Federal Court  Cour fédérale

Date: 20101208

Docket: IMM-1554-10

Citation: 2010 FC 1245

Ottawa, Ontario, December 8, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

GILBERTO PALACIOS NICOLAI

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 of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated February 16, 2010, concluding that the applicant is not a Convention refugee or person in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act) because the applicant does not have a well-founded fear of persecution for a Convention reason and his removal to Mexico will not subject him personally to a risk to life, or a risk of cruel and unusual treatment or

punishment, or a danger of torture, because there is adequate state protection available to the applicant in Mexico.

FACTS

Background

[2] The applicant is a 47 year-old citizen of Mexico. He fled Mexico to Canada on June 14, 2007, and made a claim for refugee protection on July 9, 2007. The applicant fears for his life at the hands of his former employer.

[3] The applicant and his wife worked in different businesses that were both owned by the same individual, who the Court will identify by his first name "Jose". Both businesses were in the city of Yautepec. Neither counsel knew where this city was located. According to the atlas, it is situated in the State of Morelos and is approximately 75 kilometres south of Mexico City.

[4] The applicant's affidavit deposed that his wife was the assistant manager at a restaurant owned by "Jose" and he, the applicant, was a salesman at a real estate business owned by Jose. On July 17, 2005, the applicant's wife was fired by Jose after being employed at the restaurant for four years. The applicant deposes:

> We are unsure of the reasons that she was fired.

Over the next two weeks, the applicant remained at his position but found the work environment very tense. As a result, he quit his job two weeks after his wife had been fired.

[5] On August 19, 2005 the applicant's wife filed a wrongful dismissal suit against her former employer with the Board of Conciliation and Arbitration in the State of Morelos. The applicant and his wife began receiving threats and harassment from their former employer, warning them to drop the suit.

[6] On December 15, 2005, the former employer launched a countersuit in the Public Ministry, accusing the applicant's wife of fraud, theft, and breach of trust, and accusing the applicant of uttering threats and attempted murder.

[7] Both cases remain ongoing.

[8] On March 6, 2007, the applicant was physically assaulted by three men who warned him that they would kill him if he refused to retract the wrongful dismissal suit against his former employer. The applicant attempted to report the incident and threats to the Public Ministry of the City of Yautepec on that same day, but was told that he could not file a report because of the outstanding lawsuit, and because of the charges against the applicant by Jose. The next day the applicant went to the local human rights office, but was told that there was nothing that they could do to help him. The applicant then asked his lawyer what he could do to report the assault and get protection, but was told that there were no other options available to him.

[9] In late April or early May of 2007, a former colleague of the applicant's wife warned them that she had overheard Jose indicate that he was going to kill the applicant as a result of the lawsuit.

In May of 2007, the applicant and his wife moved to Mexico City because they were afraid of being attacked again.

[10] The applicant fled Mexico on June 14, 2007. He states that he is afraid that should he return to Mexico he will be attacked because the court case remains ongoing and because his former employer has the resources to find out where the applicant is living.

[11] The applicant's wife remained in Mexico City. The applicant has not been in contact with his wife, but before he left Mexico City, he had not received any threats from his former employer.

[12] When the applicant entered Canada, he reported on the advice of his "previous counsel" that he was seeking refuge because he had been sexually assaulted by his former employer. This story was retracted and corrected when the applicant retained his present counsel. At the hearing, the applicant's current counsel acknowledged that the applicant's brother had also come to Canada and made a refugee claim. At the hearing the applicant stated that he did not know the basis of his brother's refugee claim.

Decision under review

[13] On February 16, 2010, the Board dismissed the applicant's claims because it found that he does not have a well-founded fear of persecution for a Convention reason, and his removal to Mexico would not subject him to a risk to life, of cruel and unusual treatment or punishment, or of torture.

[14] The Board made no finding on the credibility of the applicant. The Board's decision depended on three findings regarding whether the applicant's fear was objectively reasonable: the adequacy of state protection in Mexico, the adequacy of the applicant's attempts to avail himself of state protection in Mexico, and the adequacy of the applicant's evidence in rebutting the presumption of the state's ability to protect him.

[15] With regard to the first issue, the adequacy of state protection in Mexico, the Board stated that where a state is not in complete breakdown there a presumption that it is capable of protecting its citizens. The Board further stated that perfect protection is not required, but, rather, state protection must be adequate. In democratic states, the Board recognized that there is a heavier onus on refugee claimants to demonstrate that they have exhausted all courses of action reasonably available to them to access state protection – a failure by local authorities alone to provide protection does not mean that the state as a whole has failed to offer adequate protection.

[16] The Board considered the documentary evidence before it regarding country conditions in Mexico. It found that Mexico is in effective control of its territory. It found that Mexico has a functioning security force that is hierarchical, and before which a complainant may seek redress at higher levels if dissatisfied with services at the local level. The Board also noted that there are a number of authorities and agencies before which citizens may present complaints of corruption or other problems with the security forces. The Board further detailed some of the efforts that the Mexican government has undertaken to ensure police effectiveness and to purge corruption within the security forces.

[17] With regard to the second issue, the adequacy of the applicant's attempts to avail himself of state protection in Mexico, the Board found that the applicant's efforts in this regard were insufficient. The Board recognized that the applicant had attempted to report the March 6 physical assault to the Public Ministry and to the human rights office, but had been rebuffed. The Board further acknowledged that the applicant has spoken to his lawyer about possible avenues of redress. The Board found that the applicant could have done more. First, the Board found that the applicant should have been familiar enough with the Mexican justice system and the options available to him to seek redress at higher levels. At para. 20, the Board stated:

> ¶20. The claimant testified that after he was unsuccessful in reporting the physical assault and threats to the Public Ministry, he attempted to report it to the human rights office. The official at the human rights office told the claimant that they could not help the claimant and provided no further assistance or direction. The claimant then spoke to his lawyer who told the claimant that there was nothing else the claimant could do because of the inquiries that were ongoing with respect to the lawsuits filed by the claimant's wife against Jose's firm and Jose's lawsuit against the claimant and his wife. Regardless of the pending lawsuits, I find that the claimant should have sought redress at a higher level of the security forces since his allegations were serious enough to warrant attention. Since the claimant and his spouse have been successful to date in pursuing their lawsuit against Jose's firm and responding to the lawsuit that Jose initiated against the claimant and his spouse, I find that the claimant should be familiar with the Mexican justice system and all the options available to him with respect to seeking redress.

The Board based this finding in part on the fact that the applicant's ongoing civil lawsuit should have familiarized him with Mexico's legal system. However, the Board did not identify which "higher security forces" could have provided better redress.

[18] Second, the Board found that the applicant failed to report to the security forces the death threat that he and his wife received prior to fleeing. The Board held that the applicant stated that he

did not report this threat because he did not believe that he would be taken seriously. The Board found at para. 21:

> ¶21. . . . although the claimant was unsuccessful in filing a report with the Public Ministry in the past, if the claimant truly felt threatened, he should have reported the information to the police and sought state protection in Mexico prior to seeking international protection in Canada.

[19] Finally, with regard to the third issue, the Board found that the applicant had failed to discharge his burden of providing "clear and convincing" evidence of the state's inability to protect him. The Board recognized at para. 22 that "there is information in the documentation to indicate that inefficiency, bribery and corruption remain issues in Mexican security forces at all levels, as well as within the public service sector." At para. 23 the Board concluded:

> ¶23. The Board recognizes that there are some inconsistencies among several sources within the documentary evidence; however, the preponderance of the evidence regarding current country conditions suggests that, although not perfect, there is adequate state protection in Mexico for victims of crime, that Mexico is making serious efforts to address the problem of criminality, and that the police are both willing and able to protect victims. Police corruption and deficiencies, although existing and noted by the Board, are not systemic.

[20] The Board specifically considered the documentary evidence submitted by the applicant, but found that the documents did not suggest a different assessment: while Mexico is facing problems with respect to state protection, it is also making serious efforts to address those problems. The Board concluded that the claimant had failed to rebut the presumption of state protection with clear and convincing evidence, and that, therefore, Mexico would be "reasonably forthcoming with state protection, should the claimant pursue it."

[21] At para. 25 the Board held:

> ¶25. I am of the view in perusing the documentary evidence, that, as a whole, the issues of corruption and deficiencies are being addressed by the state of Mexico. . . .

LEGISLATION

[22] Section 96 of the Act grants protection to Convention refugees:

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,	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) 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	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) 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	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.

[23] Section 97 of the Act grants protection to persons whose removal from Canada would subject them personally to a risk to their life, or of cruel and unusual punishment, or to a danger of torture:

97. (1) A person in need of protection is a person in Canada whose removal to their	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait

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	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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au 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 (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (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, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUE

[24] The applicant submits that the Board's decision raises the following issue:

> In its analysis of State Protection, the Board erred by conducting a highly selective analysis, using outdated objective evidence, thereby making a decision that is unsupported by the recent evidence before it or by the actions of the Applicant.

STANDARD OF REVIEW

[25] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[26] Questions of state protection concern determinations of fact and mixed fact and law. They concern the relative weight assigned to evidence, the interpretation and assessment of such evidence, and whether the Board had proper regard to all of the evidence when reaching a decision. It is clear that as a result of *Dunsmuir* and *Khosa* that such questions are to be reviewed on a standard of reasonableness: see, for example, my decisions in *Corzas Monjaras v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 771 at para. 15; and *Rodriguez Perez v. Canada (Minister of Citizenship and Immigration)* 2009 FC 1029 at para. 25.

[27] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, supra, at paragraph 47; *Khosa*, supra, at para. 59.

ANALYSIS

Issue: **Did the Board err by conducting a highly selective analysis, using outdated objective evidence, thereby making a decision that is unsupported by the recent evidence before it or by the actions of the Applicant?**

[28] The applicant submits that the Board erred in concluding that state protection is reasonably available to the applicant, because the Board relied on outdated evidence from 2008, ignored contrary evidence, and disregarded attempts made by the applicant to gain state protection. The applicant makes three submissions in support of his position:

1. The applicant submits that the Board specifically cited only three sources, two of which date from 2004. The Board made 6 references to a 2004 Report on conditions in Mexico. This report is from the Research Directorate of the Board and it is entitled "Mexico: Possible Recourse for Victims of Bribery Demands/Corruption by Government Officials…". It is dated October 1, 2004. The applicant submits that updated documents in the Board's national documentation package provide contrary evidence regarding the adequacy of state protection in Mexico, including problems of corruption and violations of human rights.
2. The applicant further submits that the Board merely cited the existence of initiatives and agencies created to combat corruption and other problems in Mexico's security forces without engaging with the question of the effectiveness of those efforts. Relying upon *Vigueras Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359 at para. 27, the applicant submits that the Board must consider the willingness and ability of the state to act to protect its citizens, and not merely the existence of an intent to do so. Relying upon *Zepeda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 and *Molnar v. Canada (Minister of*

Citizenship and Immigration), 2002 FCT 1081, [2003] 2 F.C. 339, the applicant submits that alternate institutions, like human rights offices, do not constitute protection *per se*, because the police are the only institution that is mandated with the duty of protecting the country's citizens.

3. Finally, the applicant submits that by demanding that the applicant do more to avail himself of state protection, the Board placed an improperly high burden on the applicant. The applicant submits that going to the Public Ministry, the Human Rights Office and seeking advice from his lawyer ought to have sufficed to discharge the applicant's duty to seek state protection. The applicant submits that it was unreasonable for the Board to conclude that because of the applicant's pending civil lawsuit, the applicant "should be familiar with the Mexican justice system and all the options available to him with respect to seeking redress."

[29] As the Board in this case stated, except in cases where there has been a complete breakdown in the home state apparatus, there exists a general presumption that a state is capable of protecting its citizens: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689. Moreover, this presumption can only be rebutted where the refugee claimant provides "clear and convincing" evidence confirming the state's inability to provide protection: *Ward*, at 724-725. The evidence that state protection is unavailable must satisfy the Board on a balance of probabilities that state protection is "inadequate" – no state is expected to provide perfect protection to all its citizens at all times: see, for example, *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.). The more democratic is the state, the heavier is the burden upon the claimant to displace the presumption of adequate protection and demonstrate that he has exhausted

all courses of action reasonably available to him: *Flores Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para. 30; *Canada (Minister of Citizenship and Immigration) v. Kadenko* (1996), 143 D.L.R. (4th) 532 (F.C.A.), at 534.

[30] The law is clear that the Board need not explicitly refer to all of the material before it and will be assumed to have considered all of the evidence unless there is some contrary indication. However, as Justice Evans stated in *Cepeda-Gutierrez v. Canada (Minister of Citizenship & Immigration)*, 157 F.T.R. 35, [1998] F.C.J. No. 1425, at para. 16, "the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts."

[31] The Board's reasons in this case demonstrate that it considered all of the evidence. The Board does refer to other documentary evidence besides the 2004 document. The Board uses the 2004 document as evidence of alternative authorities and agencies that are available to members of the public to complain about the security forces. The applicant has not pointed to evidence that the availability of such organizations has changed since 2004. The Board does not suggest that it has relied exclusively upon these reports in drawing its conclusion regarding the adequacy of state protection in Mexico. To the contrary, in addition to explicitly referring to the U.S. Department of State 2008 Report, *Human Rights Reports: Mexico*, 25 February, 2009, the Board recognizes, as stated above, that "there is information in the documentation to indicate that inefficiency, bribery and corruption remain issues in Mexican security forces at all levels, as well as within the public service sector." The Board also explicitly refers to the additional documentary evidence submitted by the applicant. At para. 24 of its reasons, the Board expressly names certain articles and an

Amnesty International report submitted by the applicant. The Board recognizes that these reports and articles support the other documentary evidence considered by the Board. The Board states:

> ¶24. . . . Although most of the items report on the problems Mexico is facing with respect to state protection, most of them also outline Mexico's efforts to identify and resolve the problems they are having.

[32] At para. 25, the Board concludes:

> ¶25. . . . Having considered the totality of the evidence including the Board's documentary evidence with respect to the adequacy of state protection in Mexico, I find that the claimant, in the circumstances of this case, has failed to rebut the presumption of state protection with clear and convincing evidence.

[33] The Court therefore agrees with the respondent that the Board did consider all of the evidence before it.

[34] With regard to the question of whether the Board failed to consider the efficacy of Mexico's efforts to protect its citizens, the Court similarly concludes that the Board's reasons demonstrate that it applied the appropriate considerations in its determinations of the adequacy of state protection. It was reasonably open to the Board on the evidence to find that the applicant did not undertake all reasonable efforts to avail himself of the protection of the Mexican state. In particular, the Board reasonably concluded that the applicant ought to have reported the murder threats that he feared to the police and any other authority that might have been of assistance. The Board reasonably concluded that the applicant's failure to report the 2007 death threat to police undermined his claim. It is reasonable for the Board to expect that a specific death threat from a specific individual would

be reported to the police. The police would investigate such as specific threat to murder the applicant.

[35] However, the Board finds that one conclusion of the Board was not reasonably open to it. With respect to the assault which the applicant reported to the Public Minister for the City of Yautepec, and the subsequent report to the Human Rights Commission in the same city, the Board found at paragraph 20 as noted above:

> ¶20…Regardless of the pending lawsuits, I find that the claimant should have sought redress at a higher level of the security forces since his allegations were serious enough to warrant attention … I find that the claimant should be familiar with the Mexican justice system and all the options available to him with respect to seeking redress.

[36] In making these statements, the Board relies upon the Board's document from the Research Directorate dated October 1, 2004 which is entitled "Mexico: Possible Recourse for Victims of Bribery Demands/Corruption by Government Officials …". The Court has read this document carefully and finds first, that it is not relevant to the applicant filing a criminal complaint for assault and second, it does not identify any "higher level of security forces" from which the applicant could have sought redress. Accordingly, with respect to the assault complaint of the applicant, the applicant did properly seek state protection and could not have done more. However, the Public Ministry, which is the federal police, did not accept the complaint because of the on-going dispute between the applicant and Jose. This was reasonably open to the Public Ministry and the Court cannot criticise the Public Ministry for discounting the attempt by the applicant to file criminal charges against Jose or his accomplices. In addition it was reasonably open for the Board to find that the applicant should have sought state protection with respect to the subsequent murder threat,

which is outlined above. Accordingly, while it was not reasonably open to the Board to find that the applicant should have done more to seek protection with respect to the assault, the Court finds this error not material since the Public Ministry did not consider this complaint and dismissed it for the reasons discussed.

CONCLUSION

[37] For these reasons, the Court concludes that the decision of the Board was reasonably open to it and there is no basis upon which the Court should interfere.

CERTIFIED QUESTION

[38] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1554-10
STYLE OF CAUSE:	*Gilberto Palacios Nicolai v. The Minister of Citizenship and Immigration*
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 25, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	KELEN J.
DATED:	December 8, 2010

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