Date: 20080307

Docket: IMM-2534-07

Citation: 2008 FC 314

Ottawa, Ontario, March 7, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

VIRIDIANA CATALINA HERRERA VILLALVA

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 (the Board) dated May 17, 2007 concluding that the applicant is not a Convention refugee or a person in need of protection.

FACTS

[2] The applicant, a 30-year-old Mexican citizen, arrived in Canada on September 5, 2005 seeking refugee protection on account of her relationship with Alfredo Jimenez Mota, an

investigative journalist who went missing in April 2005 and has not been heard from since. At the time of his disappearance, Mr. Mota was investigating the connections between drug traffickers and the police. He had also published a number of articles on the subject.

[3] The applicant's relationship with Mr. Mota lasted approximately three years, from April or May 2002 until his disappearance in April 2005. The applicant states that during this time, Mr. Mota occasionally confided in her about his activities. The applicant states that because of her connection to Mr. Mota and his investigations, she herself was threatened and harassed on five occasions. The incidents cited by the applicant include:

1) around April 2003 the applicant was confronted by two men in a coffee shop, one of whom pushed the applicant and told her that she would "face the consequences" if Mr. Mota did not stop working on his investigations;
2) around October 2003, the applicant was abducted at gunpoint by the same two individuals. She states that they beat and manhandled her and told her to tell Mr. Mota that she would suffer the consequences if he did not stop his investigations;
3) around December 2003, shortly after Mr. Mota had published an article about a car accident involving the son of a "drug lord," the applicant began receiving threatening messages on her cell phone from numbers that she traced to government offices;
4) around December 2004, after the applicant had moved to another city, she was again approached by the same two men and was threatened at gunpoint; and

5) around April 2005, after Mr. Mota had gone missing, the applicant received a threatening phone call from an individual who told her that her "last days" had arrived. The phone call came approximately three weeks after a journalist friend of the applicant's had been fatally shot.

[4] Shortly after the December 2004 incident, the applicant's parents persuaded her to contact the authorities. Accordingly, the applicant attended the Mexican Public Ministry and requested protection. However, she was told that because her complaint was based on her connection to Mr. Mota, he would need to make a joint statement with the applicant. When the applicant explained the situation to Mr. Mota he told her to flee for her own safety.

[5] The applicant believes that because of the nature of Mr. Mota's investigations, which connected the police to the drug trafficking industry, she would not be able to receive adequate protection in Mexico. It is this fear that forms the basis of her refugee claim, which was heard by the Board on December 13, 2006.

Decision under review

[6] On May 17, 2007, the Board concluded that the applicant was not a Convention refugee or a person in need of protection. In reaching its decision, the Board made no adverse findings with respect to the applicant's credibility. Rather, the Board based its decision on the adequacy of state protection in Mexico, concluding that the applicant failed to rebut the presumption of state

protection enunciated by the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689. The Board stated at page 6 of its decision:

> The panel does not disagree that criminality, including corruption, continues in Mexico. However, based on the totality of the evidence adduced, the panel finds that Mexico is making serious efforts to protect its citizens who are witnesses and victims of crime, corruption and kidnappings.
>
> Therefore, based on the evidence adduced, the panel finds that adequate, if not perfect, state protection is available to the claimant in Mexico. In this case, the claimant, living in a democracy, simply did not reasonably exhaust the courses of action available to her prior to seeking international protection.
>
> Since adequate state protection is available to the claimant, the panel finds that there is not a serious possibility that the claimant will face persecution, a risk to her life, a danger of torture, or a risk of cruel and unusual treatment or punishment should she return to Mexico.

It is this decision that the applicant seeks to have judicially reviewed.

ISSUE

[7] The sole issue raised in this application is whether the Board erred in finding that state protection was available to the applicant in Mexico.

STANDARD OF REVIEW

[8] In *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, the Supreme Court of Canada affirmed the primacy of the pragmatic and functional approach when determining the appropriate standard of review. In applying the pragmatic and functional approach to the issue of state protection, Madam Justice Tremblay-Lamer concluded in *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, 45 Imm. L.R. (3d) 58,

that the appropriate standard is that of reasonableness *simpliciter*. This standard has been followed by a number of decisions of this Court: see *Ramay v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 954, [2007] F.C.J. No. 1234 (QL); *Nunez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1661, 51 Imm. L.R. (3d) 291; and *Franklyn v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1249, [2005] F.C.J. No. 1508 (QL).

[9] I agree with this reasoning and conclude that the appropriate standard to apply to the Board's decision in the case at bar is that of reasonableness *simpliciter*. Accordingly, as long as the Board's reasons are "tenable in the sense that they can stand up to a somewhat probing examination," then the decision is reasonable and the Court will not interfere with the Board's decision: see *Franklyn*, above, at paragraph 17.

ANALYSIS

Issue: <u>Did the Board err in concluding there existed adequate state protection in Mexico</u>?

[10] In *Ward*, above, the Supreme Court of Canada held that except in situations where there has been a complete breakdown of the state apparatus, there exists a general presumption that a state is capable of protecting its citizens: see also *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 150 N.R. 232 (F.C.A.). As Mr. Justice La Forest stated at page 725 of *Ward*:

> … Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus … it should be assumed that the state is capable of protecting a claimant.

[11] While the presumption of state protection may be rebutted, this can only occur where the refugee claimant provides “clear and convincing” evidence confirming the state’s inability to provide protection. Such evidence can include testimony of similarly situated individuals let down by the state protection arrangement, or the refugee claimant’s own testimony of past incidents in which state protection was not provided: see *Ward*, above, at pages 724-725.

[12] In *Kadenko v. Canada (Solicitor General)* (1996), 206 N.R. 272 (F.C.A.), the Federal Court of Appeal held that refugee claimants have an obligation to make “reasonable efforts” at seeking out state protection, and that the burden on the claimant increases where the state in question is democratic. Mr. Justice Décary stated at paragraph 5:

> ¶ 5 When the state in question is a democratic state, as is the case at bar, 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. …

[13] In the case at bar, the Board relied on the principles enunciated in both *Kadenko* and *Ward*, above, in reaching its conclusion that the applicant failed to rebut the presumption of state protection. The Board held that the applicant, “living in a democracy, simply did not reasonably exhaust the courses of action open to her” prior to seeking refugee protection. Accordingly, the Board concluded that she had therefore not “discharged the onus of showing clear and convincing proof of the state’s inability and unwillingness to protect her”: Board decision at page 4.

[14] In her testimony, the applicant stated that she did not approach other law enforcement agencies about her experiences because, on the basis of Mr. Mota's investigations, she believed they were in collusion with members of the drug trafficking industry and would cause her more harm than good. However, the Board found it unreasonable that, given her connection to Mr. Mota, she would not ask him about which agencies or officials may be safe to approach.

[15] The Board then reviewed the documentary evidence, concluding at page 5 of its decision:

> Based on the evidence adduced, the panel is not persuaded to believe that there is lack of action by the state authorities against corrupt government officials. In this case, the claimant did not make any further attempt to seek help.

According to the Board, the Mexican administration has made corruption in government agencies a significant priority, and has enacted "strict laws attacking corruption and bribery" within the public service. Further, the Board concluded that there was no "persuasive evidence" that the Mexican National Human Rights Commission would not have been able to ensure that the applicant received adequate state protection from the individuals threatening her life.

[16] On the basis of the Board's conclusions, the respondent argues the applicant's claim must fail since the evidence demonstrates that Mexico is capable of protecting its citizens, and that the applicant failed to take "specific, demonstrable steps" to seek state protection as required by *Kadenko*, above, and the recent Federal Court of Appeal decision in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 362 N.R. 1.

[17] However, the Board's decision does not canvas the recent Federal Court jurisprudence, which states that *Kadenko* cannot not be interpreted as requiring the refugee claimant to exhaust "every conceivable recourse" available to them in order to rebut the presumption of state protection. This is especially true where the state is alleged to be involved in the persecution. For example, in *Chaves*, above, Madam Justice Tremblay-Lamer held at paragraph 15:

> ¶ 15 In my view, however, [*Ward*], *supra* and *Kadenko*, *supra*, cannot be interpreted to suggest that an individual will be required to exhaust all avenues before the presumption of state protection can be rebutted…. Rather, where agents of the state are themselves the source of the persecution in question, and where the applicant's credibility is not undermined, the applicant can successfully rebut the presumption of state protection without exhausting every conceivable recourse in the country. The very fact that the agents of the state are the alleged perpetrators of persecution undercuts the apparent democratic nature of the state's institutions, and correspondingly, the burden of proof. …

See also *Nunez*, above, at paragraph 15 and *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 731, 36 Imm. L.R. (3d) 283 per Mactavish J. at paragraph 22.

[18] In *Ward*, above, Mr. Justice La Forest stated that the presumption of state protection can be rebutted by both the refugee claimant's own evidence concerning his/her inability to obtain state protection, as well as by the evidence of similarly situated individuals who themselves were unable to obtain such protection. In the case at bar, the applicant provided extensive evidence showing that journalists, researchers, and their associates who were involved in investigating ties between drug trafficking and the police, were unable to receive adequate state protection. This evidence provides numerous specific examples, including reports of Mr. Mota's own disappearance, and is persuasive

in establishing that individuals in a similar situation to Mr. Mota and the applicant were unable to obtain adequate state protection from the Mexican authorities.

[19] The evidence from the Mexican paper "Reporters without Borders for Press Freedom" dated November 28, 2005 states that the police investigation of the disappearance of reporter Mota was "totally inadequate". This quote was from the head of the Mexican National Human Rights Commission which concerns itself with attacks against journalists.

[20] "Reporters without Borders for Press Freedom" for April 14, 2005 reported that Mr. Mota notified the municipal police that he felt threatened and the police "treated him as paranoid" and refused to take any action.

[21] In another journal entitled "Attacks on the Press in 2005" it is reported that after Mr. Mota disappeared his editor came to the conclusion that the newspaper cannot do any kind of investigative reporting on organized crime because there is not adequate protection for such journalists.

[22] In its decision, the Board failed to address any of this evidence that the applicant was unlikely to receive adequate state protection even if she had made further inquiries to the Mexican authorities. The Court concludes that the Board's analysis of state protection was too general in the sense that it failed to address the issue of state protection within the context of the applicant's specific situation. The evidence before the Board establishes that journalists, researchers, and their

families face significant risk in Mexico, especially when involved investigating the ties between public officials and the drug cartels.

[23] In *Avila v. Canada (Minister of Citizenship and Immigration)*, [2006] F.CJ. No. 439 Justice Martineau held at paragraph 34:

> Although the Board alluded in its decision to the problem of corruption in general, it made no specific finding in this regard. Now, the question is not so much whether remedies exist against corrupt public servants in Mexico, but is to determine whether in practice those remedies are useful in the circumstances …

In the case at bar, the evidence was that the police were ineffective in protecting journalists, and those close to the journalists, when the journalists are investigating links between criminals and the police such as the drug dealers in the case at bar.

[24] Having found the applicant credible with respect to the central aspects of her claim, it was not open to the Board to reject that claim without specifically addressing this evidence: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35.

[25] There is one other clear error in the Board's decision. At page 5 of the decision the Board refers to the claimant lodging a complaint with the Human Rights Commission against four judicial police officers on April 29, 2004. The Board decision refers to the applicant as a male. The Board relies on this evidence to make a particular finding. The reference to this evidence is patently unreasonable. The applicant did not make any complaint to the Human Rights Commission against four judicial police officers on April 29, 2004 or any other date. Moreover, the applicant is not a

male. Obviously the Board was confusing the applicant's fact situation with that of another case. The Court's conclusion in this case does not turn on this issue but is noted since it was raised by the applicant.

[26] For the reasons expressed in this decision, the Court will allow this application for judicial review.

[27] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is allowed, the decision of the Board dated May 17, 2007 is set aside and the refugee claim is referred to a differently constituted panel of the Board for redetermination.

"Michael A. Kelen"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Clifford Luyt	FOR THE APPLICANT
Ms. Neeta Logsetty	FOR THE RESPONDENT

SOLICITORS OF RECORD:

D. Clifford Luyt Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT