

Date: 20080908

Docket: IMM-5324-07

Citation: 2008 FC 995

Ottawa, Ontario, September 8, 2008

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

**EUSEBIO FRIAS MUNOZ
CLAUDIA FLORES SOTO
VIVIAN AUDREY FRIAS FLORES**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review is allowed because the Refugee Protection Division of the Immigration and Refugee Board (Board) erred in law by imposing on the applicants the wrong standard of proof.

[2] The applicants are citizens of Mexico who sought refugee protection. While the Board expressed some credibility concerns related to the identity of the agents of persecution, it made no

clear credibility findings. Instead, the Board found the determinative issue to be whether the applicants had rebutted the presumption of state protection.

[3] After a cursory review of "efforts by the government to combat corruption and provide protection" in the Federal District of Mexico City, the Board concluded that:

I am not satisfied within the preponderance of probability category, as I must be, that the authorities in the FDMC [Federal District of Mexico City] would not be reasonably forthcoming with serious efforts to protect the claimants if they were to return and approach the state for protection.

[4] As authority for this statement, the Board cited the decision of this Court in *Xue v. Canada (Minister of Citizenship and Immigration)* (2000), 195 F.T.R. 229. There, the Court wrote at paragraph 12:

Having regard to the approach expressed by Dickson C.J.C. in *Oakes*, i.e. that in some circumstances a higher degree of probability is required, and the requirement in *Ward* that evidence of a state's inability to protect must be clear and convincing, I do not think that it can be said that the Board erred in its appreciation of the standard of proof in this case. If the Board approached the matter by requiring that it be convinced beyond any doubt (absolutely), or even beyond any reasonable doubt (the criminal standard), it would have erred. However, the Board's words must be read in the context of the passage in *Ward* to which it was referring. Although, of course, the Board does not make reference to *Oakes* or *Bater*, and while it would have been more precise for the Board to say that it must be convinced within the preponderance of probability category, it seems clear that what the Board was doing was imposing on the applicant, for purposes of rebutting the presumption of state protection, the burden of a higher degree of probability commensurate with the clear and convincing requirement of *Ward*. In doing so, I cannot say that the Board erred. [Emphasis added.]

[5] However, the Federal Court of Appeal has now clarified in *Carillo v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 399 that an applicant must only meet the balance of

probabilities standard when rebutting the presumption of state protection. At paragraph 21 of its reasons the Court confirmed that it is an error of law to rely upon the *Xue* case for the proposition that a higher degree of probability is required when rebutting the presumption of state protection.

[6] Given the cursory nature of the Board's consideration of the country condition documentation, and its failure to mention elsewhere in its reasons the balance of probabilities standard, I am unable to conclude that the Board's error of law was not material to its decision.

[7] For that reason, the application for judicial review will be allowed. Counsel posed no question for certification, and I agree that no question arises on this record.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada dated November 27, 2007 is hereby set aside.
2. The matter is remitted for redetermination by a differently constituted panel of the Refugee Protection Division.

“Eleanor R. Dawson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5324-07

STYLE OF CAUSE: EUSEBIO FRIAS MUNOZ ET AL., Applicants
and
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION, Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 3, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** DAWSON, J.

DATED: SEPTEMBER 8, 2008

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