Federal Court  Cour fédérale

Date: 20130129

Docket: IMM-3223-12

Citation: 2013 FC 88

Ottawa, Ontario, January 29, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

JOSE ARTURO GUERRA DIAZ
ALEJANDRA MACIAS CATILLO
JORGE EMILIANO GUERRA MACIAS
ALMA KARINA GUERRA MACIAS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board], dated February 29, 2012, wherein the Board determined that the applicants were excluded from claiming refugee protection in Canada.

I. Background

[2] The applicants, Jose Arturo Guerra Diaz [the principal applicant, or PA], his wife Alejandra Macias Catillo, and two children, Jorge Emiliano Guerra Macias (born in 2004) and Alma Karina Guerra Macias (born in 2006) are citizens of Mexico where the PA operated a cellular telephone shop.

[3] In May 2007, four members of a criminal cartel called the Cartel del Gulfo [Gulfo Cartel] visited the telephone shop and demanded to be paid a monthly extortion fee. The PA gave the members half of the amount requested and did not inform the police of the extortion incident.

[4] One week later, the same members returned demanding the remainder of the fee and also demanded that the PA obtain and activate two untraceable cellular telephones for the cartel. Such telephones are illegal. The members vandalized the shop when the PA informed them that he was not familiar with the devices.

[5] The PA was able to obtain two untraceable telephones for the Gulfo Cartel. When the members came to pick them up, they requested that he obtain an additional four. By the end of June 2007, they had requested an additional eight untraceable telephones.

[6] When the PA informed the members that he would not be able to obtain any more untraceable phones, they vandalized his shop and threatened to kill him. This time, the PA called the police to report the damage to his shop. The police indicated that he could not make a report since he could not identify his attackers.

[7] After closing the business to repair the damage and recover from his injuries, the PA was threatened at home by the same gang members asking for monthly extortion money and untraceable telephones.

[8] At the end of July 2007, the applicants moved to a different address. Two months later, the PA re-opened the shop, but under another person's name, Ricardo Zamarripa, with whom he only communicated by telephone.

[9] In July 2008, the Gulfo Cartel resurfaced and severely damaged the premises of the new cellular business because the PA was almost a year in arrears of his monthly extortion fees (plus interest). They also demanded to know his new home address and his personal cellular telephone information as well as ten more untraceable telephones.

[10] In August 2008, the applicants changed their address again and the PA also changed the name of the business.

[11] In February 2009, Gulfo Cartel members entered the new shop and took money and merchandise as payment for the extortion fees the PA owed. The members also learned his new home address and attempted to run down the PA with a light truck. They then threatened to kill him if he did not obtain the untraceable telephones.

[12] On March 9, 2009, members of the Gulfo Cartel fired several shots at the PA in a failed attempt to kill him.

[13] On March 18, 2009, the applicants decided to flee Mexico for Canada, because they had received little assistance from the Mexican authorities.

[14] On March 31, 2009, they applied for refugee protection in Canada.

[15] on February 29, 2012, the Board decided that the applicants were not convention refugees or persons in need of protection under section 96 and 97 of the IRPA.

II. Issues

[16] The applicant raises the following issues :

A. Did the Board err in determining that the PA is excluded from claiming refugee protection on the basis of Article 1F(b) of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can TS No 6 [Convention]? More specifically, did the Board err in finding that:

i. the PA's acts in Mexico, if committed in Canada, would constitute offences under s. 467.11 of the *Criminal Code*, RSC, 1985 c C-46 [CC],;

ii. the defense of duress does not apply; and

iii. the alleged offences are "serious crimes"?

B. Did the Board err in finding that the PA was not a credible witness?

C. Did the Board err in determining state protection was available for the applicants?

III. Standard of review

[17] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the Supreme Court of Canada [SCC] held that a standard of review analysis should only be undertaken where the standard of review applicable to a particular question before the court is not well-settled by past jurisprudence.

[18] With regard to the first issue, there is varied jurisprudence as to which standard applies. In December 2012, the Federal Court of Appeal held that the standard of review applicable to the interpretation of section 98 of the IRPA and Article 1F(b) of the Convention is correctness (*Feimi v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 325 at para 14-15 [*Feimi*]; *Febles* v Canada (Minister of Citizenship and Immigration), 2012 FCA 324 at para 22-25 [*Febles*]; *Pineda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 454 at para 18 [*Pineda*]).

[19] However, it has also been held the standard applicable to the application of section 98 and Article 1F(b) to the facts of a particular case is a question of mixed fact and law, reviewable on a reasonableness standard (*Sanchez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1130 at para 35-36; *Pineda*, above, at para 18; and *Jawad v Canada (Minister of Citizenship and Immigration)*, 2012 FC 232 at para 21 [*Jawad*]).

[20] The standard of review applicable for the defence of duress is reasonableness (*Canada (Minister of Citizenship and Immigration) v Maan*, 2007 FC 583 at para 15 [*Maan*]; *Canada (Minister of Citizenship and Immigration) v Hussain*, 2002 FCT 209). The standard applicable when

determining the seriousness of a crime in regards to Article 1F(b) of the Convention is also reasonableness (*Feimi*, above, at para 16).

[21] Thus the Board's decision on the first issue should be reviewed on a correctness for interpretation of Article 1F(b) and a reasonableness standard otherwise (*Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FC 238 [*Jayasekara*], *Murillo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 996, *Jawad*, above).

[22] The standard of review applicable to the second issue, that of credibility of the PA, is reasonableness (*Gecaj v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1369 [*Gecaj*]; *Negash v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1164 at para 15; *Hazell v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1501 at para 27; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) at para 4).

[23] The standard of review applicable to the third issue, that of the availability of state protection, is reasonableness (*Gecaj*, above; *Carrillo v Canada (Minister of Citizenship and Immigration*), 2008 FCA 94 at para 36 [*Carrillo*]; *Bibby-Jacobs v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1176 at para 2).

[24] When reviewing on the standard of reasonableness, as always, the court is concerned with justification, transparency and intelligibility of the decision and to determine if the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at para 47).

IV. The Impugned Decision

[25] The Board found that in supplying the Gulfo Cartel with untraceable telephones, the PA had committed a serious non-political crime and was excluded under section 98 of the IRPA which states:

> 98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

[26] Article 1F(b) of the Convention, states:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> […]
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

[27] The Board found that the PA's acts in Mexico would be considered offences under s. 467.11 of the CC, if they were committed in Canada.

[28] The Board noted that the PA admitted, during the hearing, to being aware that the Gulfo Cartel was involved in serious crimes in Mexico. The Board rejected the argument that the PA simply obtained the untraceable telephones through a third party.

[29] The Board also rejected the argument that, pursuant to the UNHCR Handbook, which uses the words "a capital crime or a very grave punishable act", that based on the foregoing, the principal claimant is not subject to exclusion, since the penalty prescribed under s. 467.11(1) of the CC provides for a term not exceeding five years.

[30] The Board also concluded that there was serious reason to believe that the PA knowingly contributed and enhanced the Gulfo Cartel's ability in Mexico "… to facilitate or commit an indictable offence…".

[31] The Board further concluded that if theses crimes had been committed in Canada for a criminal organization similar to the Gulfo Cartel, pursuant to subsection 467.11(1) of the CC, the PA may be subjected to a penalty of "… imprisonment for a term not exceeding five years" for each offence or a total of fifteen years.

[32] On the credibility issue, the Board believed that the existence of contradictions, discrepancies, and implausibilities in the evidence of a claimant is a well-accepted basis for a finding of a lack of credibility. On this note, the Board found that the PA was not a credible and trustworthy witness with regard to his allegations that he approached the Mexican police to seek assistance, since he admitted in his oral and documentary evidence that he deliberately withheld the pertinent information that he had supplied untraceable telephones to the Gulfo Cartel from the Mexican police. The Board rejected the argument that he withheld the information because he did not want to compromise himself or his friends. Instead, the Board believed that the Mexican authorities' investigations into the PA's complaint would be seriously curtailed if they were not given an accurate description of who, where, what, when and why the events had occurred.

[33] With respect to section 96 of the IRPA, the Board then found that the applicants did not have a link to any Convention ground. While the applicants stated that they had a well-founded fear

of persecution for reasons of their "membership to a particular social group", the Board determined that there was no evidence to support the theory that refusing to participate in illegal criminal activities or refusing to pay extortion monies to the Gulfo Cartel did not engage the machinery of state, government or policy in Mexico, and as such the PA's actions are not an expression of political opinion.

[34] With respect to section 97 of the IRPA, the Board ultimately determined that the claim should fail because state protection was available to the applicants.

V. Analysis

A. *Did the Board err in determining that the PA is excluded from claiming refugee protection on the basis of Article 1F(b) of the Convention?*

i. Did the Board err in finding that the PA's acts in Mexico, if committed in Canada, would constitute offences under s. 467.11 of the CC?

[35] Section 467.11 of the CC provides that:

> (1) Every person who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence under this or any other Act of Parliament knowingly, by act or omission, participated in or contributes to any activity of the criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

[36] The applicants submit that it is not disputed that the Gulfo Cartel is a criminal organization. What is disputed, however, is whether the PA supplied the untraceable telephone to the members of the cartel "for the purpose of enhancing the ability of" the cartel to "facilitate or commit an indictable offence".

[37] The applicants submit that the reason behind the PA's participation was his safety and that of his family. They further submit that there is no evidence in the record to establish that the PA provided the telephones for the purpose of enhancing the Gulfo Cartel's ability to facilitate or commit a serious offence. Nor is there any evidence to indicate that the cartel actually used the telephones for criminal purposes.

[38] The applicants submit that this argument is buttressed by s. 467.11(3) of the CC, which sets out factors that a court may consider in determining whether an accused participated in or contributed to activities of a criminal organization. Section 467.11(3) of the CC states:

> (3) in determining whether an accused participated in or contributes to any activity of a criminal organization, the court may consider, among other factors, whether the accused
> a) uses a name, word, symbol or other representation that identifies, or is associated with, the criminal organization'
> b) frequently associates with any of the persons who constitutes the criminal organization;
> c) receives any benefit from the criminal organization; or
> d) repeatedly engages in activities at the instruction of any of the person who constitutes the criminal organization.

[39] The respondent submits that the exclusion finding by the Board is not unreasonable. The respondent submits that, contrary to the applicants' arguments with regard to the Board's assessment of the acts committed by the PA in Mexico, the standard of proof is "serious reasons for considering". As such, that it is clear that the Board did not err in finding that the PA's acts could constitute offences under section 467.11 of the CC.

[40] I believe that the PA did not commit a serious non-political crime and should therefore not be excluded from applying for refugee protection in Canada.

[41] As stated in Article 1F(b), the standard of proof for an exclusion finding is "serious reasons for considering", which is equivalent to "reasonable ground to believe" which requires something more than a suspicion, but less than proof on a balance of probabilities (*Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250 at para 23).

[42] This Court, in a number of cases, has considered what constitutes a serious, non-political crime within the meaning of Article 1F(b). In *Chan v Canada (Minister of Citizenship and Immigration*), [2000] 4 FC 390, [2000] FCJ No 1180, the Federal Court of Appeal stated at para 9:

> This part of my analysis begins with the presumption that the appellant's conviction in the United States constitutes a serious non-political crime within the meaning of Article 1F(b). While this presumption is contrary to the appellant's interests, it is consistent with the position articulated by the Board and adopted by the Motions Judge. In this regard, the Motions Judge held that the Board did not err in concluding that the appellant's conviction arose out of an offence involving drug trafficking and that such conduct amounted to a serious non-political crime. This was so despite the fact that the appellant was convicted not for drug trafficking per se but for the unlawful use of a communication device, an offence unknown to [page399] Canadian law. Moreover, I am going to presume that, had the appellant engaged in similar conduct in Canada, he would have been convicted of an offence such as drug trafficking for which a maximum prison term of ten years or more could have been imposed. In other words, for present purposes I will presume, without deciding, that a serious non-political crime is to be equated with one in which a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada. As will become evident, these presumptions assist me in demonstrating the inconsistency in the Minister's interpretation of Article 1F(b) when contrasted with other relevant provisions of the Act.

[43] In *Farkas v Canada (Minister of Citizenship and Immigration)*, 2007 FC 277, Justice Judith A. Snider stated at para 22:

> The second problem with this argument is that it ignores the more recent jurisprudence. In *Chan*, above at para 9, the Federal Court of Appeal accepted that, "a serious non-political crime is to be equated with one in which a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada." The ten-year threshold was affirmed by Justice Michael Kelen in *Xie v Canada (Minister of Citizenship and Immigration)*, [2004] 2 FCR 372 at para34, aff'd [2004] FCJ No 1142, 2004 FCA 250, after a careful analysis. Other Courts have endorsed the concept of referring to the penalty provided in Canadian law (see, for example, *Medina v Canada (Minister of Citizenship and Immigration)*, 2006 FC 62, [2006] FCJ No 86 (FC). Accordingly, with the evidence that the crime, if committed under Canadian law, carries a penalty of ten years, the Board had an evidentiary base to conclude that the crime qualified as "serious" within the meaning of Article 1F(b) of the Convention.

[44] The Federal Court of Appeal again considered the issue in *Jayasekara*, above, at paras 44 and 45:

> I believe there is a consensus among the courts that the interpretation of the exclusion clause in Article 1F(b) of the Convention, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction: see *S v Refugee Status Appeals Authority*, (NZ CA), supra; S and *Others v Secretary of State for the Home Department*, [2006] EWCA Civ 1157 (Royal Courts of Justice, England); *Miguel-Miguel v Gonzales*, no 05-15900, (US Ct of Appeal, 9th circuit), August 29, 2007, at pages 10856 and 10858. In other words, whatever presumption of seriousness may attach to a crime internationally or under the legislation of the receiving state, that presumption may be rebutted by reference to the above factors. There is no balancing, however, with factors extraneous to the facts and circumstances underlying the conviction such as, for example, the risk of persecution in the state of origin: see *Xie v Canada*, supra, at paragraph 38; *INS v Aguirre-Aguirre*, supra, at page 11; *T v Home Secretary* (1995), 1 WLR 545, at pages 554-555 (English C.A.); *Dhayakpa v The Minister of Immigration and Ethnic Affairs*, supra, at paragraph 24.

> For instance, a constraint short of the criminal law defence of duress may be a relevant mitigating factor in assessing the seriousness of the crime committed. The harm caused to the victim or society, the use of a weapon, the fact that the crime is committed by an organized criminal group, etc. would also be relevant factors to be considered.

[45] Respondent's counsel argues that there is no bright line established by the Court as to whether a "serious non-political crime" requires that a maximum sentence of ten years or more must be able to be imposed. I agree, but one must take into account the factors as set out in *Jayasekara* by the Federal Court of Appeal.

[46] I do not believe that the evidence demonstrates that the PA provided the untraceable telephones "for the purpose of enhancing the ability of a criminal organization to commit indictable offences." As the evidence below demonstrates, the PA was being extorted by the Gulfo Cartel and was providing them with money and untraceable telephones in an attempt to avoid being killed and to protect his family. In any event, the PA provided the telephones under duress as set out below.

ii. Did the Board err in concluding that the defense of duress did not apply?

[47] The applicants take issue with the Board's application of the test in *R v Ruzic*, 2001 SCC 24 [*Ruzic*]. Firstly, the applicants submit that the Board's strict application of the "immediacy" standard was inconsistent with the flexible approach endorsed by the SCC which only requires that "there must be a close temporal link between the threat of harm and the commission of the offence". Second, the applicants submit that "safe avenue of escape" test does not require an accused to move to another part of the country to avoid committing a crime, nor does the law require an accused to seek the official protection of the police in all cases (*Ruzic*, above at para 7). Finally, the applicants

submit that the proportionality of harm test was not properly applied because no evidence was adduced about the harm inflicted by the PA in providing the untraceable telephones to the Gulfo Cartel – that the harm was speculative and remote.

[48] The respondent submits that the Board did not err in determining that the defence of duress did not apply, and that the reasoning at paragraphs 27 to 35 of the Board's decision is clear, cogent and comprehensive.

[49] The respondent suggests that this case is different from those in *Ruzic* and *Maan*, above, relied upon by the applicants. The main differences being that the Board found that the police would be wiling to assist the applicants had they reported the threats from the Gulfo Cartel, and that there was an internal flight alternative available to the applicants. Thus, unlike the situations in *Ruzic* and *Maan*, the PA did not lose his ability to act freely – there was an alternative to breaking the law.

[50] Finally, the respondent also submits that the applicants' argument that there is no evidence to establish that the Gulfo Cartel used the illegal equipment for criminal purposes is without merit. Indeed, the PA testified that the equipment he obtained for the cartel was illegal and that the cartel engaged in crimes such as drug trafficking, extortion, kidnapping, murder, etc. From these admissions, the Board reasonably inferred that the untraceable telephones would be used for illegal activity.

[51] The test of duress is outlined in the *Ruzic* decision. The tripart test consists of determining if there is 1) an urgent situation of clear and imminent danger; 2) no reasonable legal alternative to breaking the law; and 3) proportionality between the harm inflicted and the harm avoided.

[52] At paragraph 56 of *Ruzic*, the SCC stated that: "in Canada, the common law defence of duress has freed itself from the constraints of immediacy and presence and thus appears more consonant with the values of the Charter." Indeed, Canadian courts have interpreted the immediacy in a much more flexible manner than some of its international counterparts. In *Ruzic*, the Court held that:

> the immediacy test is interpreted as a requirement of a close connection in time, between the threat and its execution in such a manner that the accused loses the ability to act freely. A threat that would not meet those conditions, because, for example, it is too far removed in time, would cast doubt on the seriousness of the threat and, more particularly, on claims of an absence of a safe avenue of escape. *(Ruzic* at para 65)

[53] One way of looking at duress is to ask whether the threat was effective to overbear the accused's will at the moment he committed the crime.

[54] In applying the *Ruzic* test, I find that the PA was in a situation of clear and imminent danger. While I recognize that there was some delay between the threats and the acquisition of the untraceable telephones, I believe that the PA's will was altered by the threats whenever he was obtaining the telephones for the Cartel.

[55] On the second part of the test, I find that the PA had tried to reasonably avoid obtaining the telephones: he told the gang members that they were unobtainable, he closed his store and reopened

it under a different name, he changed his address – twice, and despite these efforts, and much time elapsing, he was still a target of the Gulfo Cartel. Moreover, going to the police for protection proved to be a futile experience, and was not a reasonable or practical option.

[56] On the third part of the test, I do not agree with the applicants that there was no evidence adduced about the harm inflicted by the PA in providing the untraceable telephones to the Gulfo Cartel. I believe that the Gulfo Cartel was able to communicate without being tracked by the authorities because of the untraceable telephones and as such this may have delayed their ability to apprehend the cartel, but there is no doubt that the threats of the cartel to the PA and his family were real and the harm that was inflicted on the PA and the attempts on his life was far greater than the speculation of what might have been done with the untraceable telephones.

[57] Accordingly, in this case I find there was a valid defence of duress for the PA and that the Board erred in this regard.

iii. Did the Board err in concluding that the alleged offences were "serious crimes"?

[58] The applicants submit that the Board failed to properly consider the factors set out in the Federal Court of Appeal's decision in *Jayasekara*, above, which must be weighed in determining whether a crime is a "serious non-political crime" under Article 1F(b): a) the penalty prescribed; b) the facts; and c) the mitigating and aggravating circumstances underlying the conviction.

[59] I agree with the applicants that on the facts in this case, the Board was unreasonable in determining the PA's actions amounted to participating in a serious crime.

B. *Did the Board err in finding that the PA was not a credible witness?*

[60] While judicial review should be granted on the first issue alone, I have considered the second and third issues raised.

[61] The applicants submit that the Board's credibility analysis does not meet the minimum standards summarized by Justice Eleanor Dawson in *KK v Canada (Minister of Citizenship and Immigration)*, 2005 FC 873 at para 4: "…Those aspects of the testimony which appear not to be credible are to be specifically identified by the RPD and the reasons for such conclusion are to be clearly articulated." Particularly, the applicants find it difficult to discern what particular evidence the Board found not credible as the Board's reasons on this topic are not "clearly articulated".

[62] The applicants also submit that it was unreasonable for the Board to characterize the PA as an untrustworthy criminal when he only provided the untraceable telephones to the Gulfo Cartel under threat.

[63] The respondent submits that the Board did not err in drawing negative inferences from the applicants' evidence and that this argument is not one upon which leave or judicial review should be granted.

[64] The respondent argues that the Board's decision is clear: it indicates that the Board took issue first with the delay in the PA's denunciation, second with the lack of important information from his Personal Information Form [PIF]. The Board also noted the PA's failure to declare to the

authorities that he had given untraceable telephones to members of the Gulfo Cartel. In the end, the respondent argues that even if the Board erred as alleged, the error is immaterial given the Board's state protection finding.

[65] The case law in regards to credibility is clear as stated by Justice Ronald J. Rennie in *Khan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 415 at para 16: "…Since the Board member had the advantage of hearing the testimony and observing the applicant's demeanor, the Court must be deferential regarding her credibility findings, so long as they were reasonably open to [the Board]."

[66] I believe that it was reasonably open to the Board to find that the PA's testimony was not credible. Moreover, the section of the Board's decision that puts into question his credibility is transparent, intelligible and justified. The Board elaborated on the different inconsistencies including the omissions from the first PIF, the delay in submitting a denunciation to the police, and the fact that he had not reported the untraceable telephones to the authorities. Nevertheless, the PA's credibility should not be determinative of the outcome of this application.

C. *Did the Board err in determining state protection was available for the applicants?*

[67] The applicants take issue with the fact that Board admitted, at paragraph 55 of its decision, that the documentary evidence does suggest that corruption continues to be a problem in Mexico yet concluded that the conditions have improved to the point where there is adequate state protection for victims of crime.

[68] The applicants contend that the evidence does not support this conclusion; on the contrary, documentary evidence, which the Board did not refer to, indicates that corruption remains a problem. The applicants suggest that the Board's failure to address one such document is a reviewable error.

[69] The applicants also take issue with the fact that the Board failed to address two significant elements of the PA's own evidence with respect to his attempts at seeking state protection. The first omission was the fact that the PA was warned by the members of the Gulfo Cartel not to contact the police. The second omission is the fact that the gang members came to his home only after he had reported the attack on his store to the police, which the applicants suggest indicates that the members of the Cartel may have learned his home address from the police.

[70] The applicants clarify that they are not asking the Court to re-weigh evidence, as asserted by the respondent, rather, they are asking the Court to review whether it was reasonable for the Board to deal with only a selection of the documentary evidence and to downplay the evidence that contradicted the Board's finding on the availability of state protection as was the case in *Huerta v Canada (Minister of Citizenship and Immigration)*, 2008 FC 586 and *Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 262.

[71] The respondent reminds the court that the onus is on the applicants to "adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that state protection is inadequate" (*Carrillo*, above, at para 30). The respondent supports the Board's

finding that Mexico is a democratic country, where the government is in effective control of its territory with military, police and civil authorities in place.

[72] The respondent further submits that the Board did not ignore the evidence submitted by the PA regarding corruption. Specifically, the respondent relies on the decision in *Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670 at paragraph 40 which states:

> As I have described, reasons need not refer to every piece of evidence to be sufficient, but must simply provide an adequate explanation of the basis upon which the decision was reached.

[73] At paragraph 50 of *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, the SCC held that there is presumption that a state is capable of protecting its citizens except in situations where the home nation is in a state of complete breakdown. It also held that the onus is on the applicant to rebut that presumption by providing clear and convincing evidence of the state's inability to protect its citizens.

[74] There is also a responsibility on the applicant to approach the state for protection. Indeed, the applicants are obliged to make "determined efforts" to access state protection and "additional efforts" may be required to rebut the presumption (*Carrillo*, above, at para 34).

[75] This Court may intervene if it finds that the applicants were able to demonstrate that the panel's findings concerning state protection were made in a perverse or capricious manner or without regard for the documentary evidence or testimony in the record (*Castaneda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 393). That is not to say that a decision will be overturned solely because the Board failed to consider a particular document. However, as stated at

paragraph 88 of *Rios v Canada (Minister of Citizenship and Immigration)*, 2012 FC 276 [*Rios*], boards must address significant and important evidence (see *Michel v Canada (Minister of Citizenship and Immigration)*, 2010 FC 159 at para 40). As stated in the often-cited case of *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35 at para 17:

> …the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence"…

[76] The applicants claim that the Board did not consider some documentary evidence that went against the presumption of state protection. In *Rios*, above, a similar claim is made, that the Board only mentioned once that "deficiencies may exist in the Mexican criminal justice system", without providing any further analysis on the significant evidence that contradicts its finding that "there is continuing progress in regard to the government's efforts to provide adequate protection for citizens in Mexico". In the case of *Rios*, Justice John A. O'Keefe found that the Board made an erroneous finding of fact on the question of state protection, without regard to the evidence before it.

[77] In the case at bar, the Board mentions at paragraph 57 of its decision, that it "accepts that Mexico has had some difficulties in the past with addressing the criminality and corruption that exist within the security forces in Mexico, but concludes that the applicants had not provided clear and convincing proof that state protection in Mexico was inadequate. The applicants take issue with the fact that the Board does not give weight to the evidence provided by them and the PA's testimony.

[78] I find that while it was open to the Board to not refer to every piece of evidence provided by the parties, it none the less should have provided further analysis of significant evidence that contradicted its findings that "on the whole, the issues of police corruption and deficiencies are being addressed by the state of Mexico".

[79] Given the PA's testimony that he was beaten at home for the first time only after he reported the damage to his shop to the police and the fact that corruption in this case appeared to be readily apparent, the Board made an erroneous finding of fact on the question of state protection for the applicants in this case.

[80] The parties agree that unless I decide the issue that a serious crime requires a maximum sentence of ten years, no question need be considered for certification. I have not done so.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1.) The applicants' application for judicial review is granted and the matter is referred to a different panel of the Board for redetermination;

2.) No questions are certified.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ian Richler	FOR THE APPLICANTS
Gregory George	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gowling Lafleur Henderson LLP Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT