant's argument that there had been no follow-up on his eviction complaint, the RPD validly found that there was no connection between this and the threats he and his family received and that it did not constitute an obstacle to his engaging the authorities.

[37] To conclude, in the absence of a convincing explanation based on solid evidence, "a failure to pursue state protection opportunities within the home state will usually be fatal to a refugee claim – at least where the state is a functioning democracy with a willingness and the apparatus necessary to provide a measure of protection to its citizens" (*Camacho v Canada (Minister of Citizenship and Immigration)*, 2007 FC 830 at paragraph 10, 2007 CarswellNat 2555). The RPD faulted the applicant for not having made even minimal efforts to avail himself of state protection.

[38] As for the oral submission that one of the explanations for not turning to the authorities had not been mentioned by the RPD in its decision (the meeting between the police and the drug traffickers during which the applicant saw them shaking hands), it would have been preferable to have mentioned it. However, a review of the hearing transcript reveals that the RPD covered

several topics with the applicant and his counsel, while taking into account his hurry to leave Mexico, leaving his spouse behind. On the whole the decision is reasonable.

VIII. Conclusion

[39] The parties were asked to submit a question for certification but no question was submitted.

[40] In conclusion, it was reasonable for the RPD to dismiss the applicant's refugee claim on the basis that, on the facts, state protection was available to him. Regardless of where Mexico falls on the "democratic spectrum", it was reasonable to conclude that the applicant's unjustified refusal to file a complaint with the authorities makes it impossible for him to rebut the presumption of state protection.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed and no question will be certified.

“Simon Noël”

Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT
SOLICITORS OF RECORD

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