Federal Court		Cour fédérale

Date: 20100913

Docket: IMM-1027-10

Citation: 2010 FC 916

Vancouver, British Columbia, September 13, 2010

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

LUIS DANIEL AGUIRRE
SONIA MARINA MORALES DE AGUIRRE
LUIS FERNANDO AGUIRRE MORALES
ALEJANDRA DANIELA AGUIRRE MORALES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision of the Refugee Protection Division (the "RPD") dated February 4, 2010, denying the Applicants' claim for refugee status. The RPD found that the Applicants had failed to rebut the presumption of state protection. Having carefully considered the record and the parties' oral and written submissions, I have come to the conclusion that the RPD erred in assessing the Applicants' circumstances and in finding that they did not provide a reasonable explanation for not having attempted to seek protection.

FACTS

[2] Mr. Aguirre was the owner of a transport business in El Salvador with a fleet of about 40 vehicles. Starting in 2004, he claimed that a group of extortionists subjected him to a series of attempts to make him pay "rent". According to the Applicant, his trucks were frequently hijacked and the extortionists would leave a message that they would be returned when the "rent" was paid. Mr. Aguirre stated that he made 50 to 100 reports of such incidents to the local police.

[3] In late 2006, Mr. Aguirre began to experience more robberies. In 2007, the extortionists started threatening to hurt his family members. In 2008, Mr. Aguirre's secretary began to receive phone calls from people refusing to identify themselves, who said they wanted to do business with him.

[4] Two further incidents prompted the Applicants to claim refugee protection.

[5] In March 2008, several strangers entered the Applicants' house and told Mrs. De Aguirre that if her husband refused to negotiate with them, they would be dealing with her and her children. They robbed the house of its most valuable items. The family did not report this incident to the police.

[6] In August 2008, when the Applicants were preparing to come to Canada to visit relatives, another incident occurred. One of Mr. Aguirre's drivers was kidnapped after his vehicle was hijacked by the extortionists. Mr. Aguirre reported the kidnapping to the police. He believes the extortionists meant to kidnap him instead, but he did not report this belief to the police.

[7] After the Applicants came to Canada, they learnt from Mr. Aguirre's mother that strangers had been looking for him. Mr. Aguirre believes that these were the extortionists. He did not contact the police regarding his fears that the extortionists were looking for him.

[8] In addition, there are some significant facts arising from Mr. Aguirre's Personal Information Form that the Panel did not mention. The family moved house twice in an effort to evade the extortionists: first to a safer neighbourhood in 2006, and again several days after the home invasion incident in 2008. Furthermore, they closed their transportation business and opened a restaurant in the hopes that closing the business targeted by the extortionists would allow them to escape the harassment.

THE IMPUGNED DECISION

[9] The Panel determined that the Applicants are not in need of refugee protection. It found that the Applicants had failed to rebut the presumption of state protection because they did not contact the police about the incidents that prompted them to flee their country.

[10] The Panel assumed without deciding the facts alleged by the Applicants. Regarding the situation in El Salvador, the Panel also acknowledged high levels of gang violence and reports that local police are unwilling or unable to offer protection. However, the Panel found that El Salvador is a functioning democracy with a police system that is putting significant resources towards gang-related problems and seemed to conclude that state protection was likely available.

[11] The Panel appeared to base its refusal on the Applicants' failure to have gone to the police for protection. When asked why they did not, Mr. Aguirre said that the extortionists have police

connections, that he was afraid of reprisals if he went to them, and that he knew of a distant relative who had been killed after making a complaint to the police about an extortion demand. The Panel did not accept these explanations as reasons that justified a grant of international, and surrogate, refugee protection.

[12] The Panel further commented that not going to the police in the home country creates a self-fulfilling prophecy: if claimants do not approach local authorities, those authorities will not be able to succeed in their duties because they have no one willing to assist them in their investigations.

ISSUE

[13] The only issue raised by this application is whether the Panel erred in concluding that the Applicants had not rebutted the presumption that the state was able and willing to protect them.

ANALYSIS

[14] Counsel for the Applicants submits that the Panel erred in law by failing to apply the appropriate test for state protection. By deciding that the claimants' failure to report the incidents necessarily meant that they did not rebut the presumption of state protection, the Panel in effect decided that any claimants who fail to seek internal protection for reason of fear of reprisals or for fear that their assailants are connected to the police cannot rebut the presumption. This being an error of law, according to the Applicant, it should be reviewed on the correctness standard.

[15] Contrary to the Applicant's argument, I do not believe that the Panel applied the wrong test. At paragraph 12 of its reasons, it stated the test accurately as follows:

> The state is presumed to be able and willing to protect its citizens. The claimant who considers that that

> presumption should not be applied in their case must demonstrate why not, through clear and convincing evidence. The claimant who does not even approach the authorities in their own country must demonstrate why it would be unreasonable to expect them to have done so.

[16] The Supreme Court of Canada has directed that where the standard of review can be ascertained by reference to existing jurisprudence, there is no need to engage in a standard of review analysis. The issue of state protection, which involves mixed questions of fact and law, has been determined to be reviewable on a standard of reasonableness in a host of decisions by this Court and the Federal Court of Appeal: see, for ex., *Hinzman* v. *Canada (M.C.I.)*, 2007 FCA 171, at para. 38; *Zamorano* v. *Canada (M.C.I.)*, 2009 FC 82, at para. 13; *Gomez* v. *Canada (M.C.I.)*, 2010 FC 375, at paras. 24; *Perez Nava* v. *Canada (M.C.I.)*, 2008 FC 706, at para. 12.

[17] The Panel was clearly aware of the applicable general principles, and was not attempting to detract from these principles or to set new ground rules for the future. To that extent, its decision appears to be grounded on the particular facts of this case, and as such, it merely sought to apply the general principle to the situation of the Applicants. However, if the Panel was attempting to rule out in the abstract the possibility of rebutting the presumption of state protection on the basis of fear of reprisals or of police connections with the agents of persecution, that part of its reasons could well attract a review on the correctness standard. Be that as it may, I need not pursue this matter any further as I have found that the Panel has not satisfied the less stringent standard and has made an unreasonable finding on the basis of the evidence that was filed.

[18] As a general principle, an Applicant is expected to take all reasonable steps to seek state protection from his prosecutors. However, as Justice La Forest aptly stated in *Canada (Attorney*

General) v. *Ward*, [1993] 2 S.C.R.689 (at p. 724), this will hold true only in situations where state protection might reasonably be forthcoming:

> Most states would be willing to attempt to protect when an objective assessment established that they are not able to do this effectively. Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.
>
> 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.

[19] In the case at bar, I find two flaws in the Panel's reasoning. First, the Panel assumes that the state can provide protection because "huge resources" have been dedicated to address gang violence, without ever assessing whether these efforts have had any real impact on the ground. Second, the Panel did not take into account and discuss the reasons given by the Applicant for not approaching the police. I will deal with each of these issues in turn.

[20] The case law is replete with statements confirming that it is not sufficient for a state to make efforts to provide protection; an objective assessment must also establish that the state is able to do so in practice: see, *inter alia*, *Avila* v. *Canada (M.C.I.)*, 2006 FC 359; *Sanchez* v. *Canada (M.C.I.)*, 2009 FC 101; *Capitaine* v. *Canada (M.C.I.)*, 2008 FC 98. However, the Panel does not seem to be alert to this distinction, and does not refer to any documentary evidence showing that the resources devoted to combating crime have produced any tangible results. There is only one vague reference

to the "National Documentation Package", which is most unhelpful considering the voluminous number of documents that it contains. Even this one reference only supports the assertion that huge resources are dedicated to dealing with gang violence. There is not a shred of analysis of the numerous documents indicating that gang members are increasingly powerful and roam freely throughout the country, that El Salvador is one of the most violent countries in the world, and that extortion rings plague businesses and more particularly transportation and trucking companies. The Panel clearly had an obligation to review, weigh and explain why it rejected this documentary evidence which was not only relevant but which also contradicted its own findings: *Cepeda Gutierrez* v. *Canada (M.C.I.)* (1998), 157 F.T.R. 35, at para. 17. It should not have simply glossed over this dire information and contented itself with saying that El Salvador is a functioning democracy that has put enormous resources towards its problems.

[21] Moreover, the Panel did not pay adequate attention to the Applicants' own experience with the police and their previous attempts to seek state protection. The Applicants fled El Salvador after having been harassed by a ring of extortionists for four years. During this time, they took various significant measures to seek help and evade the extortionists, including moving to a safer neighbourhood, closing their transportation business and opening a restaurant, and making between 50 and 100 reports to the police over hijacking incidents. There is no evidence that the police offered any protection, investigations, or arrests in response to these reports. These complaints demonstrate a willingness on the part of the Applicants to seek protection from the state, and show that the police were well-aware of the harassment that the Applicants suffered at the hand of the extortionists.

[22] Furthermore, the Applicants did contact the police about the violent hijacking and kidnapping of the driver, which was one of the incidents that prompted the family to flee. The driver subsequently decided to quit his job, and refused to make an official police complaint.

[23] The Panel seems to stake particular significance on the fact that the family did not report either their belief that the kidnappers had intended to take Mr. Aguirre or their fears that the extortionists were looking for him even after they had fled El Salvador. Given the police's ineffective response to concrete crimes committed by the extortionists, such as the hijackings and the kidnapping, I do not think it was unreasonable of the Applicants to neglect to report their fears of events that had not yet come to pass. The Applicants have demonstrated much more than a subjective reluctance to engage the state, and it cannot be said that the family was too quick to assume that state protection would not be forthcoming.

[24] Finally, the Board failed to address Mr. Aguirre's statement to the effect that he never dealt with the extortionists and never reported that he had been personally targeted by the extortion ring on the advice of a friend who held a position in the police. He had apparently been advised that the extortion rings had infiltrated the police and that opening a police complaint could only put him in greater danger. This is entirely consistent with reports of police corruption and association with criminal gangs found in the documentary evidence. Indeed, the president of the Salvadoran Chamber of the Transport Industry is reported as saying that sometimes "the criminals are informed that they have been denounced before the victims have finished lodging their report of an incident" (Applicant Record, p. 254). Yet again, the Panel fails to even mention that evidence, let alone analyze it.

[25] For all of the foregoing reasons, I am therefore of the view that the Board came to an unreasonable decision and that this application for judicial review ought to be granted. Counsel suggested no question of general importance for certification, and none arises.

ORDER

THIS COURT ORDERS that the application for judicial review is granted, the decision of the Refugee Protection Board of February 4, 2010 is set aside and the applicant's claim is referred back to the Board for redetermination by another member. No question is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1027-10
STYLE OF CAUSE:	LUIS DANIEL AGUIRRE, ET AL V. MCI
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	September 9, 2010
REASONS FOR ORDER AND ORDER:	DE MONTIGNY, J.
DATED:	September 13, 2010

APPEARANCES:

Mr. Craig Costantino	FOR THE APPLICANTS
Ms. Kimberley Shane	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Elgin Cannon and Associates Vancouver, BC	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada Vancouver, BC	FOR THE RESPONDENT