Date: 20090401

Docket: IMM-3474-08

Citation: 2009 FC 337

Ottawa, Ontario, April 1, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JOSE MANUEL JIMENEZ RUIZ,
MAYRA SORIA CUERVO,
HANNIA YUMEI JIMENEZ SORIA
and KENYA NAOMI JIMENEZ SORIA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to s. 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of a Board of the Refugee Protection Division of the Immigration Refugee Board (Board), dated July 9, 2008 (Decision) refusing the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Principal Applicant, Jose Ruiz, is a 32-year-old citizen of Mexico. His common-law wife, Mayra Cuervo (24 years old) and their minor daughters Hannia Soria (6 years old) and Kenya Soria (5 years old) are all citizens of Mexico.

[3] The Principal Applicant claims that he was the victim of a robbery that took place on August 3, 2006 in the State of Mexico. Two men, one with a gun, got out of a car with tinted windows and accosted the Principal Applicant. He says they stole his wallet, watch and ring. The Principal Applicant claims that the robbery was politically motivated because his father used to work as an employee of the Federal Government evicting squatters from land that the government wanted to acquire. The Principal Applicant claims that his father fled to the state of Matamoros four years ago and has been in hiding ever since.

[4] The Principal Applicant claimed that the Partido Revolucionario Democratico Party (RPD), which controls the government of Mexico City and deals with land for the Federal Government, wanted to get to him so that they could get back at his father. He says he has never been politically affiliated with any party in Mexico at any time.

[5] The Principal Applicant claimed that between 1998 and 2004 his family resided in Tampico, Mexico and his father used to visit them there. His father stayed for a period of five months in 2004 but then moved to Mexico City and also travelled around. The Principal Applicant claims that

people asked him about his father, but he believed that they were members of the PRD. His father had been threatened by the PRD in the past. The Principal Applicant claims not to have seen his father since the end of 2004 and, after 2004, the family has not known of the father's whereabouts.

[6] The Principal Applicant and his family moved to Mexico City at the beginning of 2005, where they stayed until they came to Canada on August 28, 2006 by air to Toronto.

[7] The Principal Applicant alleges that, on August 6, 2006, the same men who had robbed him attempted to kidnap his children from school. The kidnappers warned both the Principal Applicant and his wife not to approach the authorities. The Principal Applicant also claims that his family received several threatening phone calls that he attributed to the same individuals. They told the Principal Applicant that they were watching him and they reminded him of the kidnapping attempt.

[8] The Principal Applicant complained to the state Attorney General's office on August 16, 2006, where he was told that one of the perpetrators, Luis, was a member of the RPD. As a result of the complaint, the Principal Applicant was asked to attend at the Attorney General's office to identify a suspect who had been detained. However, when he arrived, there was no record of him being called or of anyone having been detained. The Principal Applicant claims that he then realized that his life and the lives of his family were at risk and that there could be no adequate protection from the Mexican authorities for them.

[9] The Applicants arrived in Canada at the end of August 2006. The Principal Applicant discovered that his father was in Canada and had made a claim for refugee protection in Montreal, which was denied. His father was available to provide evidence as a witness in the Applicants' claims, which were facilitated by a telephone conference from Montreal. The father claimed that his problems arose from a denouncement he had made against Julioa Levya Guerrero and her confederate, Enrique Resendez Cuellar, concerning the illegal possession of assets belonging to the Federal Government. He claimed that Julioa belonged to the Patido Revolucionario Institucional (PRI) party.

[10] The Applicants allege that they have a well-founded fear of persecution in Mexico because of their perceived political opinion, their membership in a particular social group and as persons targeted by organized crime in Mexico. They claim they are in danger of torture or a risk to their lives or a risk of cruel and unusual treatment or punishment if they return to Mexico.

DECISION UNDER REVIEW

[11] The Board concluded that the Applicants were not convention refugees or persons in need of protection. Specifically, the Board found that the Applicants had not rebutted the presumption of state protection. Nor would their removal to Mexico cause them to be subjected to a personal risk to their lives or a risk of cruel and unusual treatment or punishment. The Board found that there were no substantial grounds to believe that the Applicants' removal to Mexico would subject them personally to a danger of torture.

[12] The Board pointed out that the evidence of the Principal Applicant and his father indicated that the agents of persecution were not from the same party. This undermined the entire credibility of the Principal Applicant. The Board found that the Principal Applicant had not been persecuted for either his or his father's perceived political opinions.

Criminality and Nexus

[13] The Board found that victims of crime, corruption or vendettas generally fail to establish a link between their fear of persecution and one of the five grounds in the Convention refugee definition. The Board held that the Applicants' claims were not linked to any Convention ground and that they did not fall within any of the three categories of a "social group" as defined in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (*Ward*). The Board pointed out that "victims of crime" is not a Convention ground. As well, the Applicants had not established an identifiable risk that was distinguishable from risks faced by the general population in Mexico. For this reason, the Board found that the Applicants were not Convention refugees.

State Protection

[14] The Board was not convinced that the state would not be reasonably forthcoming in affording them protection if the Applicants returned to Mexico. The Board found that the totality of the evidence did not support the conclusion of state breakdown; nor did it rebut the presumption that

Mexico was able to protect its nationals. The state is not expected to provide perfect protection to its citizens.

[15] The Board relied on *N.K. v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1376 (F.C.A.) (*Kadenko*) at paragraph 5:

> When the state in question is a democratic state…the 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. The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: 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.

[16] The Board also cited *Canada (Minister of Employment and Immigration) v. Villafranca*, [1992] F.C.J. No. 1189 (F.C.A.) (*Villafranca*) for the proposition that just because a country is not always successful at protecting its citizens is not enough to justify a refugee claim. As well, *Milev v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 907 (F.C.T.D.) makes it clear that if the state does not provide perfect protection that is not, in itself, a basis for determining that the state is unwilling or unable to offer reasonable protection in the circumstances. International refugee protection is not meant to permit a claimant the opportunity to seek better protection abroad than they would receive at home.

[17] The Board again relied on *Ward* for what must be established to rebut the presumption that a state is capable of protecting its citizens. There must be “clear and convincing” evidence of the state’s inability to protect. This means that a claimant must seek the protection of the authorities of his home country, or establish that it was not objectively reasonable to do so.

[18] The Board accepted that, although Mexico is a federal republic and the government is generally respected and has promoted human rights at the national level, cultural impunity and corruption still exist there. The Board relied on several pieces of documentary evidence which discussed Mexico's corruption, the avenues of recourse and victim assistance programs, protections for witnesses of crimes and the traceability of individuals fleeing violent situations. The Board found that the Applicants came to Canada approximately four weeks after the initial incident had occurred and had not provided the Mexican authorities with an opportunity to find the individuals who perpetrated the incident. This was "too quick to assume that no state protection was available": *Hussain v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 590 (*Hussain*).

[19] The Board concluded that the Applicants had not established that they would face a risk of harm and they had not rebutted the presumption of state protection with clear and convincing evidence.

ISSUES

[20] The Applicants raise the following issue:

1) Are the Board's conclusions on the issue of state protection reasonable?

STATUTORY PROVISIONS

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

Convention refugee

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,

(*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

(*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.

Définition de « réfugié »

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) 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) 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

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

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of

Personne à protéger

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) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au

Article 1 of the Convention Against Torture; or

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.

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

[22] In *Chaves v.Canada (Minister of Citizenship and Immigration)* 2005 FC 193, the court held as follows:

> 11. … Deciding whether a particular claimant has rebutted the presumption of state protection involves "applying a legal standard [i.e. "clear and convincing confirmation of a state's inability to protect": Ward, supra, at para. 50] to a set of facts", which according to the Supreme Court constitutes a question of mixed fact and law: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 26. The RPD has relative expertise with respect to the findings of fact and assessing country conditions. However, the Court has relative expertise with respect to whether the legal standard was met. Accordingly, the appropriate standard of review is in my view reasonableness simpliciter. This is consistent with the rulings characterizing the issue of state protection as a question of mixed fact and law: *Smith, supra* and *Racz, supra*.

[23] The recent decision of *Lozada v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 492 also describes the standard of review on state protection issues as follows:

> In *Carillo v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 399, 2008 FCA 94, the Federal Court of Appeal considered the issue of state protection where an applicant claimed refugee status in Canada because she felt she could not get state protection from spousal abuse in Mexico. The Federal Court of Appeal determined the standard of review for the Board's assessment of state protection and the failure to seek state protection was reasonableness (*Carillo* (F.C.A.) at para. 36). While neither party made extensive written submissions with respect to standard of review on decisions related to state protection, there is a long line of jurisprudence emanating from this Court where it has been found that the standard of review for a finding of state protection, using pre-*Dunsmuir*, above, terminology, is reasonableness *simpliciter* (see: *Monte Rey Nunez v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 2067, 2005 FC 1661; *Chaves v. Canada (Minister of Citizenship and Immigration)*, [2005 F.C.J. No. 1508, 2005 FC 1249; and *Fernandez v. Canada (Minister of*

Citizenship and Immigration), [2005] F.C.J. No. 1389, 2005 FC 1132).

[24] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, however, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[25] The Supreme Court of Canada in *Dunsmuir* also held that the 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.

[26] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to this issue to be reasonableness. 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": *Dunsmuir* at paragraph 47. Put

another way, the Court should only intervene 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."

ARGUMENT

The Applicants

[27] The Applicants submit the Board found that Mexico has a "deeply entrenched culture of impunity and corruption"; however, the Board went on to find that the Applicants left Mexico only a month after the Principal Applicant complained to the authorities and that they were "too quick to assume that no state protection was available." The Applicants submit that this was internally inconsistent, illogical and unreasonable.

[28] The Applicants say that the Board did not make any adverse credibility findings concerning their evidence. The Principal Applicant testified that he had been called by authorities to identify a perpetrator, only for the Attorney General's officer to deny all knowledge of having called him when the Applicant appeared. The Applicants submit that this evidence is consistent with two scenarios: (1) that corrupt means were used by the perpetrator to evade prosecution; or (2) serious incompetence on the part of the authorities. Neither scenario inspires "any degree of confidence that the authorities would be willing and able to apprehend the perpetrators if the Applicant had waited in Mexico for a longer time."

[29] Further, the Applicants submit that the Board failed to identify any effective body or avenue that would allow them to transcend the prevailing and systemic corruption and impunity that the Board acknowledged exists in Mexico. The Applicants highlight that "impunity" implies that there is no effective recourse for an injustice suffered by a citizen.

[30] The Applicants state that the factors of the current case are distinguishable from *Hussain* because of the fact that the Pakistani police in that case would have rendered assistance if Mr. Hussain had returned to the police.

[31] In relation to *Ward*, the Applicants submit that, given the Board's findings about country conditions in Mexico and the unhelpfulness of the authorities, the Principal Applicant was entitled to conclude that protection would not be forthcoming and that it was reasonable not to incur any further risk to his life or his family by staying in Mexico.

[32] The Applicants rely upon *Zepeda v. Canada (Minister of Citizenship and Immigration)* 2008 FC 491 at paragraph 25 for the position that, unless there is evidence to the contrary, a claimant is entitled to limit his/her complaints to bodies with actual enforcement powers, such as the police, and need not wait around to present complaints that are likely to be fruitless to other bodies.

[33] The Applicants conclude that it is sufficient on judicial review to show that the result might have been different if the Board had not made errors: *Pankou v. Canada (Minister of Citizenship*

and Immigration) 2005 FC 203; *Alam v. Canada (Minister of Citizenship and Immigration)* 2005 FC 4 and *Hussain.*

The Respondent

[34] The Respondent submits that the Board's recognition that a deeply entrenched culture of impunity and corruption still exists in Mexico is not tantamount to a finding that the Mexican state is unwilling or unable to provide its citizens with adequate protection. The Board accepted that the Principal Applicant may have been a victim of crime at the hands of unknown assailants and that he attended at the Attorney General's Office where no suspect had been apprehended for the Principal Applicant to identify.

[35] However, there was no indication from the Board that they accepted the Principal Applicant's speculation that this was due to political corruption in the Attorney General's office or that this occurrence was indicative of a serious threat to the Applicant's life. The Board, in the Respondent's view, rejected the Applicants' allegations that the threats were politically motivated, so there is no basis to argue that the Board accepted that the Attorney General's office would have called the Applicant to inform him that they had detained a suspect with a connection to the RPD.

[36] The Respondent further submits that even if the Court is of the opinion that the Board did accept that the Attorney General's office may have been acting corruptly, this and the fact that corruption remains a serious problem in Mexico does not constitute sufficient, clear and convincing

evidence that the state was unwilling or unable to provide the Applicants with protection in Mexico. The Respondent points out that this Court has repeatedly and recently held that state organizations other than the police may be of assistance where the initial police response is not adequate: *Sanchez v. Canada (Minister of Citizenship and Immigration)* 2008 FC 134.

[37] The Respondent points out that the Board concluded, in light of the evidence, that it was not objectively unreasonable to expect the Principal Applicant to have sought further assistance from the state before seeking international protection. Having recognized the limitations of Mexico's ability to protect its citizens, it was up to the Board to weight the evidence before it to determine whether available state protection was adequate. It is not the task of the Court to re-weigh the evidence that was before the Board: *Kadenko* and *Gutierrez v. Canada (Minister of Citizenship and Immigration)* 2008 FC 971 at paragraph 22.

ANALYSIS

[38] The gravamen of this application is that the Board accepted the Principal Applicant's personal story about the robbery and the kidnapping attempt, and his going to the Attorney General's Office, and the Board also found that the documentary evidence revealed "a deeply entrenched culture of impunity and corruption in Mexico," and yet the Board concluded that the Applicants had not shown that state protection would not be available to them in Mexico and that they had been too quick to leave Mexico and come to Canada.

[39] In other words, if impunity and corruption are so entrenched in Mexican culture, the Applicants say that the Board does not explain how they could have sought state protection by either remaining in Mexico longer than they did, after concluding that their lives were in danger, or by accessing other forms of protection. The Applicants say that the Board's reasoning on this principal point is illogical and incomplete and so cannot be regarded as reasonable within the meaning of *Dunsmuir*. In fact, the Applicants say that there are other signs of sloppiness and contradiction in the Decision that confirm the Board was using "patterned reasoning" rather than looking at the specific evidence before it.

[40] When I review the Decision as a whole, the essence of the Board's reasoning on State Protection is that the "totality of the evidence does not support a conclusion of state breakdown, nor does it rebut the presumption that Mexico is able to protect its nationals."

[41] The Board certainly acknowledges that "a deeply entrenched culture of impunity and corruption still exists" in Mexico, but "[a]ccording to the documentary evidence, one cannot find that there has been a collapse of the state system as far as protection of citizens is concerned … ."

[42] In other words, read in the context of the Decision as a whole, the Board's acknowledgement regarding impunity and corruption do not equate to a breakdown of the state system, and the Applicants themselves provided little to suggest that they had tried to avail themselves of state protection. The Applicants' evidence concerning their own experiences remains

somewhat tainted by the negative credibility finding on political motivation but, even if that issue is disregarded, it remains highly speculative and tenuous.

[43] The Principal Applicant claimed that he went to the State Attorney General's office on August 16, 2006 to report the incidents. On the same day, he says that he later received a phone call asking him to return to the office to identify a suspect who had been detained. However, he says that when he showed up at the office there was no record of his having received a call to identify anybody and there was no one in custody. He then decided that his life was in danger and that he had to come to Canada.

[44] The Applicants ask the Court to consider this account as evidence of corruption or gross incompetence so endemic that they were reasonable in their conclusion that the Mexican state could not protect them.

[45] But there is really nothing to support the Applicants' conclusions. They could have attempted to find out what had occurred and, if it was corruption, accessed those aspects of the state apparatus that deal with corruption. If it was incompetence, it does not justify the Applicants quick decision to leave for Canada.

[46] Even though the Board conceded that impunity and corruption exist in Mexico, it pointed out that steps have been taken to deal with these problems, and I do not think it was unreasonable

for the Board to conclude that, on the basis of one unexplained phone call from the Attorney General's Office, the Applicant had done anything to refute the presumption of state protection.

[47] I cannot say that this conclusion was not reasonably open to the Board on the basis of the Applicants' subjective evidence and the documentation before it. And I do not think that this conclusion can be offset by other anomalies and inconsistencies in the Decision.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is dismissed.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	FEBRUARY 11, 2009
REASONS FOR :	HON. MR. JUSTICE RUSSELL
DATED:	April 1, 2009

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